REFORM OF THE LAW OF CHILD SUPPORT: BY JUDICIAL DECISION OR BY LEGISLATION? (Pt. 1)

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This is a two-part article. Part one analyses the recent Supreme Court of Canada decision in Willick and the Provincial Appeal Court decisions in Lévesque and Edwards on the issue of assessing child support. Part two examines the British Child Support Acts 1991-5, which introduced an administrative formula driven method of assessing child support, and the Canadian Federal/Provincial Family Law Committees Report Recommendations on Child Support. The merits and problems associated with administrative and judicial methods of assessing child support are examined and contrasted.

Il s'agit d'un article en deux parties. La première partie analyse la décision récente de la Cour suprême du Canada dans l'affaire Willick, ainsi que les décisions de la Cour d'appel provinciale dans les affaires Lévesque et Edward qui évaluent la protection sociale de l'enfant. La seconde partie examine, d'une part, les Child Support Acts britanniques (Lois sur la protection sociale de l'enfant) votées de 1991 à 1995 et qui ont introduit des moyens administratifs, basés sur une formule, permettant d'évaluer la protection sociale de l'enfant et, d'autre part, le Rapport des comités sur la législation familiale fédérale/provinciale canadienne et les recommandations concernant la protection sociale de l'enfant. Les aspects positifs et négatifs liés aux méthodes administratives et judiciaires d'évaluation de la protection sociale de l'enfant sont examinés.

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I. *Introduction*

This analysis compares several recent Canadian cases[1] and a British statute[2] on alternative approaches to the assessment of child support. The "feminisation of poverty" has been addressed by many writers[3] and the amount of public support expended on families, usually headed by women single parents has been a political issue in North America since at least 1979, when the Wisconsin Child Support Project was initiated[4] in the United States, and in Canada since 1981, when the Institute of Law Research and Reform in Alberta published its Report "Matrimonial Support Failures: Reasons Profiles and Perceptions of Individuals Involved".[5]

The difference between "putting flesh" on, or "fine tuning" existing legislation by case-law, and making new law is one of degree rather than kind, and when

[1] *Levesque* v. *Levesque* (1994), 20 Alta L. R. (3d) 429 (C.A); *Willick* v. *Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C) and *Edwards* v. *Edwards* (1994), 133 N.S.R. (2d) 8 (C.A). See Christine Davies, Q.C., The Emergence of Judicial Support Guidelines (1995) 13 C.F.L.Q. 89.

[2] *Child Support Act*, (U.K.) 1991, c.48. This *Act* is provides a framework for the calculation and enforcement of child support but most of the detail is found in a bewildering number of statutory instruments some of which have been amended almost before the ink has dried on them. In addition in July 1995 the *Child Support Act*, (U.K.) 1995, c.34 was passed to alleviate some of the problems of the 1991 Act.

[3] For example see Weitzman, *The Divorce Revolution — the Unintended Consequences for Women and Children in America* (New York: Free Press, 1985), and the same author's *Economic Consequences of Divorce — the international perspective* (Oxford: Clarendon Press, 1992) with M. Maclean.

[4] A Conference describing its work was held in 1981 and culminated in J. Cassetty, ed., *The Parental Child — Support Obligation* (Lexington, Mass.: Lexington Books, 1983).

[5] Amongst the important findings were that 85% of the men surveyed were employed full time but that only one third of the ex-husbands paid support in full and on time. About 30% of the women said that they had been paid nothing during the past year. One woman in five was in receipt of social assistance and 80% of the women had incomes of less than $1,000 per month.

it comes to law reform, and particularly substantial law reform, it is sometimes suggested that it is better left to legislation than to the courts. Judges cannot select the cases that they are to hear, and cannot call expert witnesses *ex proprio motu*.[6] The narrow confines of a court case rarely provide the basis for coherent law reform and parties should not have to bear the costs of litigation which seeks to resolve issues beyond the confines of their own case. In Canada, the constitutional division between provincial responsibility for division of matrimonial property and federal responsibility for corollary relief provides a further problem for those reforming or "fine tuning" the law. It is preferable, if judicial guidelines are to be given, that they emanate from the final appeal court rather than intermediate appellate bodies. It will be unfortunate at best, and raise constitutional problems at worst, if different provincial appellate courts establish different "guidelines" that cause the federal *Divorce Act*[7] to operate differently by jurisdiction. Despite the problems of judicial law reform, there are precedents for courts deliberately selecting a case as a vehicle for major law reform in a particular area. The House of Lords reformed the law of recognition of foreign divorces in *Indyka* v. *Indyka*,[8] notwithstanding that it could have disposed of the case in the same way on its particular facts.[9] In Canadian family law the trilogy of cases on "final settlements" provides a similar example of courts using cases to assert a general statement of the law.[10] Indeed it is arguable that both *Caron* and *Richardson* were cases that went further than the principle that the court was trying to develop.[11] The power of La Forest J.'s dissent in *Richardson* led to the

