THE NEW CONCEPT OF SPOUSAL RELATIONS IN THE FAMILY MAINTENANCE ACT

JENNIFER COOPER*

Family law legislation has been the topic of much debate and controversy over the past few years. Manitoba has emerged, a forerunner amongst the provinces, with a progressive new package of family laws. One of these, the *Family Maintenance Act*[1] is an enactment that achieves substantial reform, particularly in the area of spousal relations.[2]

According to the new *Act*, marriage is no longer an institution wherein the patriarchial male rules the wife, children and other chattels. Rather, it is a partnership of equals with shared rights and responsibilities and with a mutual obligation to support each other and contribute to the family unit. Maintenance is no longer a tool for rewarding a wronged wife or punishing a misbehaving one, but rather is a mechanism by which to achieve economic readjustment. It is available to either spouse by considering current financial need and future ability to diminish that need.

These dramatic reforms surely deserve closer attention. In respect of the new concept of marriage this article will examine the rights and obligations associated with the married relationship as enumerated in the *Act*, and the way in which an applicant spouse can seek to enforce them. It will be useful also to pause and consider whether these provisions are applicable to the increasing number of couples who are living together without legal sanction.

Also examined is the concept of maintenance based solely on need and the newly articulated onus on a dependent spouse to take all reasonable steps to become financially independent after separation. Finally, the question must be raised whether either the provision for the binding effect of a prior separation agreement or the controversial provision entitling a judge to consider conduct can properly be regarded as an exception to a determination of maintenance based on need.

---

* Student, Faculty of Law, University of Manitoba.

1. S.M. 1978, c. 25 (F20). It became effective October 15, 1978, 107 *The Manitoba Gazette* (1978) No. 40. Hereinafter referred to as the *Act*. The *Act* replaced the substantially similar *Family Maintenance Act* S.M. 1977, c. 47, which had been enacted the previous year in order to replace the outdated *Wives and Childrens Maintenance Act*, R.S.M. 1970, c. W170.

2. *See The Wives and Childrens Maintenance Act*, R.S.M. 1970, c. W170, where, *inter alia*, it was necessary to prove fault in order to secure relief, basically only a wife could apply, and if she commited adultry or deserted she lost her rights to relief under the *Act*.

Marriage as Partnership

The *Act* acknowledges three inter-spousal obligations:

1. to provide financial information upon request,[3]
2. to contribute reasonably to each other's support and maintenance,[4] and
3. to provide, while living together, periodic reasonable amounts for clothing and other personal expenses.[5]

The first provision concerning disclosure of information includes the obligation to provide each other with copies of income tax returns, itemized statements of gross and net earnings and of debts and liabilities, if any. This obligation to inform, and the concurrent right to be informed does much to endorse the principle that marriage is a partnership with at least equal knowledge of, if not participation in, the financial affairs of the family unit. The court is empowered to make an order for the provision of such information,[6] and its treatment as confidential if necessary.[7]

The second spousal obligtion recognizes that it is not the male's sole responsibility to bear the burden of supporting the family unit. Rather, the responsibility is mutual: spouses are expected to work together by contributing reasonably to each other's support and maintenance. It may be, particularly if there are children involved, that the nature of that contribution by one spouse consists of the provision of domestic services. Such a contribution is equivalent to having spent that time working outside of the home.[8]

What will constitute a "reasonable contribution" is a neat question. Would a working spouse in a childless marriage have a legitimate complaint against a spouse whose contribution consisted only in a couple of hours housekeeping for their joint benefit? Such are the questions of fact which must wait for judicial interpretation.

If a spouse fails to make a reasonable financial contribution, the court upon application may make an order requiring that spouse to pay a lump sum or periodic sums for support.[9] In effect, the applicant spouse will have secured an order for the specific performance of this obligation.

