DIVORCE, MAINTENANCE, AND SOCIAL ASSISTANCE— A CLASSIC SITUATION AND A CLASSIC SOLUTION— *MANSON* v. *MANSON**

The Alberta Supreme Court quantified maintenance for children under section 11(1)(a) of the Divorce Act[1] with reference to the amount of social assistance that the mother and children were receiving and what it would cost the father if he had custody of the children. The rationale given was that as between the taxpaying public and the husband/father, the latter has greater responsibility to his wife and children. The decision was based on public policy to prevent the socially undesirable consequences of a wife and children becoming a charge on the public purse rather than on specific grounds enumerated in section 11(1)(a) of the Divorce Act. The submission of this comment is that if the court was concerned with the socially undesirable consequences, the remedy lay with the Parliament of Canada and should not have been the subject of judicial legislation in this case. A further submission is that it seems that the evidence in this case was not properly presented or appraised for arriving at the quantum of maintenance.

The facts of this case as indicated in the judgment are that a decree nisi was granted to the wife, petitioner by counter-petition, on the ground of her husband's cruelty. The parties had reached agreement that the wife should have custody of the four infant children and the husband had agreed to pay to the wife for their support and maintenance the sum of $75 per month for each child or a total of $300 per month. The court was invited to approve this agreement and make it a part of the decree nisi. The court, however, inquired about the sources of income of the wife. She was not employed. She and the children had been maintained for some time by social assistance, and were receiving $709 per month from Alberta Social Services and Community Health. The court found that the husband was a skilled tradesman qualified as a welder. He had earned about $14,000 in 1977 and closer to $20,000 in 1976. However, he said that he could not find employment throughout the year (1977-78). He was also unwilling to pay anything towards his wife's maintenance because he thought she had committed adultery and had left him. The court directed that the husband pay for the support and maintenance of the four children the sum of $125 per month per child, i.e. $500 a month payable on the first day of each month commencing with 1st of April 1978. The wife's claim for maintenance was reserved for future consideration depending upon any change of circumstances.

In the course of his judgment, Mr. Justice Miller said:[2]

> This case then presents the classic situation that appears before our courts with increasing frequency. On the one hand the husband is earning good money from his skills but the husband's family is being supported largely from the public purse. On the other hand the husband feels no obligation to support his wife because of some alleged private grievance and feels that he has no duty to his wife, his children or to society to look after their total basic needs. From the wife's point of view she realizes that she will have a continual hassle to collect moneys from the unwilling husband and she is

* (1978) 6 Alta. L.R. (2d) 87 (Alta. S.C. T.D.).

1. R.S.C. 1970, c. D-8.

2. (1978) 6 Alta. L.R. (2d) 87 at 88.

> probably quite content to remain on government assistance for she knows that the maintenance cheque will come on time each month without any struggle. The dilemma facing the court is the knowledge, from past experience, that many husbands, if they feel in their minds that they have been unfairly treated by the courts, regardless of whether they are right or wrong, will either disappear or refuse to pay anything with the result that both the family and the state will suffer a total lack of financial contribution from him regardless of enforcement procedures.

In Alberta when a wife is on social assistance and her husband is required to pay maintenance by the Supreme Court, her maintenance order is enforced by the Department of Social Services and Community Health by using the mechanics of the Family Court. The writer therefore went to the Family Court to check whether the fears expressed by Mr. Justice Miller in the above paragraph were unfounded or correct, and to his amazement he found that not only had the defendant not paid any money on Mr. Justice Miller's order but that he had been paying $200 a month since February 1977 very regularly and that he stopped paying even that amount. This prompted the writer to go back to the file of *Manson* v. *Manson* in the Supreme Court. The following facts came to light which were definitely before the court but which unfortunately were not properly presented and appraised.

The parties in this case were married on June 28, 1968 and four children were born of this union in 1970, 1971, 1972 and 1976. The parties separated on 27th of September, 1976 and the wife obtained an order from the Family Court, Edmonton, on January 20th, 1977 which required the husband to pay $50 per month per child as maintenance. The husband filed a petition for divorce on 3rd of March 1977 on the ground of adultery and the wife filed her answer and counter-petition on April 4th, 1977 on the basis of cruelty. In her petition the wife alleged that her husband had made approximately $26,000 (gross) in 1976. There was absolutely no mention as to whether he actually paid the maintenance awarded by the Family Court between January, 1977 and April 4th, 1977. Her demand was $125 for each child per month, $400 per month for herself, in the Notice of Demand for interim alimony, even though in her affidavit she had asked for only $350 per month for herself. She was getting social assistance of $672 a month and family allowance of $72 a month.

