

FAMILY WELFARE AND THE COURTS*

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I

The courts deal with the support of children, spouses (or ex-spouses), and the custody and protection of children, (for example under section 11 of the Divorce Act,¹ and under provincial statutes). This article examines these court operations "as if" they were special forms of social welfare programmes. Using this approach, it is possible to consider the work of the courts in these areas against performance criteria that are suitable for social systems. So (for the purposes of this article) let us regard the payment of financial support under a court order "as if" it were a "contribution" to a court-controlled system of social welfare, and (looked at from the other side) as a "benefit" to the recipient of the payment. Also let us regard orders for the custody of children, access, and the like, as specialized examples of the child welfare function of the state. Looking at the court process on custody, protection, and financial support in this way, we can ask questions about it, for example, whether a court-based system produces effective, fair, and adequate financing for broken families, and whether the system fulfills in a satisfactory way the child welfare function of the state in settling disputes about custody, or arranging protection for children who need it. The ordinary state welfare programmes are the "back-up" systems to the court process. Of course, in regard to financial support, the court-based system is not restricted to minimal assistance, but tends to relate the quanta of financial orders to the usual economic standards of the adults concerned. Also, court orders for financial support are directed against a restricted list of "contributors".

The Divorce Act, section 11,² contains the following provisions on financial support and custody of children: "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

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¹ R.S.C., 1970, c. D-8, as am.

² *Ibid.*

circumstances of each of them" order one ex-spouse to secure or to pay such lump sum or periodic sum as the court thinks reasonable for the maintenance of the other ex-spouse or the children of the marriage, and may make an order "providing for the custody, care and upbringing of the children of the marriage". In regard to the level of "contributions" and "benefits", the Act gives the court an open-ended discretion to determine the level of payments, with no detailed instructions or statement of policy as to how this should be done other than the words "having regard to the conduct of the parties and the condition, means and other circumstances of each of them". In effect, in regard to maintenance, Parliament has left it to the individual divorce judge to determine a policy and the level and conditions of inter-spousal support in each case before him. The situation is not much different at provincial level, but The Family Law Reform Act, 1978 states³ that, in determining the amount of support, the court must consider all the circumstances of the parties including, for instance, the assets and means of each party; capacity of a party to provide for his or her own support and the capacity of the other party to provide support; the ages and physical and mental health of the parties; the needs of the dependant spouse having regard to the accustomed standard of living during cohabitation; "the legal obligation of the respondent to provide support for any other person"; "a contribution by the dependant to the realization of the career potential of the respondent"; the aptitude of a child dependant "for and reasonable prospects of obtaining an education"; any other legal right to support for the dependant other than out of public money. These provisions in the Ontario statute sound rather like the kind of instructions that might be given to officials administering a welfare scheme. In England, in the case of divorce, nullity, and judicial separation, the Matrimonial Causes Act, 1973,⁴ Part 2, contains a variety of "checklist" instructions as to factors which a judge must consider when assessing financial support.

The "fault" concept has already disappeared in a number of jurisdictions and is under attack in others. The emphasis has shifted from legal proof of grounds such as adultery, desertion, cruelty to questions of need and ability to pay as the fundamental criteria for support. This shift in social policy has produced a change in the role of the courts in the area of domestic relations, and a considerable amount of judicial time is now spent in making rulings which seem to have a "family welfare" function. If "no fault" divorce becomes the accepted pattern in the future, the role of the courts in regard to financial support, child custody, and protection may become difficult to distinguish from that of an administrative programme, except for the presence of lawyers, adversary process, court ceremonial and uniforms.

³ S.O., 1978, c. 2, s. 18 (5). ⁴ C. 18.