Is there an equivalent remedy when the breach is of the obligation to contribute by way of domestic services? Although the *Act* generally provides that a spouse may apply to the court "where the other spouse is in breach of an obligation under the Part,"[10] the court is only em-

3. S.M. 1978, c. 25, s. 6.
4. S.M. 1978, c. 25, s. 2 (1).
5. S.M. 1978, c. 25, s. 3.
6. S.M. 1978, c. 25, s. 8 (1) (h).
7. S.M. 1978, c. 25, s. 8 (1) (i).
8. S.M. 1978, c. 25, s. 5 (2).
9. S.M. 1978, c. 25, s. 8 (1) (a).
10. S.M. 1978, c. 25, s. 7 (1).

powered to make such orders as are enumerated in a subsequent provision.[11] This later provision does not contain the authority to make an order respecting the provision of domestic services. This omission is presumably due to the enforcement problem that would arise were such an order possible. The perhaps unavoidable result is that where the obligation breached is the provision of domestic services, a spouse does not have an equivalent right to specific performance. The potential remedy would be either to seek a judicial separation, fail to support and argue that the other is estopped from suing by reason of his or her own breach, or simply learn to live in an untidy house.

Finally, there is the spousal obligation to provide, while living together, periodic reasonable amounts for clothing and other expenses. Presumably this enables the spouse working in the home without salary to have some degree of financial freedom. Can such a provision truly be effective? Certainly the court has the power to make an order for the provision of such an allowance.[12] However, the defendant spouse need ony move out in order to stifle any court action since cohabitation is a requirement for securing relief.

It would be useful to examine these spousal obligations with respect to common law unions. There is a common myth that after a certain time, variously stated to be between three or seven years, such a union "turns into" a marriage for the purpose of the rights of the parties thereunder. This has never been true in Canada in any general way. However, people are often unaware of this and fail to adequately protect themselves. A typical situation is that of a dependent common law wife who finds that after many years of dedication she has no rights to maintenance or to any marital property not legally in her name at the time of the termination of the relationship.

Protection for Unmarried Partners

The *Act* does provide some protection to common-law couples. It applies *mutatis mutandis* where a man and a woman:

a) have cohabited for a period of one year or more,
b) have a child of the union, and
c) make application while cohabiting or within one year after cessation.[13]

Let us examine the various requirements. In the interpretation of the phrase "a period of one year or more" the court will likely follow the Manitoba Court of Appeal decision in *Hourie* v. *Petti*.[14] In that

11. S.M. 1978, c. 25, s. 8 (1).
12. S.M. 1978, c. 25, s. 8 (1) (a).
13. S.M. 1978, c. 25, s. 11 (1).
14. (1974), 45 D.L.R. (3d) 306; [1974] 5 W.W.R. 254; 15 R.F.L. 210 (Man. C.A.).

case the Court had occasion to interpret the same phrase as it appears in *The Wives and Children's Maintenance Act.*[15] It was held that the period need not be continuous but may be cumulative.

The second requirement may be proved if both parties testify that there is a child of the union. However, given the nature of the adversary system, if the parties do find themselves in court it is likely that one will be attempting to deny that the child is of the union in order to bar the other from securing relief under the *Act.* In such a case one would expect that it would be necessary to prove paternity on the balance of probabilities as was required in the old *Wives and Children's Maintenance Act.*[16] Certainly it will be very strong evidence of paternity if the child was conceived during the one-year minimum period of cohabitation.

It is worth noting that prior to the *Act* paternity suits essentially involved single mothers trying to implicate the father for the purpose of securing child maintenance. We may now find actions where a common law father is in a position of asserting his paternity since he must prove a child of the union to get any relief, including maintenancy or custody, under the *Act.* It may be particularly difficult for a male to prove this requirement, and hence secure relief, if he asserts paternity in the face of a denial by the natural mother.