The following portions of the husband's affidavit are important:

> December 21, 1976 to May 20, 1977, total gross income has been only $4,800 due to the fact that my line of work has been very difficult to come by this year related to former years and also due to the fact that early in the year I suffered a slipped disc in my back and on occasions have been unable to report to work. . . . I have not worked since May 20, 1977 and in the last six weeks I have worked only 2 weeks. That it is with difficulty that I am now paying the sum of $200 monthly child support and I have borrowed money this year to maintain myself. It would be impossible for me at this time to increase my present $200 monthly support payments.

The parties had no matrimonial home or property. The only issue before the court was the determination of the quantum of maintenance to be paid by the husband towards the maintenance of the children and of the wife. The quantum had to be decided by applying s. 11 of the Divorce Act to the facts of the case. The court was required to consider, *inter alia*, "the condition, means and other circumstances of each of them", to quantify maintenance. It is submitted that if the wife's needs and the husband's ability to pay are quantified in terms of the condition, means and other circumstances of each of them, the figures we arrive at will not necessarily be identical. There is bound to be a gap between the two figures. Thus, for example, if the needs of the wife total up to $1,000 a

month but the ability of the husband to pay totals up to only $600 a month there is no point in stretching the husband's obligation to $1,000 because he just cannot pay. Miller J. said:[3]

> Philosophically, I find it hard to reconcile in my mind why the public purse should have to subsidize a family when the family income, from all persons contributing, would normally be sufficient to provide the basic needs if the family were still living together.

There is a basic flaw in this argument. The income of two or more persons may be sufficient to support them if they were living together; however, if they were living apart, then their income would not necessarily be sufficient for their support. An examination of the affidavits of both parties in this case pertaining to their expenses makes the point very clear. Their affidavits were as follows:

Wife's Affidavit

My monthly expenses to maintain myself and my four children are:

rent	$400
food	$275
utilities	$ 55
clothing	$ 30
entertainment	$ 20
gas	$ 50
car insurance	$ 12
Total	$842

Husband's Affidavit

rent	$280
utilities	$ 55
food	$300
furniture payments	$100
transportation	$300
working clothes	$ 40
H.F.C.	$ 11
union dues	$ 35
entertainment	$ 20
hotels	$ 50
child support	$200
Total	$1,391

It is thus clear that if the parties were living together there would be no duplication of rent and utilities and the food bill would be much lower than what it is separately for each of them. Separation or divorce does not increase the income of the parties but it certainly increases the expenses of the parties.

Miller J. then goes on to say:[4]

> Public support should be there to provide help as a last resort, or a temporary situation, and only after financial need and inability to provide has been demonstrated. If some of our citizens feel a lack of concern in that they can always rely upon the state to look after their legal and moral obligations, or if the actions of the courts are perceived by the public to bolster this point of view, then we will continue to witness a deterioration of individual responsibility and diminished community pressures to encourage people to look after their own. I cannot believe that in the long run it will be to the benefit of the people of this country or the country itself to do anything which will encourage people to dodge their responsibilities. . . . As between the state and the father, surely the latter has a greater responsibility to those children.

It is submitted that support should not be quantified with reference to social assistance. It can perhaps be asserted that the fact that the wife and children are on social assistance comes within the ambit of "conditions" or "other circumstances" of the parties and hence is relevant

3. *Id.*
4. *Id.* at 88-89.

in quantifying maintenance. The weight of judicial opinion is, however, against this assertion. Thus in *Gosselin* v. *Pelletier*[5] it was held that a wife who seeks maintenance pursuant to s. 11(1) of the Divorce Act, 1968 may be required to furnish particulars concerning her income, assets and living expenses, but ought not be required to disclose details of charitable benefits received from her family or another source. It has been held in a number of jurisdictions that the mere fact that a husband has the means to pay and the wife is being maintained at public expense is not in itself enough to justify an order for maintenance. In determining whether maintenance should be awarded and in fixing the amount thereof consideration is not to be given to the fact that children or relatives contribute to the support of the wife or that she receives charitable aid, and amounts being paid from public funds are also irrelevant. *Schartner* v. *Schartner*,[6] *Hunter* v. *Hunter*,[7] *Martyniuk* v. *Martyniuk*,[8] *Zunti* v. *Zunti*,[9] *Fedeczko* v. *Fedeczko*.[10]

In *Hyman* v. *Hyman*[11] Lord Atkin said that the court's powers to grant maintenance were granted partly in the public interest to provide a substitute for the husband's duty of maintenance and to prevent the wife from becoming a charge on the public for support. There have been several Canadian cases concerning maintenance awards in which the importance of the spouse not falling on the public purse has been stressed: *Tucci* v. *Tucci*,[12] *Caldecott* v. *Caldecott*,[13] *Hunter* v. *Hunter*,[14] *Piasta* v. *Piasta*.[15] It is submitted that we have come a long way from the feudalistic society in which the concept of "welfare" was represented by the local charity. Today not only do we have a vastly more sophisticated public welfare system than was in existence in England at the time of the *Hyman* decision but we also have a different attitude towards social assistance. As Lacourciere J. said in *McClelland* v. *McClelland:* "It is no part of the public policy to prevent the wife from becoming a charge on the public purse."[16]

Even assuming that the public policy argument is valid, it is based on the poor laws of Elizabeth. Commenting on those laws Blackstone said:[17]

> . . . no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work either through infancy disease or accident; and then he is only obliged to find them with necessities: the penalty on refusal being no more than 20 shillings a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; . . . .