II. *Custody.*

It is continually stated that the chief consideration in custody matters is the "best interests" of the child, but there is great uncertainty as to what this vague formula means in individual cases. Custody issues may arise in various situations, but most commonly on divorce. Section 11 of the Divorce Act empowers the judge to make an order providing for the custody, care and upbringing of the children of the marriage. What information does the judge have about the child, the parents, and the home circumstances, to assist him in making the order? Another factor is that a high proportion of custody issues are uncontested. A custody "battle" is a traumatic but a rare event.

When an Ontario divorce petition contains particulars of children of the marriage, the petition and other documents must be served on the Official Guardian.⁵ The Official Guardian mails a questionnaire to both parties, and the questionnaire requires information on matters such as: children of the marriage with details of health problems, progress at school and other information in regard to the child's future welfare; home conditions and environment; previous court proceedings or maintenance orders; information about any consultation with a social welfare agency or counsellor; a financial statement showing income, expenditure, assets, and liabilities. The Official Guardian's staff decide whether further investigation is required, and if not a short report is prepared for the court, indicating that the Official Guardian finds no problems as to guardianship, custody or maintenance. The short report seems to be usual in about three-quarters of Ontario divorce petitions, but the Official Guardian may instruct a detailed investigation. Bradbrook commented on interviews with twelve judges of the Supreme Court of Ontario and found that although they were generally critical of the Official Guardian's reports, the reports might be the only evidence supplied to the court.⁶ Prince Edward Island is the only other Canadian province whose divorce law provides for a third party assessment of the circumstances of the children. If there are children of the marriage, a copy of the petition is served on the Director of Child Welfare, who may apply to a judge to have a Queen's Proctor designated and directed to intervene to protect the interests of the children. In England and Wales (but not in Scotland) divorce

⁵ MacDonald and Ferrier, *Canadian Divorce Law and Practice* (1977), s. 33; Baxter, *Family Law Reform in Ontario* (1975), 25 U. of T. L.J. 236, at pp. 247-248. As to the position in England and the requirement that before making a decree absolute, the court must be satisfied about the arrangements made for the children, see Bromley, *Family Law* (5th ed., 1976), pp. 328-330; Cretney, *Principles of Family Law* (2nd ed., 1976), pp. 349-353.

⁶ Bradbrook, *An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws* (1971), 49 Can. Bar Rev. 557, at p. 561.

petitioners are required to complete a form stating the arrangements that they propose for their children. The great majority of petitioners in England seek the approval of the court for a continuation of the existing arrangements as to custody. Only in a small proportion of cases is any change proposed in the residence of the child and in the majority of these cases there are special circumstances. The English requirement in regard to "proposals" by the parents is contained in the Matrimonial Causes Act, 1973, section 41, and derives from the conclusion of the Morton Commission⁷ that procedure was needed to ensure that the parents have given full consideration to the question of their children's future welfare. The Commission thought that this should be done by a rule that the decree *nisi* should not normally be made absolute unless the court was satisfied that the arrangements proposed for the care and upbringing of the children were the best that could be devised in the circumstances.

One social policy question, in regard to the involvement of the state in marriage breakdown situations, is whether a divorce is *ipso facto* an occasion on which the well-being and future of a child is likely to be at risk, making desirable an "across the board" system of seeking reports on the circumstances of the children in all divorce cases. An alternative method, as in England, is to require the submission of proposals to the court on the organization of the children's future. Many jurisdictions do not have comprehensive "divorce" reporting on children, for example, a country such as Sweden, which has a high rate of investment in social services. The research literature on the effects of divorce on children seems to be sparse and inconclusive. Professor Schlesinger recently reviewed the literature on one-parent families and found only a handful of research studies relating to the child and divorce, and in these most of the references were opinions, pronouncements, advice, and assessments of children who came to the attention of social and health agencies.⁸ Studies have detected both negative and positive effects of divorce on children, and indeed it seems natural to suppose that sometimes there may be a positive effect when a child is moved from a home that has become an adult battle-ground into the relative peace of single-parent custody. In trying to assess the need for a comprehensive system of "reports" or "proposals" there are certain questions that need to be asked, such as: (1) Do divorcing couples frequently neglect to consider their children's welfare at that time? Do they often fail to make reasonable provision for their children's

⁷ Royal Commission on Divorce (1956), Cmd. 9678, paras 372-373.