The third and final requirement is largely a matter of being aware of one's rights and then acting on them in a timely fashion. If the court is satisfied that three requirements are met, it is clear that all forms of relief under the *Act* are potentially available to the applicant.[17]

Custody

Where the relief sought is a determination of custody the court is empowered to make an order, " [t]hat the custody of any child of the marriage between the spouses be committed to the applicant spouse or the respondent spouse or both . . ."[18] Accordingly, a father who has satisfied these requirements can apply for, and perhaps be awarded, joint or sole custody of his illegitimate child(ren). The interesting question is whether the *Act* has changed the tests that will be applied in the event that such a father does seek to gain custody.

The Manitoba Court of Appeal, after reviewing the common law and *The Child Welfare Act,*[19] articulated the current state of the law in the case of *Vandenberg* v. *Guimond*:

15. R.S.M. 1970, c. W170, s. 6 (a).

16. R.S.M. 1970, c. W170, s. 6 (b).

17. Orders providing for: s. 8 (1) (a) lump sum or periodic payments for maintenance or personal expense allowance, (b) non-cohabitation, (c) restraining entry, (d) non-molestation, (e) joint or separate custody, (f) access, (g) allocation of court costs, (h) production of financial information, (i) keeping the latter confidential; s. 10 (1) the right to occupy the family residence, and (2) the right to postpone sale of the family residence.

18. S.M. 1978, c. 25, s. 8 (1) (e).

19. S.M. 1974, c. 30 (C80).

> The law implies that in order for a father to gain custody of an illegitimate child, the amount or degree of neglect by the mother must be greater than that which is requied in the case of legitimate child. It is not a mere balance scale with both parties starting equal, but rather, the balance scale is tipped heavily in favour of the mother of illegitimate children.[20]

This imbalance amounts to a *prima facie* right in the mother to custody subject always to the equitable rule making the welfare of the child paramount.

The Court of Appeal then had occasion to consider the effect of the previous *Family Maintenance Act*[21] on custody law. In the case of *Kraynyk* v. *Kraynyk*[22] the spouses had each filed an application for sole custody of the two children of their marriage. The legislation provided that, "for the purposes of an order under this Part, [includes an order as to custody] a judge *shall* consider the following factors *and no others*"[23] (emphasis added). There followed a list of eight factors. Notwithstanding this fairly express language, the Court held that the factors which they were entitled to consider in respect of a custody order had not been limited by this provision: "I am satisfied that the Legislature did not intend to change the guidelines established over the years for determining which parent should have custody of a child of the marriage."[24] Consequently, the Court felt that the conduct of the parties should have been considered at trial, even though it was not one of the enumerated factors, because it was, "relevant to the fitness of that person to be the custodian of the . . . children."[25] A new trial was ordered.

If the words in that legislation were insufficiently express to change the law regarding the custody of legitimate children, there is no doubt that the Court would find this to be equally true of the law regarding custody of illegitimate children. The new *Act* affords an even stronger support for this contention since the Section has been amended to read that the court, "shall consider *all the circumstances* of the spouses *including* the following: [list of ten factors]"[26] (emphasis added) when making an order including an order for custody. The new Section does not even attempt to restrict the factors that the court is entitled to take into account. One must conclude that the Legislature did not intend to change the law of custody for common law (or

---

20. (1968), 1 D.L.R. (3d) 573, at 581; 66 W.W.R. 408, at 416-17 (per Dickson J.A.).

21. S.M. 1977, c. 47. This legislation was operative for about one month before it was suspended for "review" and eventually repealed. It was in fact not operative at the time that the Manitoba Court of Appeal had cause to consider it. It is useful to examine case law decided in that brief period of time because the *Act* is quite similar to the new *Act* and because there is no case law, at the time of writing, pertaining to the new *Act*.

22. (1978), 86 D.L.R. (3d) 401; [1978] 3 W.W.R. 641; 5 R.F.L. (2d) 17 (Man. C.A.).

23. S.M. 1977, c. 47, s. 5 (1).

24. *Supra* n. 22, at 406; [1978] 3 W.W.R., at 646; 5 R.F.L. (2d), at 23.

25. Quoting from *MacDonald* v. *MacDonald*, [1976] S.C.R. 259 (per Spence J.). *Id.*, at 405; [1978] 3 W.W.R., at 644; 5 R.F.L. (2d), at 21.