Thus even the Statute of Elizabeth and Blackstone insist that a man will be compelled to pay for the maintenance of his children *only if he has the ability to pay for their maintenance.* In other words, the parental duty of maintenance was never unconditional. This policy has continued

5. [1969] C.S. 515 (Que.).
6. (1970) 72 W.W.R. 443, esp. 452 (Sask. Q.B.).
7. (1973) 9 R.F.L. 312 (Man. Q.B.).
8. (1974) 14 R.F.L. 160 (Ont. C.A.).
9. Unreported, 19 May 1977 (B.C.C.A.).
10. [1978] 2 A.C.W.S. 10 (B.C.S.C.).
11. [1929] A.C. 601 (H.L.) at 628, 629.
12. [1969] 2 O.R. 429 (C.A.).
13. (1970) 71 W.W.R. 470 (B.C.S.C.).
14. (1973) 9 R.F.L. 312 (Man. Q.B.).
15. (1974) 15 R.F.L. 137 (Sask. Q.B.).
16. [1972] 1 O.R. 236 (H.C.) at 240.
17. *Blackstone's Commentaries* (1st ed. 1755) 437.

through time from Blackstone to date. The Maintenance Order Act[18] embodies the philosophy of the Statute of Elizabeth and Blackstone. The most relevant provisions of the Maintenance Order Act for our purposes are as follows:

S. 3(2). The father of, and mother of, a child under the age of sixteen years shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such child.

s. 3(3). This section does not impose a liability on a person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour, nor does it impose liability in favour of a person who is able to maintain himself.

s. 5(2). [Ability as condition for liability]
No judge shall make any such order unless he is satisfied that the person against whom it is sought to obtain the order is able to provide the maintenance.

s. 5(4). [Order not to be affected by public aid]
Where the person in respect of whose maintenance an order is made is in receipt, directly or indirectly, of aid from the Province or municipality, the judge in making an order under this Act shall exclude such fact from his consideration in estimating the amount to be directed to be paid by the order.

It is thus clear that even under the provincial legislation which provides for social assistance to the needy and enables the state to recover that assistance from the person liable to maintain the needy recipient of social assistance, the judge is not required to make an order against the person liable if he has no ability to pay. Furthermore, the judge is not to take into account the amount of social assistance given while quantifying his award. It therefore seems somewhat ironic that in *Manson,* the court referred to public assistance while quantifying a maintenance award under the Divorce Act which does not refer to any provincial statutes or to public assistance. "As between the state and the father, surely the latter has a greater responsibility to those children", but responsibility is different from "ability" to pay. The mere fact that the father has greater responsibility does not necessarily mean that he should contribute more than the state towards the maintenance of his children: he must but only if he can. It is submitted that the only issue before the court was the extent of Mr. Manson's ability to pay and it could not and should not have been decided by reference to how much social assistance the children were receiving.

It is submitted that the adequacy of quantum is to be determined by reference to the conditions, means and other circumstances of the children and not by reference to what it would cost the father if he had custody of children and if he were to hire a babysitter: *Milliken-Smith* v. *Milliken-Smith.*[19] While reducing the maintenance awarded to the wife by Ormrod J. on the footing that that is what it would cost the husband to employ a housekeeper if the wife had not been there, Harman L.J. said, "I am not sure that I like that way of looking at it . . . I do not think that we ought to give her a sum which, so to speak, will show her remuneration for looking after her own children".[20] Russell L.J. said, "I

18. R.S.A. 1970, c. 22, as am.
19. [1970] 2 All E.R. 560 (C.A.).
20. *Id.* at 561.

agree with Harman L.J.; I do not think that that is a right approach to draw any parallel between the mother of children, looking after them, and a paid housekeeper".[21]

There was the affidavit of Mr. Manson in which he had mentioned that he had been paying $200 a month as child support. Perhaps this affidavit was not substantiated by producing a statement of account from the Family Court which would have shown clearly that he had in fact been paying $200 a month commencing from 25th of February 1977 and had paid it regularly for 13 months until the date of the judgment in this case. This payment was on a Family Court order of $50 per child per month and at no time was Mr. Manson in arrears. However, in spite of his health and unemployment problems, he was willing to increase that payment from $200 to $300, that is $75 per month per child until the children become self-supporting or eighteen years of age or they are married, whichever comes earlier. It is regrettable that all this evidence was not properly presented or appraised by the court.