⁸ Irving and Schlesinger, *Child Custody: Canada's Other Lottery*, a paper prepared for a Seminar on the Child and the Courts presented by the Connaught Programme on Family Law and Social Welfare of the University of Toronto Law School in November 1976.

custody and future, or produce a harmful environment for their children?; (2) If the answer to (1) is "yes", is the reporting system in Ontario or the proposal system in England of real value so as to justify the investment of money and personnel?; (3) If the answer in (1) is "yes" and the answer in (2) is "no", is there a likelihood of developing an effective system of reporting without a very high investment of money and qualified staff? In regard to question (2), it would be interesting to know how often judges transfer custody away from the *de facto* custodial spouse because they are influenced by the Official Guardian's report. On the basis of English research (and probably there is a similar situation in Ontario) the number of transfers away from *de facto* custody are in any event very rare, and one might suppose that the "transfer" influence of the short Official Guardian's report is negligible. An Official Guardian's report may make the judge feel better about leaving the child where it is *de facto*, and soothe anxiety about "flying blind" in an undefended case, without data on which to base a decision. Survey checks on the condition of children at the time of divorce may also be a means of quieting the public conscience by appearing to "do something" about the frequently stated opinion that the children suffer most from divorce.

The chief roles of the courts in regard to children are "private dispute settlement" and "child protection". If there is no contest between the parents as to custody, how does the function of a divorce judge under section 11 of the Canadian Divorce Act fit into this classification? Since there is no "private dispute", the role of the court must be "protection". Should society automatically investigate the children of divorcing parents to see whether they need some form of protection? Should there be a "trawl net" investigation in the hope of identifying any children of divorcing parents who need protection?

If the custody issue is contested, the court's main and perhaps only source of information about the child, the parents, and the prospective home is by hearing evidence and arguments presented by counsel in an adversary contest between the child's parents. Under the Canadian Divorce Act (and even when there is a "checklist" or "guidelines") the court has a wide discretion, and is expected to award custody in accordance with the child's best interests or, as it is sometimes put, in accordance with what is least detrimental to these interests. It has been argued that the determination of what is "best" or "least detrimental" for a particular child is usually speculative.⁹ It has been said that a judge applying a "best interests" principle to custody disputes is not applying legal rules "but is exercising

⁹ Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* (1975), 39 L. & Cont. Prob. 226, at pp. 229-230.

administrative discretion which by its nature cannot be rule-bound. A statutory admonition to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as is an instruction to the manager of a state owned factory that he should follow the principle of maximizing output at the least cost to the state".¹⁰

Primarily, a court is a machine for dispute settlement. Normally, (for example, in commercial cases) it does this according to general rules or legal principles, so that similar cases will be decided in a similar way. But in family law areas, such as custody and support, the principles are so general that they constrain little or nothing. The judges operate mainly by discretion, which refers them ultimately to their own standards. The theory is that specific rules are undesirable because families and family problems are so varied. So virtually, there is no social policy in these matters beyond the reference of the issue to the judge, and the judge's own reactions to any evidence, arguments, or reports that may be presented to the court.

III. *Child Protection.*

In Ontario, child protection is mainly a matter for the Provincial Courts (Family Division), under Part 2 of The Child Welfare Act.¹¹ The statutory function of the Provincial Family Court is to determine whether a child comes within any one of twelve general clauses in section 20 so as to be a "child in need of protection". These categories do not necessarily imply fault on the part of the parents. If the child is found to be "in need of protection", the judge has three choices under section 26 of The Child Welfare Act, namely: (a) "that the child be placed with or returned to his parents or other person" with a period of supervision by a children's aid society; (b) an order for temporary wardship; (c) an order for Crown wardship. Only the consent of the Director of Child Welfare is needed in the case of adoption of a Crown ward, and statistics available for 1969 to 1972 show that out of a total of 17,089 adoptions 11,451 were adoptions of Crown wards.¹² In Part 2 of the Ontario Child Welfare Act, therefore, there are some lines of social policy. Even with legal aid, lawyers do not often appear in court in Part 2 matters and the "judicial process" is a social-administrative determination as to whether the child qualifies for a state "protection" programme and