[6] In *Levesque, supra* footnote 1 at 391 the Alberta Court of Appeal expresses the hope that in the light of its guidelines the Alberta Court of Queens Bench will "flesh out" the guidelines with detail on model forms and procedures and even model budgets for given income levels and standardised calculations. The job for the Court of Queens Bench would be much easier if funding were available for either an expert to be attached to the Court or for funding to retain the services of a body like the Canadian Research Institute on Law and the Family at the University of Calgary.

[7] R.S.C 1985, c.3 (2nd. Supp), as am. by S.C, c.27 (2nd Supp), s.10; 1990, c.18, ss1 & 2 a,d 1993 c.8, ss.1-5.

[8] [1969] A.C. 33.

[9] The case might have been simply disposed of on the basis of the decree emanating from the courts of the parties domicil, an existing head for recognition of the Czech decree. Mr Indyka had probably adduced insufficient evidence that he had intended to settle in England and make it his permanent home as early as 1946. Certainly the loss of only one letter by Mr. Indyka, one that might have been vital to his future movements in 1946 seemed suspicious. This is only reported in the All England Reports of the Case at [1966] 3 All E.R. 584 letter E. Despite this the House of Lords went on to carve out the "real and substantial connection test" of either of the parties with the foreign jurisdiction as the basis for recognising the foreign divorce. See further D.C. Davies, *Family Law in Canada* (Toronto: Carswell, 1984) and A. Bissett-Johnson and D.C. Day, *The New Divorce Law: Commentary on the Divorce Act, 1985* (Toronto: Carswell, 1986).

[10] *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801, *Caron* v. *Caron*, [1987] 1 S.C.R. 892 and *Richardson* v. *Richardson*, [1987] 1 S.C.R. 856.

[11] See the writer's comments in "Family Law — Judicial Variation of Global Settlements" (1988) 67 Can. Bar Rev. 153 at 165. In *Caron*, *ibid.* the evidence of the wife's work pattern prior to or during the marriage was meagre, and the Supreme Court held that there was insufficient basis for varying the agreement. However, there must be some doubt

decision in *Moge*[12] which restricted the application of the "trilogy" to situations involving final, global settlements of financial matters, and stated that in cases not involving final global settlements, spousal support should be determined by reference to the four principles stated in the *Divorce Act 1985*.[13] Nevertheless the desire of courts to use a case as the basis for general guidelines to the profession in a specific area of the law is deep seated and three recent cases on family support provide part of the basis for this article. The great difference is that the reforms in *Indyka* involved a reform of the common law by the House of Lords and *Caron, Pelech and Richardson* involved guidelines on federal legislation emanating from the Supreme Court of Canada while the three of the four cases dealt with here, were determined at intermediate appellate level.

II. *The Facts of the Cases*

(i) *Willick*[14]

The facts confronting the Supreme Court of Canada in *Willick* were that in a separation agreement made in July 1989, the husband, an airline pilot, agreed to pay to the appellant wife $450 per month for their two children for as long as they were "children" within the meaning of the *Divorce Act*.[15] In addition $700 per month spousal support was payable for three years following the birth of the youngest child plus a further period of twenty six months to enable the wife to undergo retraining. The sums were to be tax free in the hands of the wife and the husband was not to seek tax deductibility in respect of these payments whilst he maintained non-Canadian resident status. The amounts were subject to an annual 3% increase each September. Finally, the husband undertook to maintain

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about whether the agreement in *Caron* was final since para.7 of the agreement contemplated the variation of terms by agreement or by a court of competent jurisdiction, a point emphasised by Bissett-Johnson, *ibid.* at 165, fn 63). In *Richardson*, the majority of the Supreme Court of Canada held that the wife's allegation that the agreement was based on her expectation, that she would be able to find employment and therefore only needed support from her husband for a limited period, was not supported by the evidence. There was no radical unforeseen change in circumstances. However, it is difficult not to agree with La Forest J. that there was evidence that the wife had not worked for any substantial period after having had her second child, and that her lack of recent work experience placed her at a significant disadvantage when she tried to reenter a limited job market after the breakdown of her marriage. Mrs. Richardson's lack of employment after 12 months was both unforeseen at the time of the agreement and causally related to her role in the marriage which had led to the atrophying of her work skills.