Mr. Manson had said in his affidavit that his work was seasonal and that he found difficulty in finding work throughout the year. Mr. Justice Miller observed, "I have some difficulty in understanding why he cannot earn something from his skill in the other months of the year . . .".[22] It is submitted that on this count also the evidence was not properly presented or appraised. It is possible to obtain evidence from the International Brotherhood of Boiler Makers and Welders Local 146, which is a union of welders and boiler makers, the Unemployment Insurance Office, and the Department of Manpower to the effect that it is really difficult for boiler makers and welders to get a job round the year. The situation has become more aggravated because of the influx of more boiler makers and welders from out of the province to Alberta. If a welder or a boiler maker is a member of a union and accepts a non-union job when he is laid off from his regular job obtained through a union, he loses his chances of getting a job with the union. If he accepts a job other than his own trade, he is paid less and his unemployment insurance benefits go down. On paper a boiler maker or a welder may make something like $16 an hour and therefore by computation he may be making $32,000 a year but in fact very few of them make that kind of money. Whatever they earn in seven or eight months of irregular work, they have to use it for the whole year. Many of these technically skilled people are unable to collect unemployment insurance because the gaps between their periods of unemployment are not long enough to entitle them to the unemployment insurance benefit.

Mr. Manson also mentioned in his affidavit that he had suffered from a slipped disc and that is why he could not report for work on many occasions. Again what was perhaps required was a certificate from his doctor to the effect that he had in fact suffered from a slipped disc and that he had problems. It seems that the whole thrust of Mr. Justice Miller's decision is that Mr. Manson is a skilled worker, a welder who makes enough money to support his wife and four children; that he can work all year round if he wants to; that he is irresponsible because he is content to leave his wife and children on social assistance even though he can support them; that he does not want to support his children. If only the evidence had been presented properly the court would have seen that

21. *Id.* at 563.
22. *Supra* n. 2 at 88.

even though Mr. Manson's income was hypothetically quite high, it was not sufficient to support two households; it is really difficult for people in this trade to find work all year round; it is also difficult for people in this trade to collect unemployment insurance during all the periods of their unemployment; that he did in fact borrow money for his own maintenance in the year 1977; that he paid regularly for 13 months the sum of $200 a month towards the maintenance of his children on a Family Court order. In other words he had the ability to pay $200 a month and he had the willingness to pay $200 a month which is displayed by his regular payment of $200 for a period of 13 months. Now that he had agreed with counsel for his wife to pay $300 a month, it is submitted that if the order was limited to $300 he would perhaps have paid that also. However, the fears of Mr. Justice Miller came true because Mr. Manson did not pay on Mr. Justice Miller's order of March 31, 1978.

An arrears affidavit was filed on May 24, 1978 in the Edmonton Family Court by the wife for $800. Mr. Manson was required to appear in court on 3rd February, 1979 on a show cause hearing and was ordered to pay $200 on arrears of $800 or in default to go to jail for 60 days. On February 12, 1979, the true arrears were $2,600 but only $800 were listed on the affidavit in May 1978 and therefore only $800 were enforceable payment. In effect, therefore, Mr. Manson ended up paying only $200 a month for the four children in spite of the Supreme Court order of $500 a month.

It is submitted that social assistance is given under provincial statutes and there are strict procedures for the award of assistance and recovery from liable spouses and fathers. Assistance is given to persons who can prove need which may arise because of some misfortune like the disability or death of the breadwinner or even divorce resulting in poverty of one spouse and dependent children. If the intention of the legislature was to prohibit social assistance for a divorced spouse and dependent children, it was not specified in the Social Development Act.[23] If it is considered that reliance of spouses and children on social assistance because of divorce is a socially undesirable consequence, then it is submitted that the remedy lies with Parliament and should not be the subject of judicial legislation. Section 11 of the Divorce Act, a federal statute, is not the proper vehicle for incorporating the policies of the Social Development Act, a provincial statute, especially when the provincial policies as enunciated in the Maintenance Order Act[24] clearly enjoin the judge only to make an order for recovery against a person who has the ability to pay out of his own property or earnings.

It is submitted that the courts should recognize the existence of the social assistance system and apply the rules of law to any given case without the fear of public censure. The judges take their oath of office to uphold the law, not to teach social responsibility to people.

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23. R.S.A. 1970, c. 345, as am.

24. *Supra* n. 18.

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