A New Deal for Children of the Marriage?

> A parent who sends his son into the world uneducated and without skill in any art or science does a great injury to mankind as well as to his own family, for he defrauds the community of a useful citizen and bequeaths to it a nuisance.[1]

The meaning of the phrase "children of the marriage" as defined in the *Divorce Act*[2] has recently been clarified by the Supreme Court of Canada in *Jackson* v. *Jackson*.[3] This guidance is to be welcomed since it deals with a point of law of some importance, related as it is to the support and maintenance of children of divorced parents. It is an area of the law which has been referred to as "relatively primitive"[4] and is in need of comprehensive definition; however, judicial and legislative reform has been somewhat hampered by rapidly evolving concepts of both marriage and divorce in the latter half of the twentieth century.

Surprisingly, a child's right to maintenance must be statutory in nature.[5] At common law, although a father had a moral obligation to support his child and the infant had a right to be supplied with necessaries, he had no direct means of enforcing this obligation. The mother, providing she was also the wife, could enforce his right to maintenance, but only indirectly, through her power to pledge her husband's credit for necessaries.[6] Fortunately, the child's rights have been expanded by statute,[7] and insofar as one is concerned with the rights of children upon the divorce of their parents, the *Divorce Act* sets out the governing principles. Section 11 of the *Divorce Act* provides that:

> (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
>
> (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

---

[1] II *Kent's Commentaries* (1889), Part IV, 195.

[2] R.S.C. 1970, c.D-8, hereinafter referred to as the *Divorce Act*.

[3] (1973), 29 D.L.R. (3d) 641.

[4] Macdougall, "Alimony and Maintenance" in Mendes da Costa, I *Studies in Canadian Family Law* (1972), 285.

[5] Payne, *Power on Divorce* 2d ed. (1964), 576.

[6] *Cf. supra*, f.n.4, 289.

[7] The first statutory change was the *Poor Relief Act*, 43 Eliz., c.2.

(i) the wife
(ii) the children of the marriage, or
(iii) the wife and children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
(i) the husband,
(ii) the children of the marriage, or
(iii) the husband and the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage.

This section is to be interpreted in light of the definitions set out in s.2 of the *Act*, of which the most material are as follows:

In this Act

"child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis;*

"children of the marriage" means each child of a husband and wife who at the material time is

(a) under the age of sixteen years, or

(b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause to withdraw himself from their charge or to provide himself with the necessaries of life....

One of the first problems encountered by the courts involved children of the marriage who were sixteen years of age or over but who remained, in some capacity, as students studying at recognized educational institutions. The issue raised was whether the "ejusdem generis" rule would limit the meaning of "by reason of illness, disability or other cause" to situations involving actual physical disability.

Beginning with *Grini* v. *Grini*,[8] the courts have overwhelmingly taken the view,[9] with few exceptions,[10] that "other cause" includes

---

[8] (1969), 5 D.L.R. (3d) 640 (Man. Q.B.).

[9] *Tapson* v. *Tapson* (1970), 8 D.L.R. (3d) 727 (Ont. C.A.); *Jones* v. *Jones* (1971), 17 D.L.R. (3d) 217 (Sask. C.A.); *Sweet* v. *Sweet* (1971), 17 D.L.R. (3d) 505 (Ont. H.C.).

[10] *Madden* v. *Madden* (1970), 14 D.L.R. (3d) 100 (Man. Q.B.).

Bastin,J. stated at pages 102-3 that:

> In my opinion it could be logically argued that by using the word "unable" Parliament intended to limit the exceptions to cases where the person in question was incapable from want of sufficient power, strength, resources or capacity, but not from want of volition to support himself.

full-time attendance at secondary schools or similar institutions.[11] It is submitted that part-time attendance, to the extent that it renders the child "unable ... to provide himself with necessaries of life", would similarly entitle the child to maintenance.

Having established the *Grini* principle, the courts were soon faced with the problem of how far to extend it. Should a father be required to support a son or daughter who is pursuing a university education? And if so, should the court extend such maintenance beyond the child's age of majority?