[12] (1992), 99 D.L.R. (4th) 456 (S.C.C.). It is interesting to speculate whether the reasoning in the trilogy, and result in *Richardson*, would have been different had Chouinard J, who took no part in the judgment, been replaced by L'Heureux-Dubé J.

[13] *Supra* footnote 7.

[14] *Supra* footnote 1.

[15] I.e. under 16, or over 16 but who are unable by reason of illness, disability or other cause to withdraw from their parent's charge or to obtain the necessaries of life. *Divorce Act*, *supra* footnote 7, s. 2(1).

a scholarship fund for the children and life insurance on his own life in the sum of $150,000 with the wife and children named as beneficiaries.

At the time of making the agreement the husband was earning approximately $40,000 *per annum* and the wife's sole income was the support payment and family allowance. No evidence of expenses was provided at the time of signing the separation agreement, though the wife swore an affidavit that the spousal and child support agreed on, a total of $1,600 per month, was sufficient.

Within three months of signing the separation agreement the wife became aware that the husband's income had increased to $60,000 *per annum* supplemented by a housing allowance of $4,600 per month. Notwithstanding this, the divorce judgment granted in November 1989 incorporated the original separation agreement support provisions.

Two years later when the wife sought variation of the child support provision, the husband's income was $154,000 *per annum* and he was buying a home in Palm Springs valued at $(U.S.) 135,000, though subject to a $(U.S.) 108,000 mortgage,[16] whilst the wife's income was $25,056.[17] The chambers judge increased the child support in respect of each child to $850 only for the Court of Appeal of Saskatchewan to hold that the threshold criteria to bring the variation provisions of section 17(4)[18] of the *Divorce Act* had not been fulfilled.

(ii) *The Alberta Cases*

Levesque v. *Levesque* [19] and *Birmingham* v. *Birmingham*[20] were dealt with briefly on their facts by the Alberta Court of Appeal.[21] Mr. Levesque's claim on appeal that he would be impoverished by the order for child support made by

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[16] Apart from standard deductions, the husband had the cost of maintaining leased premises in Hong Kong, the child and spousal support payments and other expenses totalling $60,005.6 out of a take home pay of $64,688.64, giving a monthly surplus of $306.92 on the husband's own figures.

[17] Comprised of *monthly* receipts of $1,697 spousal and child support payments, $325 p.m. income from part-time employment, and family allowance payments of $66 p.m.. Her expenses were established at $3,579 p.m., a 125% increase from those at the time of the original order. The wife's capital and assets had remained static since the time of the marital property division; she had $8,389 in securities, $847 in savings and securities and $880 in bank accounts (see para 37 of L'Heureux Dubé J.'s judgment).

[18] "Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order the court shall take into consideration that change."

[19] *Supra* footnote 1.

[20] Hearing consolidated and reported with *Levesque*, *supra* footnote 1.

[21] The history of the case appears to be that when two litigants appealed against orders to increase the child support of children of whom they had custody, the Chief Justice, in an attempt to resolve a number of issues relating to child support, took the highly unusual

the chambers judge under the *Divorce Act*[22] did not convince the Alberta Court of Appeal. However, as neither party had placed before the chambers judge all the information that the Court of Appeal subsequently thought necessary in its reasons for judgment, a retrial was ordered as providing the fairest outcome for all parties.

In the *Birmingham* case, the application by Mrs. Birmingham for child support had been dismissed peremptorily by the chambers judge. Subject to court approval, the parties had signed minutes of settlement in 1980 granting custody of the children to the mother and the husband signed over the matrimonial home to the wife" in full settlement of all future claims against him".