¹⁰ Fuller, *Interaction Between Law and Its Social Context*, p. 11, quoted in Mnookin, *op. cit.*, *ibid.*, at p. 255.

¹¹ R.S.O., 1970, c. 64, as am.

¹² The writer has discussed the Ontario rule on state consent to adoption of a Crown Ward in England and Sweden and the usual reaction has been to regard it as an overreaching of parental "rights", but there is support for the idea in Mnookin, *op. cit.*, footnote 9, at pp. 273-277.

if so, which one of three types. The choice of an option under section 26 may have lasting and even dramatic effect on the child's future life. In individual cases, it may be a game of chance which option may prove least detrimental, for example, supervision at home, a foster home (or a succession of them), placement for adoption.

In proceedings under The Child Welfare Act to determine whether the child is "in need of protection", the judge has the power "of summoning any person and requiring him to give evidence on oath and to produce such documents and things as may be requisite . . .".¹³ Also the court may hear "any person on behalf of the child" as well as certain officials including "the local director of the children's aid society or any person authorized by the board of the directors of the society on behalf of the society, . . .". This indicates that the Ontario Legislature had in mind something more like an administrative inquiry than an adversary process. But the concept of the adversary process is deeply engrained in the common law mind, and one gets the impression that a proceeding under Part 2 of The Child Welfare Act is quite likely to be regarded by the legal profession as just another adversary hearing at which (if there is a dispute) the contestants may be (a) a children's aid society "seeking Crown wardship" and (b) the parents. There may be a relaxation of evidentiary restrictions (such as the "hearsay" rule) in regard to reports and evidence by the staff of children's aid societies. It might be better to regard a hearing under Part 2 of The Child Welfare Act simply as an administrative enquiry conducted by an official who is independant of both the child's family and also the children's aid society.

IV. *Financial Support.*

If court orders for the financial support of a child, a spouse, or ex-spouse are regarded "as if" they were forms of social welfare, (according to the point of view being taken in this article) we can think of payments under a maintenance order as "contributions" imposed on certain members of the community (so selected because of the family relationship) and the same payments as "benefits" in the hands of the recipient. The court having jurisdiction then has the function of assessing the "contribution" and "benefit" in individual cases. Does this court-based system work efficiently, and does it make financing readily and securely available to the "beneficiaries"? Do those who are liable pay their "contributions" regularly? Complete information is not available, but all the indications point to a high failure rate in paying under financial support orders, and indeed, the level of failure suggests that the court-based system is an inefficient and expensive way of supporting

¹³ *Supra*, footnote 11, s. 25.