Ironically, the major impetus for restricting the scope of maintenance provided in s.11 of the *Divorce Act* came from the decision of Laskin,J.A. (as he then was) in *Tapson* v. *Tapson*,[12] a case which is often cited in support of the liberal view propounded in *Grini* v. *Grini*.[13] While allowing maintenance for a 16 year-old daughter who was attending a secondary school, the court stated that:

> If it should prove to be the case that a child, having reached the age of 16, withdraws from a parental home and goes out to live by himself or by herself, other considerations will have intruded to make this provision probably no longer applicable.[14]

Using these words as a stepping stone, the Ontario High Court in *Clark* v. *Clark* adopted a constrictive approach by noting that "Laskin,J.A. appears to give support to limiting the schooling to secondary school education and to children living at home".[15] In coming to this conclusion, the Court was genuinely concerned with the difficulties which would arise unless the words "children of the marriage", as defined in the *Divorce Act*, were limited:

> Is a child over 15 years old living outside the home, but helped by a parent to go to school, "a child of the marriage"? Is a child over 15 years old going to a private or boarding school, or taking a special course for some short-term objective or taking university work and living outside the home at a parent's expense included? Is a child learning weaving, needlework, carpentry or domestic science included? Is an unpaid apprentice living at home included?[16]

In the same year, the Alberta Court of Appeal took a less stringent approach.[17] The Court extended maintenance to a child

---

[11] The learned trial judge in *Grini* ordered the father to provide maintenance for a 16 year old daughter until she completed Grade XI *and* a one-year course at a business college.

[12] (1970), 8 D.L.R. (3d) 727 (Ont. C.A.).

[13] (1969), 5 D.L.R. (3d) 640 (Man. Q.B.).

[14] (1970), 8 D.L.R. (3d) 727, 729 (Ont. C.A.).

[15] (1971), 16 D.L.R. (3d) 376, 380.

[16] *Ibid.*

[17] *Re C. and C.* (1971), 14 D.L.R. (3d) 477 (Alta. App.Div.).

pursuing post-secondary education on the basis that university training was a "necessary" referred to in s.2 of the *Divorce Act*. The learned trial judge stated that:

> It is unnecessary to dwell upon the complexity of modern business and industry and the necessity for a specialized training for those who are to be employed therein. High school and university are but succeeding steps in such a training.[18]

The conservatism exhibited by some Canadian Courts concerning the importance of university training is disappointing, to say the least. In contrast, an American court recognized the father's obligation to provide support for a child attending college as early as 1926,[19] and by doing so established a precedent for others.[20]

A further attempt to limit the scope and application of s.11 of the *Divorce Act* came in the form of confining the meaning of the word "child" as used in s.2 to someone under the age of 21 years. In *Sweet* v. *Sweet*,[21] the Court refused to allow the mother maintenance for a 21 year-old son who was in the third year of his university training by saying:

> ... I am inclined to interpret the word "child" in the *Divorce Act*, 1967-68 (Can.) c. 24 in its ordinary sense and to hold that there is no obligation upon a parent to support a healthy, able-bodied son or daughter who has attained the age of 21 through an educational career indefinitely extended.[22]

However, the court did acknowledge, albeit indirectly, the necessity of higher education, for it made an award on behalf of a 19 year-old daughter "so long as she continues to reside with the petitioner and to attend school or other educational institutions and has not attained the age of 21 years".[23]

Both the trial court and the British Columbia Court of Appeal carried the argument a stage further in their consideration of the *Jackson* case. In that case the appellant mother, who had been divorced in 1965, had been receiving maintenance from the respondent father for her children, including a daughter named Penelope, pursuant to an order of the Court made in 1971 under s.11 of the *Divorce Act*. He terminated his payments for Penelope's

---

[18] *Esteb* v. *Esteb*, 138 Wash. 174, 244 P. 264 (1926).

[19] By 1968 at least 26 states had followed the *Esteb* decision, and held a college education to be a necessity. See Note, *The College Support Doctrine: Expanded Protection for the Offspring of Broken Homes*, (1969) Wash.U.L.Q. 425.