26. S.M. 1978, c. 25, s. 5 (1).

married) spouses, and *Vandenberg* v. *Guimond*[27] is still good law in Manitoba.

Common law spouses are further given the limited protection of an order for non-entry and/or non-molestation[28] if they show cohabitation for a period of one year or more.[29]

Maintenance as Economic Readjustment

In the old *Wives and Childrens Maintenance Act* it was necessary to prove that the other spouse was at fault before an order for maintenance would be made, and the right to such an order was lost if the applicant committed adultery or was guilty of desertion. All such considerations are now totally irrelevant. In making an order for maintenance a court is not entitled to attempt to ascertain whose fault it may have been in causing the marriage breakdown. The enumerated factors which a court is required to consider collectively compel the conclusion that maintenance is to be regarded as a mechanism by which to effect an economic readjustment since the parties may be economically unequal as a result of the marriage. The appropriate order is determined by considering, *inter alia*, the financial needs and means, standard of living, past contribution (domestic or financial), and impairment of earning capacity of each spouse as well as any property settlement and the length of time the marriage had existed.[30] Consistent with this principle are the new provisions for the securing of an interim order and even an *ex parte* interim order where the circumstances are such that it is needed.[31]

Probably the most dramatic evidence that maintenance is a tool to effect economic readjustment is in the new provision which establishes an obligation "after separation to take all reasonable steps to become financially independent."[32] A maintenance order is determined not only by ascertaining present needs (with regard to prior standard of living), but also in consideration of future ability to diminish that need.

What will constitute "reasonable steps" will surely be determined on a case by case basis. While the court must consider whether the dependent spouse is complying with this requirement,[33] it must also determine what measures are in fact available to do so and the length of time and cost involved in taking those measures.[34] For example, whether the spouse has custody of dependent children would affect the extent to which gainful employment outside the home would

27. *Supra* n. 20.
28. S.M. 1978, c. 25, s. 8 (1) (c) and (d).
29. S.M. 1978, c. 25, s. 11 (2).
30. S.M. 1978, c. 25, s. 5 (1).
31. S.M. 1978, c. 25, ss. 18, 19.
32. S.M. 1978, c. 25, s. 4.
33. S.M. 1978, c. 25, s. 5 (1) (i).
34. S.M. 1978, c. 25, s. 5 (1) (g).

be possible.

An equally difficult question is the meaning of "financial independence." Since, in making the order, the court must consider, "[t]he standard of living of the spouses"[35] and "[a]ny impairment of the income earning capacity and financial status of either spouse resulting from the marriage,"[36] one would assume that maintenance is not meant to automatically cease as soon as a bare level of subsistence is achieved.

Effect of Separation Agreement

There are two provisions in the *Act* which have caused concern as possible contraventions of this newly articulated concept of maintenance. The first is the provision which treats a separation agreement between the parties as a bar to seeking a court order for spousal maintenance if it releases one spouse from liability for maintenance or if it provides for specified, periodic payments of spousal maintenance.[37] There was concern that due to the frequent inequality of the parties or, even where they are both represented by counsel, due to the nature of marital disputes and bargaining processes, the amount agreed to may not always be truly adequate in terms of financial need. However, the *Act* does further provide that such an agreement will not operate as a bar if: a) the agreed amount was "inadequate having regard to the circumstances of both spouses *at the date of the agreement*" (emphasis added), or b) the receiving spouse has become a public charge.[38]

There is still the difficulty that an agreement which was adequate at the date of the agreement will have become inadequate due to inflation or a change in circumstances. In such a case the court has no authority to interfere. Counsel acting for the recipient of maintenance would be well advised to attempt to include a clause agreeing to a variation in such circumstances. It might then be argued that the court ought not to regard the agreement as a bar to a variation since the parties specified otherwise.