At the time of the settlement another person was living with Mrs. Birmingham and helping share household expenses but this arrangement ceased in February 1991 when the children were then nineteen and sixteen. The Alberta Court of Appeal elected to treat the change of circumstances of the children over the decade as something outside the contemplation of the parties.[23] They chose to treat the final agreement as not binding the children as they were not parties to the original agreement.[24] The Court of Appeal would, however, have taken a different view of the matter if they had been convinced by evidence[25] that the circumstance had been either within the contemplation of the parties or of the judge at the time when the agreement or order was made. The Court of Appeal returned the matter to the Court of Queen's Bench for a rehearing[26] in the light of the new guidelines established by the Court of Appeal, though not before the Court had pointed out the *lacuna* in the *Divorce Act* which allowed the making of a child support order in respect of adult children not living with either parent, but without authorizing the court to hear the application on the motion of the child.[27]

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course of assembling a bench of seven judges. Counsel were given a list of 14 questions to be addressed although not all were germane to the facts at hand. Eventually after approximately twenty two months the judgment was issued *per curiam*.

[22] *Supra* footnote 7.

[23] Dissenting from the reasoning in *Chelmick* v. *Chelmick* (1991), 118 A.R. 385, (appeal allowed on other grounds July 13th 1992) in the process.

[24] See the earlier Supreme Court of Canada decisions in *Pelech* v. *Pelech*, *supra* footnote 10, *Caron* v. *Caron*, *supra* footnote 10 and *Richardson* v. *Richardson*, *supra* footnote 10 discussed by Bissett-Johnson, *supra* footnote 11.

[25] The fact that the parties should have had the circumstance within their contemplation was not considered to be enough by the Court of Appeal in *Birmingham*, *supra* footnote 1 at 448.

[26] One of the real problems with this procedure is that, though the Court can well set aside agreements so as to provide child support to the custodial parent, there seems to be no mechanism for picking apart the transfer of the matrimonial home made as part of what was apparently a "clean break" agreement. This problem also exists under the U.K Child Support legislation see *supra* footnote 2.

[27] *Supra* footnote 1 at 448.

(iii) *The Nova Scotia Case*[28]

Although less obviously a "guideline" case than *Levesque*, the *Edwards* decision also involved an application for variation of child support under section 17 of the *Divorce Act* in the context of a second marriage. The original minutes of settlement, as incorporated in the decree, provided, *inter alia*, that the father would pay $550 per month child support for the two sons now aged six and seven. Subsequently, the mother sought an increase of child support. Grant J. found that a change of circumstances had occurred and concluded that child support should be increased to bring the mother $1200 per month *free of tax*, which worked out at a gross payment of $2,274 a month starting on November 1st 1994. Costs were fixed at $11,517 taking $100,000 as the amount involved and applying scale 5 thereto.

The father then appealed:

(i) that the award was excessive having regard to the conditions, means and circumstances of the parties; and

(ii) on certain subsidiary issues including access and costs.

III. *The Judgments*

Willick

The issues identified by the majority of the Supreme Court of Canada were:

> (a) to what extent in variation proceedings under the *Divorce Act* can a court review and correct an original child support order, and to what extent is a court obliged to accept the original support order in deciding whether to vary the amount presently being paid; and
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> (b) does section 17(4) of the *Divorce Act*, as the Saskatchewan Court of Appeal suggested, require that there be both a material change in needs of the children *and* the circumstances of the parties in order to justify a variation?

The judgments rendered reached the same result, albeit by different routes. On issue (a) the majority[29] accepted that where there was a global final settlement as in *Pelech* v. *Pelech*,[30] the court would normally exercise its discretion not to upset the parties agreement absent a radical change in circumstances. However, deferring to the autonomy of the parties had no application where child support was concerned since parents cannot barter away their children's rights.[31] The majority held that where the parents had expressly agreed that the settlement adequately provided for the children this should be treated as strong, though not conclusive, evidence of the appropriateness of the agreement. This was reinforced

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[28] *Edwards* v. *Edwards*, *supra* footnote 1.

[29] Sopinka J., who delivered the judgment, La Forest, Gonthier and Iacobucci JJ.

[30] *Supra* footnote 10 at 849.

[31] See Wilson J. in *Richardson* v. *Richardson*, *supra* footnote 10 at 869-70.

by the Court having set its imprimatur on the agreement, since a court was presumed to have discharged its duty under section 11(1)(b) of the *Act* "to satisfy itself that reasonable arrangements had been made for the support of any children of the marriage". Where the court had approved the agreement by incorporating it in its order, the order had to stand until such time as it was reversed, though on the present facts, as will emerge later, reversal was called for.