[20] (1971), 17 D.L.R. (3d) 505 (Ont. H.C.).

[21] *Ibid.*

[22] *Ibid.*, 508.

[23] *Ibid.*, 509.

maintenance on her nineteenth birthday, taking the view that by virtue of the *Age of Majority Act,* 1970 (B.C.) c. 2, she was no longer a minor or infant and therefore no longer a "child of the marriage".

The case came initially before Ruttan,J. of the British Columbia Supreme Court.[24] Although making it abundantly clear that his sympathies were with the appellant mother he felt constrained to give "child of the marriage" a very restrictive interpretation. Starting with the proposition "that under the common law there is no legal obligation on parents to maintain children, except those which rely on criminal sanctions for neglect",[25] he refused to accede to counsel's argument that it was Parliament's intention to extend the obligation to children who had passed the age of majority. While canvassing many of the recent cases, he preferred to rely on the dicta of Mr Justice Wright in *Clark* v. *Clark*[26] and *Wood* v. *Wood* and stated that:

> I am of the opinion that the Court has no power... to order citizens to pay maintenance for other adult citizens merely because the relationship of parent and child exists.[27]

The British Columbia Court of Appeal[28] agreed, in what could only be described as a curt, legalistic judgment which ignored any consideration of public policy. Mr Justice Ruttan had noted the desirability of extending, in appropriate circumstances, the court's jurisdiction to award maintenance to children who had reached 19, the age of majority in British Columbia. However, his principal concern lay with the question: If maintenance for children is not limited at the age of majority, where can the line be drawn?

The Supreme Court of Canada, in dealing with the *Jackson* case on appeal,[29] has answered that very question. In delivering the judgment of the Court, Ritchie,J. stated that:

> I think the answer to the question posed... is that the line is to be drawn at such point as the Court, granting a decree *nisi* of divorce, thinks it just and fit to draw it in all the circumstances of the particular case... .[30]

---

[24] [1971] 5 W.W.R. 374 (B.C. S.C.).

[25] *Ibid.,* 378, quoting Wright,J. in *Wood* v. *Wood* (1971), 16 D.L.R. (3d) 497, 499 (Ont. H.C.).

[26] *Cf. supra,* f.n.15.

[27] *Jackson* v. *Jackson,* [1971] 5 W.W.R. 374, 378, quoting Wright,J. in *Wood* v. *Wood* (1971), 16 D.L.R. (3d) 497, 500.

[28] (1972), 22 D.L.R. (3d) 583; [1972] 1 W.W.R. 751.

[29] (1973), 29 D.L.R. (3d) 641.

[30] *Ibid.,* 650.

The Court emphasized that the period during which "children of the marriage" may be entitled to maintenance under the *Divorce Act* is totally unrelated to their attaining the age of majority.

> ...I am of the opinion that the words "children of the marriage" as defined in s.2(b) are clearly used as a term of relationship and that, with respect to each child who is "sixteen years of age or over" they do not create any age barrier but on the other hand include all such children irrespective of age who qualify as being unable to withdraw from the parent's charge or provide themselves with the necessaries of life for the reasons stated in the subsection.[31]

Moreover, to adhere to the capricious cut-off point advocated by the Courts below would have precluded consideration of maintenance even in the case of a 19 year-old child who is permanently disabled by paralysis. The Supreme Court of Canada justifiably found such a position untenable.

Regrettably, the Court did not express itself as clearly with regard to the inclusion of a university or college education as a necessary within the meaning of the *Divorce Act*. Ritchie,J. adopted the reasoning in *Tapson*, where Laskin,J.A. confined his judgment to the situation where a "child is in regular attendance, as in this case, in a secondary school, *pursuing an education in the ordinary course designed to fit her for years of life ahead*".[32] Although there is a specific mention of "secondary school", it is submitted that the latter part of the quotation conveys its true intent. So long as the child is pursuing educational activities which are "designed to fit her for years of life ahead", the court may find them necessary and that the parent is liable to provide them for the child. Implicit in this instruction is the obligation on the court to engage in a form of subjective evaluation of the child's academic abilities and the probability of his benefiting from the education proposed.