A spouse may desire to have a court order as to maintenance, even if it is identical in its terms to that contained in the separation agreement, simply to rely on the power of the court for enforcement. In such a case the agreement will operate as a bar to securing a court order unless there has already been default thereunder.[39]

35. S.M. 1978, c. 25, s. 5 (1) (c).
36. S.M. 1978, c. 25, s. 5 (1) (h).
37. S.M. 1978, c. 25, s. 7 (2).
38. S.M. 1978, c. 25, s. 7 (3) (b) and (c).
39. S.M. 1978, c. 25, s. 7 (3) (a).

Effect of Unconscionable Conduct

The second provision that has caused concern is by far the most controversial and misunderstood section in the *Act*. Section 2 (2) provides that the court may, in determining the amount of the support and maintenance, have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship. This Section does not reintroduce fault. If particular conduct fits the criteria it may be considered notwithstanding that it was not the singular causative factor in the marriage breakdown. Conversely, even where marriage breakdown is clearly due to the fault of one spouse, his or her conduct may not be considered unless it otherwise fits the criteria. Fault for marital breakdown is simply not relevant in itself. The conclusion that this results in the contravention of the principle that maintenance be based on need alone depends to some extent on one's interpretation of the Section.

One could interpret the provision according to the rules of contract law which provide that one cannot seek to take advantage of a contract which one has already repudiated. Marriage can be likened to a contract which provides that if the relationship ceases then a dependent spouse can seek to be maintained until financial independence can be achieved. However, if that spouse is guilty of extreme misconduct then it would be inequitable to allow him or her to seek a benefit which arises by virtue of the very relationship which was repudiated. This view overlooks the fact that this particular benefit is *meant* to arise upon repudiation of the marriage relationship—that is, when the parties have separated. What is required here is something more than conduct similar to contractual repudiation in order for a spouse to lose his or her rights to the amount of maintenance needed.

Although this interpretation is at least reconcilable with the principle of maintenance based on need, it leads to a highly inequitable result. Since it is always the dependent spouse who is seeking the benefit, it is his or her conduct which will be taken into account if it fits the criteria. Consequently a dependent spouse risks a downward variation of the maintenance award for misbehavior while the other spouse can misbehave with impunity. Such a result can hardly have been the intention of the Legislature in view of the spirit of the *Act* as a whole which greatly emphasizes equality between the spouses.

The more common interpretation of the Section is that it allows judicial discretion to punish a misbehaving spouse by varying the amount of the award in the event of extreme misconduct. This is more consistent with the legislative history whereby the consideration of spousal conduct, a common occurrence under the old *Act*, was initially completely abolished. This was later amended to the present version which is something of a compromise in that it disallows the consideration of conduct but follows it with an exception where the

conduct has been particularly extreme. In such a case the court is empowered, but not required, to take such conduct into account in determining amount of maintenance.

In the absence of words directing otherwise, and on the basis of the judicial interpretation of the Section entitling the court to have regard to conduct when determining maintenance in the *Divorce Act*[40] and in the English *Matrimonial Proceedings and Property Act* one must conclude that this provision would apply equally to either spouse. That is, the amount which would be awarded based on need would be decreased if the receiving spouse had grossly misbehaved or increased if the paying spouse was guilty of the misconduct.

It goes without saying that this provision is contrary to the principle that maintenance should be based on need and not on what deserves to be received or deserves to be paid. The most important question, of course, is what type of conduct is contemplated by this provision. There is a common misapprehension that the case law interpreting the conduct section of the *English Act* will quide the courts in interpreting Manitoba legislation. Indeed, the Government has tabled a list of English cases in the Provincial Legislature which are meant to represent the type of interpretation that the Government intends our conduct section should be given.[42]

