

DEPENDENTS' ALLOWANCES AND ALIMENTARY PROVISIONS FOR DIVORCED AND SEPARATED WIVES

The extracts which are quoted in this short article are printed by permission from a booklet entitled "*Dependents' Allowances — A Commentary*", prepared in the office of the Judge Advocate-General at National Defence Headquarters in Ottawa, and recently issued to personnel of the three armed services. The references in the extracts printed are to the Financial Regulations and Instructions for the Canadian Active Service Force (Canada), these Regulations having the force of law by virtue of Orders-in-Council made under the provisions of the Militia Act. Regulations almost identical in effect and in the numbering of the articles are in being for the Royal Canadian Navy and Royal Canadian Air Force, and similarly have the force of law under the Acts of Parliament which govern these services.

The Commentary above referred to was written for laymen and not for lawyers, but as the extracts which appear here deal with a feature of the Regulations which experience has shown provides a ready trap for many of the Bench and Bar in Canada, permission has been obtained to reprint them in the CANADIAN BAR REVIEW.

"XV. The case of wives separated by a judgment or order of a Court or separated under a separation agreement is dealt with in Proviso (iii) (a) to Article 101. The case of the couple who are living apart without any formal judgment or written agreement as to support is dealt with in Proviso (iv). Unless the judgment of the Court or the written agreement provides for a payment by the husband to support the wife or there is an unwritten agreement evidenced by proof of regular payments, no allowance is generally payable. If payment is provided for, then allowance plus assignment of pay must not together total more than the payment provided for in the judgment, order, or agreement. Thus the soldier pays the amount due monthly up to 15 days' pay. The Board pays the rest. For example if a separation order against a soldier calls for \$40.00 a month, and 15 days' pay of rank is \$23.00 a month, then the Board may make up the difference between \$40.00 and \$23.00 by granting an allowance of \$17.00 a month. If, for example, the separation order called for \$75.00 a month the soldier would

assign \$23.00 and the Board could allow up to \$37.20 (the maximum amount allowed for the wife of a private) making a total of \$60.20. True the woman would be \$75.00 — \$60.20 = \$14.80 short of the amount called for by the separation order, and the soldier would owe her that amount but he probably wouldn't be made to assign pay to cover it. If for instance a soldier has not been living with his wife, but has say in the six months before enlistment, without any formal agreement to do so, given her \$40.00 a month, then the soldier could assign \$23.00 (if a private) and the Government could pay her \$17.00 to make it up to the \$40.00 a month she had been receiving.

XVI. Much the same thing is done in the case of a divorced wife or an annulled marriage. But there is in connection with this a point on which there is much misunderstanding. Many men think that the moment they are given reason to suspect that a wife is misbehaving herself or running wild, they have only to so notify the Board, and that the Board should stop all allowances and allow assigned pay to be cancelled. The Board does not so act, for to do so would disregard an important principle of both Canadian and English law. The law is that a man, having solemnly assumed the obligations of marriage cannot just throw them over, unless the Courts of the land just as solemnly release him from those obligations. Obviously it would be most unfair to allow him to do so on mere suspicion, and who is to be trusted to draw the line between suspicion and actual facts adequately proved? Obviously not an interested party like the husband. In fact and in practice it has long been established that it can only properly be done by a Court of Law. In the result a man remains legally liable to support his wife until a Court has said otherwise — usually by the decree nisi. To do otherwise — such as for instance to abolish the duty of support merely upon the issue of a writ for divorce — would open the road to grave injustice upon innocent wives. In fact, in law a woman is even able to make her husband pay her legal costs of defending a divorce action — a provision only reasonable and just when the matter is thought out. The Board must make its decisions with due regard to the law, and when it continues assigned pay and allowances until a decree nisi, it is merely helping the man to fulfil his ordinary legal obligations. When allowances are

stopped prior to decree nisi it is on special grounds only, such for instance as the fact established beyond doubt that the wife is living with and being supported by another man, or the case falls within Para. VI (d) above.¹

XVII. In the case of a divorced wife, if there is no order for alimony then there is no allowance. If there is an order then different cases may arise. The following are typical:—

- (a) where the service man is not remarried and there is no dependents' allowance for children in pay.
- (b) where dependents' allowance for a present wife is being paid.

Case (a) above is dealt with in proviso (iii) (b). Then the service man must assign 15 days' pay and dependents' allowance may be granted up to \$25.00 to bring the total amount up to but not more than the amount ordered by the judgment for alimony.

Case (b) above is dealt with in proviso (iii) (c). Suppose for instance the soldier has a divorced wife. The judgment of divorce directs that he pay \$30.00 a month for the support of that wife. He has married again and has one child by either the divorced or the present wife. He assigns 15 days' pay to support the ordinary allowance of \$37.20 for his present wife and \$13.92 for his child. Then by assigning 5 days' pay, he can support and make his divorced wife eligible to receive an allowance equal to the difference between the \$30.00 a month he owes her and 5 days' pay, \$7.67, that is to say \$22.33.

XVIII. A service man may also under certain conditions get an allowance for a woman with whom he has been living before enlistment but who is not his wife. The description "woman represented as a wife" is the term used in the regulations and by the staff of the D.A.B.² but the rather misleading term "common law wife" is sometimes employed. It is misleading because no such relationship is known in law. Such cases are dealt with in Article 117. To come under this Article:—

- (a) the pair must have lived together and the woman have been held out to the world by the man as his wife for two years or more before he enlisted;

¹ That is, where the wife is living apart in such circumstances as would disentitle her to alimony.

² Dependents' Allowance Board.