However, L'Heureux-Dubé J.,for the minority,[32] was impressed by the remarks within the judgment of the Court in *Levesque*[33] that custodial parents are often ill-prepared, through lack of experience, as the head of a single parent household to estimate the true costs of child support. This difficulty of accurate prediction of the future meant that the courts should balance the utility of encouraging parents to make satisfactory agreements against the needs of the child. After agreeing with the majority that a change in circumstances of either parent or child would bring the case within section 17(4), L'Heureux-Dubé J. tried to resolve the question of the sufficiency of the change in circumstances to encourage parents to resolve cases. At the same time, she recognized that the test of sufficiency of a change in circumstances should be easier to satisfy in respect of a child who was not a party to the parents' agreement. In particular, any deference to a prior agreement on the basis that a change in circumstances was "within the contemplation of the parties"[34] at the time of the original order, should be restricted to the situation where the future event was *demonstrably*[35] within the contemplation of the parties at the time of the agreement if this is necessary to enable children to share in the improved economic position of a parent (usually the payor parent).[36] In addition to the burden of proof resting on the party seeking variation, a further means of preventing the courts being swamped with variation applications was envisaged by requiring more than a minimal change in the parents overall financial situation. Equally, where the needs of a child change by an amount adequate to overcome the sufficiency test, then variation can be sought on this basis also.[37]

Once the threshold for variation had been established, the question arose: "does the quantum of the variation have to reflect the change, or should the change be at large" and the award follow on a review of maintenance *de novo*?[38]

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[32] Concurred in by Gonthier and McLachlin JJ.

[33] *Supra* footnote 1 at 438.

[34] See L'Heureux-Dubé J.'s incorporation of the discussion of Bielby J. in *Vervoorst* v .*Vervoorst* (1991), 37 R.F.L. (3d) 178 (Alta. Q.B.) into her judgment at 214ff.

[35] *Ibid.* at 213, para 98.

[36] Thus allowing reopening on the basis of a "windfall" change in circumstances such as a lottery win by the father — *Goncalves* v. *Goncalves* (1986), 49 R.F.L. (2d) 376 (B.C.S.C.) *or* a non-windfall but not marginal increase in the payer parent's income — *Guelmili* v. *Guelmili* (1989), 19 R.F.L. (3d) 347 (Man. C.A.), *Chelmick* v. *Chelmick*, *supra* footnote 23.

[37] *Dickson* v. *Dickson*, [1988] 2 W.W.R. 117 (B.C.C.A.); *Robertson* v. *Robertson* (1989), 23 R.F.L (3d) 188 (Ont. H.C.J.).

[38] See the discussion of the issue by Bielby J. in *Vervoorst* v. *Vervoorst*, *supra* footnote 34 which L'Heureux-Dubé J. incorporates into her judgment.

L'Heureux-Dubé J. argues that once the threshold test for variation has been met, the circumstances of both parties *and* the children need to be reviewed in order, to assess the impact of the change on the quantum of the new order to determine whether there is accord between the needs of the child and the means of the payor. L'Heureux-Dubé J. seems to be much more willing to support an increase in support than a decrease given the linkage between spousal and child support. She cites the problem of an order made for $500 per month as spousal support and $1000 per month as child support, which because of the husband's limited ability to pay, does not fully meet the assessed needs of the children.[39] Subsequently, the wife obtains a part-time job and the husband, whose income had not altered appreciably, asks the court for a downward variation. If an immediate downward variation of $200 per month is made without considering the needs of the children, this might result in the perpetuation of the depression of the children's standard of living which had originally been caused by the inability of the payor to pay, and not because the appropriate needs of the children were being met.[40] The inference is that a more extended review by the court will be required to see whether the original order may have been low but was all that the payor could afford to pay. If this is so, then a further inquiry will be necessary to see what the needs of the children are in the light of the changed circumstances. By way of tempering the assessment of the needs of the children, L'Heureux-Dubé J. emphasised that children had no right to whatever luxuries they desired. They did, however, have a right to benefit from the better lifestyles of their parents. Although L'Heureux-Dubé J. distinguishes variation proceedings from original proceedings,[41] she also calls for a compatible approach to both sections 15(8) and 17(8). Despite the emphasis that section 17(8) is contingent on the nature and magnitude of the changes, the distinction may be lost sight of in practice, to the extent of an increased volume and length of variation proceedings, especially given the fact that judicial notice is to be taken of inflation and the fact that costs rise as children grow older.