The *Jackson* case is important because it clearly overrules the *Sweet*[33] contention that the age of majority limits the jurisdiction of the Court to grant maintenance under s.11 of the *Divorce Act*. It also abandons the thesis proposed in *Madden*[34] that a university education can never be necessary, and that Parliament intended to limit support under s.11 to cases of physical disability. Instead, the decision vests the Court with a wide cloak of discretion in every case where the child is sixteen years of age or over to determine the age at which parental support is to cease, as well as items to be included in a particular child's list of necessaries.

---

[31] *Ibid.*, 647.

[32] *Cf. supra*, f.n.12, 728-29. The emphasis is mine.

[33] (1971), 17 D.L.R. (3d) 505 (Ont. H.C.).

[34] *Cf. supra*, f.n.10.

Unfortunately, the Court did not see fit to provide guidelines for the exercise of that discretion. While directing the matter to be remitted to the Court of first instance because the merits of the maintenance applications had not been heard, the learned judge neglected to outline the factors which could be relevant.[35] For example,[36] to what extent should the social status and educational background of the parents be considered? Are the number of children in the family relevant to a particular child's application? To what extent is the income of the custodial parent, or the parent with whom the child is living, relevant to the amount of maintenance to be provided by the other parent? Should the child's own income and savings be considered as a factor in decreasing the parental obligation to support?[37] What significance is to be attributed to the age of the child, all other factors being equal? To what extent should the disadvantage caused the parent by continued support be considered?

Perhaps a more difficult problem will be the consideration to be given to the past academic performance of the student. Is the student armed with a scholastic record of straight A's to be treated differently from one who has only been able to muster B's?[38] Or should all questions of academic admissions be left entirely with our universities and removed entirely from our courtrooms?

Moreover, the Supreme Court, although given the opportunity to do so, refused to discuss the basic policy underlying the issues in the *Jackson* case.

Equity suggests that a child of divorced parents should be in no worse position than a child from an unbroken and happy home. But should he be in a better position? It is an accepted fact that many parents, while having sufficient means, do not send their children to college. Society does not condemn them nor does the criminal law prosecute them. Why then, do the courts impose a more rigorous duty on divorced parents? Does not logic require

---

[35] In all fairness, the Court did quote from s.11 of the *Divorce Act* which requires the Court to have "regard to the conduct of the parties and the conditions, means and other circumstances of each of them" but it is submitted that this is far from instructive.

[36] For a discussion of some of these factors, *cf. supra,* f.n.19.

[37] The Court appeared to think so in *Sweet* v. *Sweet, supra,* f.n.9.

[38] If the child does have such a direct interest in the outcome of the proceeding, should he not be given separate standing and the right to represent his interest with counsel?

that parents of children from happy homes be similarly compelled to send their children through post-secondary levels of education? But are we prepared to say that the Court and not the parents determine who in our society should receive a university education? [39]

On the other hand, a parent is normally not expected to maintain a child indefinitely and his obligation, in most cases, must end at some time. Is it not equally unreasonable to establish an arbitrary cut-off point for support and thus to eliminate all consideration of special circumstances? No doubt many children who have been forced to put themselves through college have benefited greatly from that experience. However, to suddenly terminate financial support for a student at the age of majority, when he may have one or two years of study left to complete a university degree, may also be grossly inequitable.

The failure of the *Jackson* Court to respond to these basic problems will surely be the cause of continued litigation in the future. The extent of the obligation imposed by the *Divorce Act* to maintain their children remains undefined, and lawyers will be well advised to utilize separation agreements in order to provide continued support for "children of the marriage" beyond their age of majority.

Heino Lillies *

---

[39] In *Esteb* v. *Esteb, supra,* f.n.17 the court considered that because of the absence of a separated parent from the home, he would not have the child's talents and abilities before him daily and therefore might not fully appreciate them, and that this justified the court's interference in such cases.

* LL.B. (Queen's), LL.M. (London), Assistant Professor of Law, Queen's University.