family dependants after a marriage breakdown. In an article published in 1974 Judge Goulard¹⁴ commented on the 1972 annual report of the Ontario Provincial Courts (Family Division), which indicated that the number of current accounts in arrears was 16,369 and that the total of maintenance arrears at 31st December, 1972 (on "current accounts") was \$24,352,757. This did not take into consideration the transfer of 3,731 accounts to "dormant accounts" (that is, bad debts). These figures related only to orders where support was paid into an Ontario provincial family court and where there was a "current account". There are no comparable figures for arrears on maintenance orders under section 11 of the Divorce Act, arrears on alimony judgments obtained in the Ontario Supreme Court, or arrears under separation agreements. An empirical research project on child support collections in the state of Michigan was carried out with the aid of grants from the National Science Foundation.¹⁵ It was found that collection "success" varied greatly in different parts of the state, and was related to the energy and effectiveness of the enforcement system. It appeared, for example, that counties that jailed more fathers collected more money. Perhaps some improvement in the financial support collection rate might be achieved by a monitored system of payments into court. But there is still the question of what effective action will be taken if payments are not made. This might require a public enforcement staff and procedures, which in many cases may be difficult and expensive, in relation to the amounts sought to be recovered. Another problem is the mobility of modern society, and the tendency of non-custodial parents to move from one part of Canada to another, or outside Canada. If orders are to be truly effective there ought to be a national enforcement system, covering all kinds of orders made for the financial support of children and spouses. Ideally, perhaps, one might even include payments under court registered separation contracts, in a national support system. Another difficulty is caused by the extent to which decisions on quantum are left to the discretion of the court. As already indicated, for maintenance orders under the Canadian Divorce Act, this is really a wide-open discretion. In such a system the amount awarded will vary from judge to judge, and the policies on which the assessments are made will also vary from judge to judge. There can be no certainty that similar circumstances will result in similar amounts. So the present court-based system for the financial support of children, spouses, and ex-spouses does not have

¹⁴ (1974), 13 R.F.L. 281.

¹⁵ Chambers, *Child Support, Collections in Michigan — a Study of the Effects of Tenacity and Terror*, a paper prepared for a Seminar on the Child and the Courts presented by the Connaught Programme on Family Law and Social Welfare of the University of Toronto Law School in November, 1976.

the characteristics of an effective, well-administered social welfare programme.¹⁶

Should we be thinking of "improvements" in the present system of financial support by court order, or perhaps of a different system altogether? What follows is only an introductory sketch of one different approach, limited to financial support paid to the non-independent custodial parent of minor children, in certain circumstances.

Let us construct an outline model of a system for financial support to custodial parents. This model will be different from the present system under the Divorce Act, or provincial legislation, and more consistent with the usual concept of a social welfare scheme. To make discussion easier, the model will be limited to situations where a child is in the custody of one parent by virtue of a court order, and the model will only be concerned with financial "contributions" to be made by the non-custodial parent for the maintenance of the child. Let us start from the assumption that both parents have a legal and social obligation to maintain their children, the obligation being related to their respective economic situations. In the case of a marriage that has not broken down, and where the parents form a common household, each parent will normally expend some portion of his or her income (if any) to feed and clothe the children, and to provide shelter, education, and so on. So the next step is to obtain statistics for different parts of the country, and probably on a provincial basis, about the average proportions of income which families in different (combined-income) brackets, and with different numbers of children, expend annually on the support of a child. If tables for different family incomes and for different numbers of children were constructed, showing the result of averaging statistics gathered on family expenditure on children, we would then have a numerical basis on which to calculate "contributions" and "benefits" for a "parent-based" social welfare scheme for the support of children in the case of divorce and marriage breakdown. The "parent-based" social welfare scheme would have the usual "state-based" welfare as a "back-up" system.

¹⁶ Some might argue that the proper approach is to appoint more judges to the present court-based system, to involve more lawyers, and to infuse more money into it. This type of response to the operation of civil courts in the United States was criticized by Professor Shaffer of the Massachusetts Institute of Technology in a paper entitled *Limitations on Providing Social Services and the Civil Courts* presented to the Seminar on Social Welfare as a Policy Objective at the University of Toronto Law School. In *Time Magazine* of 27th June 1977, Chief Justice Warren Burger (also referring to the United States) was quoted as having said: "We may be well on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated."