The fact is that, according to ordinary rules of statutory interpretation, a judge is not entitled to examine the Hansard Reports in order to ascertain the meaning that the Legislature intended to give to particular legislation. Furthermore, although judges can do and look to other jurisdictions with similar legislation in order to seek guidance in the interpretation of their own legislation, the fact is that the *English Act* is greatly *dissimilar.* There are many ways to distinguish the two *Acts* which diminishes their comparative value. For example, the *English Act* deals with the division of marital property while the Manitoba *Act* is limited to maintenance payments at separation. However, the most significant distinction is based exactly on the point in issue. Whereas the Manitoba *Act* speaks of "a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship," the *English Act* simply says, "having regard to their conduct." The way in which the English courts have interpreted "conduct" is simply incapable of affording us

40. R.S.C. 1970, c. D-8, s. 11 (1).

41. c. 45, s. 5 (1) (U.K.). Hereinafter referred to as the *English Act.*

42. The cases include *Campbell* v. *Campbell* [1976] Fam. 347, [1976] 3 W.L.R. 572, [1977] 1 All E.R. 1; *Cuzner (formerly Underdown,* v. *Underdown,* [1974] 1 W.L.R. 641, [1974] 2 All E.R. 351 (C.A.); *Dixon* v. *Dixon* (1974), 5 Fam. L. 58 (C.A.); *Griffiths* v. *Griffiths,* [1973] 1 W.L.R. 1454, [1973] 3 All E.R. 1155 (Fam.), [1974] 1 W.L.R. 1350, [1974] 1 All E.R. 932 (C.A.); *Harnett* v. *Harnett* , [1973] Fam. 156, [1973] 3 W.L.R. 1, [1973] 2 All E.R. 593 (Fam.), [1974] 1 W.L.R. 219, [1974] All E.R. 764 (C.A.); *Jones* v. *Jones,* [1976] Fam. 8, [1975] 2 W.L.R 606, [1975] 2 All E.R. 12 (C.A.); *Martin* v. *Martin,* [1976] Fam. 167, [1976] 2 W.L.R. 901 (Fam.), [1976] Fam. 335, [1976] 3 W.L.R. 580, [1976] 3 All E.R. 625 (C.A.); *Rogers* v. *Rogers,* [1974] 1 W.L.R. 709, [1974] 2 All E.R. 361 (C.A.); *Trippas* v. *Trippas,* [1973] Fam. 134, [1973] 2 W.L.R. 585, [1973] 2 All E.R. 1 (C.A.); *W.* v. *W.*, [1976] Fam. 107, [1975] 3 W.L.R. 752, [1975] 3 All E.R. 970; *Wachtel* v. *Wachtel,* [1973] Fam. 72, [1973] 2 W.L.R. 84, [1973] All E.R. 113 (Fam.), [1973] Fam. 81, [1973] 2 W.L.R. 366, [1973] 1 All E.R. 829 (C.A.); *West* v. *West,* [1978] Fam. 1, [1977] 2 W.L.R. 933, [1977] 2 All E.R. 705 (C.A.).

any guidance on how to interpret what is meant by "conduct that is so unconscionable."

In ascertaining the meaning of this Section there are few things that can be said with certainty. It is clear that there must have been a course of conduct such that an isolated incident, no matter how extreme, may not be considered. Furthermore, such course of conduct must be "unconscionable" which means, in ordinary language, "unreasonable, excessive or immoderate."[43] This unconscionable conduct must constitute an "obvious and gross" repudiation of the marriage relationship. Since the English courts have interpreted their legislation to mean "obvious and gross" conduct, could it be that the English case law would be useful in helping to ascertain the type of fact situations meant to be included within the ambit of this phrase? I think not. Obvious and gross conduct is something really quite different from an obvious and gross repudication of a marriage relationship. It is difficult to escape the conclusion that one would be well advised to simply await judicial interpretation of this troublesome provision.

In conclusion, it has been demonstrated that the new *Act* has a more realistic and equitable conception of the marriage relationship and of the role that maintenance should play in the event of its breakdown. It is also true, however, that much will depend on the way in which certain provisions are judicially interpreted in the months that lie ahead. Certainly the *Act* has tremendous potential for causing marital disputes to be resolved in a rational and egalitarian manner.

43. *Webster's New World Dictionary* (2nd. ed. 1970).