The difference between the majority and minority really emerges as one of approach, with L'Heureux-Dubé J. canvassing a wide range of material from the behavioral sciences in contrast to the majority which adopted a "black letter law approach". For the majority, it was crucial that the language of section 17(4) of the *Divorce Act* used the disjunctive word "or" when talking of a change in the circumstances of either former spouse *or* (emphasis added) of any child of the marriage. It was equally important, and consistent with this view, that the section went on to direct the court in variation proceedings to take *that change (singular)* into account. If changes to both the parents' *and* the child's circumstances had been intended the wording *those changes (plural)* would presumably have been used. In this light, a material change in circumstances can

[39] *Willick* v. *Willick*, *supra* footnote 1, para. 103.

[40] Two Nova Scotia cases of *Gillis* v. *Gillis* (1994), 3 R.F.L. (4th) 128 (S.C.) and *Ryan* v. *Ryan* (1992) 114 N.S.R. (2d) 255 (S.C.) were cited by L'Heureux-Dubé J. in support of this proposition.

[41] *Willick*, *supra* footnote 1 at 107.

occur whenever the relationship between the needs of the child and the means of the parents alters.[42]

The majority also relied on the overall scheme of the legislation from section 11 (1)'s instruction to courts to withhold decrees of divorce until reasonable arrangements have been made for the children, through section 15's emphasis on the needs of the children and the joint obligation of the parents to support their children according to their ability to pay, as creating a child centred approach to child support orders. The case-law supports the view that as much as possible children were to be protected from the adverse economic consequences of divorce.[43] So far as possible, the child is to be sheltered by providing for escalating needs and by permitting the child to benefit from any improvement in the lifestyle of either or both parents. In Sopinka J.'s view, the reason why the means of the parents and the needs of the child were alternate bases for variation, is that the former almost invariably affected the latter, even to the extent of payor parents using section 17(4) to protect themselves against diminution in income even where the needs of the children were unchanged.[44]

If the grounds for variation are met, then the trial judge must establish the needs of the children in the light of the change. The needs of the children do not arise in a vacuum but are tied to the parents' means. Means were not tied to those existing at the breakdown of the marriage. Children can seek fulfilment of their reasonable expectations based on pre-breakdown expectations. The factors a court should consider in child support proceedings according to L'Heureux-Dubé J. are:

(i) the total income of the family available for child support,

(ii) the current costs associated with raising the children,

(iii) the fact that these costs tend to increase with age,

(iv) the cost of living,

(v) the original order,

(vi) the agreement between the parties, and

(vii) the parties responsibilities to subsequent families,

and all are to be regarded as relevant to the variation proceedings.[45]

Given that the husband's salary had increased far in excess of his expectations at the time of the of the separation agreement, and that the children's leisure

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[42] See Sopinka J. *ibid.* at 178ff.

[43] *Dickson* v. *Dickson*, *Friesen* v. *Friesen* (1985), 48 R.F.L. (2d) 137 (B.C.C.A) and *Paras* v. *Paras*, [1971] O.R. 130 (C.A.) were cited.

[44] See the caselaw cited by Sopinka in *Willick*, *supra* footnote 1 at para. 25.

[45] *Ibid.* para.108. This should be contrasted with the longer "check list" assembled by Williams Fam. Ct. J. in *Syvetski* v. *Syvetski* (1988), 86 N.S.R. (2d) 248 (Fam. Ct.) at 253-54 in the context mainly, but not exclusively (see para. 7) of original orders, and approved by L'Heureux-Dubé J. at para. 61. The factors include:

1. an assessment of the needs of the child(ren), including lifestyle,

activities had increased as the children grew older, it is not surprising that L'Heureux-Dubé J. determined that Carter J. had correctly concluded that the children were entitled to share in the non-custodial father's standard of living. The award made by Carter J. was not out of line with other awards involving fathers earning over $100,000 *per annum*,[46] and the award and judgment did not disclose a material error that would warrant the appellate court intervening under the Pelech Principle.[47]