- (b) during that time the man must have financially supported the woman as though she were his wife;
- (c) the woman must have a good reputation and not be generally considered as a loose character.

Fifteen days' assigned pay is necessary to support an application for the woman in this case and the maximum allowance, if granted, can be the same as for a wife, although if there are no children it is usually limited to \$25.00. The fifteen days' assigned pay will also support allowances for six children of the service man.

However Article 102 (c) applies to an allowance granted in this case and the maximum of independent income or earnings plus allowance is \$65.00. This means that the amount of the allowance is arrived at as in the following example—the employment of the dependent claimed for under Art. 117 is casual but her average earnings over a period are \$50.00 a month. Then the amount of the allowance cannot exceed \$65.00 less \$50.00 — \$15.00 a month. However, income which comes from assigned pay of the service man himself or of sons in the services does not count as income to be subtracted from the amount of the allowance.

A very recent amendment provides that in special cases where need exists and there are children of the union, the Board may grant an allowance despite the fact that the woman concerned has independent earnings or income."

The above extracts should be read in the light of certain other information contained in the Commentary which may be new to many lawyers. In the first place it is not generally realized that there is no legal entitlement to dependents' allowances and that they do not form part of the pay and emoluments which an officer or man earns by serving in the armed forces. Dependents' allowances are rather something in the nature of a grant authorized by Parliament to certain defined persons who were in fact dependent upon and actually supported by the service man prior to his enlistment or enrolment, or who have, for example by marriage or birth, become dependent upon him and properly look for support to him, subsequent to enlistment. The Regulations define who are eligible for allowances, but the grant of an allowance in any particular case is at the discretion of the Dependents' Allowance Board who are charged with the administration of the sums appropriated by Parliament for the purpose. As a matter of practice, the Board in nearly all cases where eligibility is shown makes a grant of some amount, but

this does not of course alter the legal position. Secondly, all service personnel other than officers are required to make an assignment of at least 15 days' pay in favour of the dependent or dependents before any allowance can be granted. This is conveniently referred to as an assignment "supporting" an award. Officers are left to make such assignment as they think fit, it being assumed on their behalf that they will act as "officers and gentlemen" should. If, however, it is made to appear to the Board that an officer is neglecting or avoiding his responsibilities, then there is power to order a compulsory assignment of pay to a dependent or dependents not exceeding \$100.00 a month.

From what has been said it will, it is thought, be apparent that the Regulations as to the treatment of divorced and separated wives, the effect of which is described in the paragraphs above quoted, should be borne in mind when drafting alimentary provisions which are to appear in judgments of divorce, of judicial separation, in separation agreements or in orders made under provincial statutes for the protection of deserted wives and children. Otherwise the Dependents' Allowance Board may be unable to give effect to them. Actually the Dependents' Allowance Board, when faced with alimentary provisions which are unworkable from its point of view, does its best to arrive at what appears to be the fundamental intention of such provisions and then makes the awards which it thinks the draughtsman would have provided for had he understood the Regulations. It is often impossible however to do more than approximate to the expressed intention. One of the points for instance which must always be borne in mind by the draughtsman of such documents is the fundamental distinction between the allowance proper and the assigned pay which supports it. A not unusual provision appearing in alimentary agreements is one by which the wife is "to continue to receive the dependents' allowance heretofore paid to her on behalf of the husband, but the husband is not to be called upon to assign any of his pay to her". Such an agreement cannot be given effect to under the Regulations, and the Board in such an instance has ordered a compulsory assignment of 15 days' pay of rank and awarded such proportion of the usual allowance as will bring the aggregate sum received by the wife up to the amount of the normal allowance, that sum apparently having been in the minds of the parties as the amount the wife is intended to receive. Obviously this sort of thing is not very satisfactory and the parties, particularly the husband who suffers, may feel that the Board has failed in

its duty to him. Actually the most practical and satisfactory form of alimentary provision where a service man is involved is one which does not attempt to make any disposal of either assigned pay or dependents' allowance in terms but provides simply for a monthly sum or sums for which the husband is liable, a clear distinction being made between the provision made for the wife and any provision for children, allowances to whom by the way are supported by the same 15 days A.P. which supports the allowance to the wife. But here a word of warning should be said. It is perhaps only natural that those who understand the Regulations will endeavour to evade their spirit by asking magistrates to order or husbands to agree to amounts which otherwise would not be contemplated, basing their argument on recognition of the fact that once the assigned pay has been exhausted, it is the Government which pays the "upper end" of the alimentary allowance. It is here that there comes into play the discretionary power of the Board which, because of the non-entitlement feature in allowances to dependents, is well within its rights in refusing to recognize in whole or in part any alimentary judgment or agreement which appears unduly to trench upon the generosity of Parliament. In practice each alimentary provision is as far as practicable tested by the Board in relation to the yardstick generally adopted by the courts of one-third of the husband's total income.

In conclusion, it should be noted that the paragraphs of the Commentary quoted in this article were written with particular application to service men other than officers. However, an examination of the Articles and Provisos referred to will reveal that exactly the same principles apply to officers as far as the calculations of the amount of dependents' allowances payable to divorced and separated wives is concerned, the only difference being that in the case of an officer he will, unless in default, be left to make the necessary assignment of pay voluntarily. That assignment however remains, so to speak, as a first charge upon the amount of the alimentary provision named in the judgment or agreement.

In relation to paragraph XVIII of the Commentary it should also be noted in the case of officers as well as men where the dependent falls within the terms of Art. 117 (women represented as wives) that the assignment of 15 days' pay is a condition precedent to an award.