It is not enough to design a method of calculating "contributions". There must also be effective machinery for collecting them. One would like, if possible, to avoid the need for new administrative machinery to do the collection. Also, because of the mobility of the population, it would be better to have a national rather than a provincial collection system. The amount of the "contribution" will be calculated in relation to the combined incomes of the child's parents. Tables will show the proportion of family income used on the average for the support of a child for different family income brackets, and for different numbers of children in the family. If the proportion of family income is X , the income of the non-custodial parent is A , and the income of the custodial parent is B , then the "contribution" of the non-custodial parent will be $AX/(A+B)$. We look for a national money collection system which bases its assessments on personal income, which has an excellent record for collection, and which is equipped with modern technology. This indicates the Department of National Revenue. Let us consider, therefore, whether a model of a "parent-based" system for financial support of children, in respect of whom a court custody order has been made, could reasonably make collections and payments through the machinery of the Department of National Revenue, without upsetting that machinery and the basic purposes of that Department. If a social welfare model were to use the machinery of the Department of National Revenue, the "contribution" of the non-custodial parent, for instance, $AX/(A+B)$, would be a special tax levy to be paid by the non-custodial parent. The custodial parent would be entitled to claim the amount of this tax levy from the Department of National Revenue. The payments to the custodial parent by the Department of National Revenue could be made by issuing a set of twelve post-dated non-negotiable payment orders, which the custodial parent could cash at the beginning of each month.

Using the above model, a judge making a custody order in respect of a child would not include in the order any provision for financial support of the child, but would have copies of the "pure" custody order sent to the Department of National Revenue. The Department would take appropriate action (a) to collect the special tax levy from the non-custodial parent and (b) to issue twelve post-dated payment orders to the custodial parent. In certain cases the Department might need to require the filing of tax returns.

Our child-maintenance model ought to have some built-in provisions for flexibility. This could be obtained by giving the judge making the custody order a discretionary power *not* to send a copy of the order to the Department of National Revenue. The idea would be that the judge should exercise this discretion where the parents had

made a reasonable private agreement for the voluntary support of the child. Thus the parents would have an option to deal with child support on a voluntary basis, for instance, by an agreement between them which could be incorporated into the custody order.

Objections that are likely to be made to the outline model described above are: (1) that all families are different and so one cannot use a scale-of-contribution table; (2) that the non-custodial parent should have his or her day in court and be able to have a lawyer argue about the amount of support. But the position taken in presenting the model is that, nowadays, financial support for children has really become a special kind of social welfare in which the levels of contribution and payment are determined by a judge in a court of law. It is certainly not normal in a welfare programme to have the levels of contribution and payment in individual cases determined by a judge of the Supreme Court or a County Court, at his or her discretion, after a hearing and with the assistance of legal counsel. Why do we have this method of assessing the contribution and payment in order to determine child support "benefits" for the custodial parent? Very relevant to this question is the poor record of the court-order system of determining maintenance, and the cost (public and private) of having support questions determined by a judge, with the parties represented by counsel. Also a discretionary, court-order system does not ensure that similar cases will be dealt with in a similar way, and a lawyer in practice does not have a definite basis upon which to advise a client on what divorce orders are likely to be made in her favour, or a reasonable estimate of the total economic cost of divorce to him, or vice versa in regard to the sexes.

The model described above has purposely been limited to the situation of financial support for a child where there is a custody dispute on divorce or marriage breakdown. This is in order to present the model in a simple form, for purposes of discussion. But in the modern context of "no-fault" thinking about divorce and marriage breakdown, the arguments supporting the model could be extended to financial support for a spouse or an ex-spouse. Indeed, the working out of contribution tables might be easier if such an extension were made, because then we would be concerned with average family expenditures (at different income brackets and for different sizes of families), and it would not be necessary to determine the portion applicable to the support of a child. The child-custody model in this article, therefore, is presented merely as a simply, first-stage model. The real intention of the article is to open up a discussion, on whether (at the present time in North America) financial support for children, spouses, and ex-spouses, ought to be assessed by a judge in a court of law (after an adversary contest if the issue is defended). Would it be more effective,

determinate, and even-handed to treat family support as a form of social welfare operated through two programmes? These two programmes would be (a) a "parent-based" programme and (b) a "state-based" programme, both of which would operate with published criteria and procedures, and along the general lines of the model discussed in this article.