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2. an assessment of whether the *non-custodial* parent is self sufficient and able :
   (a) to contribute financially to the support of the child; and if so
   (b) to contribute on an apportionment basis (relative to the incomes of the respective parties);or
   (c) to assume responsibility for *more* than his/her portion.
3. an assessment of whether the *custodial* parent is self sufficient and able to :
   (a) contribute financially to the support of the child ; and if so
   (b) to contribute on an apportionment basis to the support of the child; or
   (c) to assume responsibility for *more* than his/her portion.
4. consider insofar as the evidence allows, other factors, including, *but not limited to*:
   (a) income tax implications of maintenance [the decision of the Supreme Court of Canada in the case *Thibaudeau* is discussed in a case-note by Lisa Philipps elsewhere in this issue;
   (b) income tax factors such as the equivalent of married deduction, child tax credit, deductibility of child care costs,
   (c) visitation expenses;
   (d) adjustments for extended visitation;
   (e) shared custody;
   (f) responsibility for the care of others,
   (g) residence/ cohabitation with others,
   (h) non-financial contributions to child care.
5. If appropriate, apportion the obligation to financially support the children between the parents.
6. If not, make an order that recognises the resources available, preferably by indication that the order was based on either the needs of the children or the limited or excessive resources of one or other parent.
7. Consider variation proceedings, changes in the above circumstances *and* the basis upon which the original order was made.

[46] E.g. *Crowfoot* v. *Crowfoot* (1992), 38 R.F.L. (3d) 354 (Alta. Q.B.) where the father was ordered to pay $2,250 p.m. for each of two children; *Heinemann* v. *Heinemann* (1988), N.S.R. 278 (2d) (S.C T.D), aff'd (1989), 20 R.F.L. (3d) 236 (C.A.), where an order of $900 p.m. per child was awarded; *Weaver* v. *Tate* (1989), 24 R.F.L. (3d) 266, add'l reasons at (1990), 24 R.F. L. 372 (Ont. H.C.J.), aff'd (1990), 28 R.F.L. (3d) 188 (C.A), where child support of $1200 p.m. for each of two children was awarded; and *Cheng* v. *Cheng* (1988), 13 R.F.L. (3d) 140 (B.C.C.A.) where an award of $1,200 p.m. was made in respect of a six year old.

[47] *Supra* footnote 10 at 824. Despite arguments that section 8 of the Saskatchewan *Court of Appeal Act*, R.S.S. 1978, c. C-42 was in wider terms, and permitted the Court of Appeal to substitute its views for that of the Judge, L'Heureux-Dubé J. relied on the Supreme Court of Canada decision in *Lensen* v. *Lensen*, [1987] 2 S.C.R. 672 for the view that a Court of Appeal was not justified, despite the broad wording of section 8 of the Saskatchewan *Act*, in substituting its opinion for that of the trial judge absent a finding of palpable and overriding error. Despite the briefness of the chambers judgment of Carter J.

The difference between the majority and minority views:

The conditions for variation reveal the greatest difference between the majority and minority. The majority held that since no material error by the trial judge had been demonstrated,[48] the judgment of the trial judge should be restored.[49] The minority, however, dealt with the legislative and social context of child support and variation proceedings by way of a sequel to L'Heureux-Dubé J.'s judgment in *Moge*,[50] which had dealt with spousal support other than where a final global settlement was involved. For L'Heureux-Dubé J. child support is not merely a question of statutory interpretation of the language of the *Act* but rather required an appreciation of the social context in which the legislation operated. L'Heureux-Dubé J. quotes with approval the words of a lower court that the law of support depends on a matrix of facts within which words such as "need" require to be defined.[51] The theoretical justification for such an approach, according to L'Heureux-Dubé J., is to be found in jurisprudence of the United States Supreme Court.[52] For L'Heureux-Dubé J., the kernel of the problem is the "alarming level of poverty in single parent families".[53] It is only in a proper social context that the "joint financial obligation" of the parents to the child referred to in sections 15(8) and 17 (8) of the *Divorce Act* can be understood, and the duty of the court to apportion the obligation according to the parents' abilities to pay given a proper character. Part of the solution involves taking an expansive view of "judicial notice" to encompass many studies and matters hitherto outside the earlier traditional operation of "judicial notice".[54] No doubt such an approach is predicated on the unexpressed need for superior courts to protect children and the application of the *parens patriae* power in such cases.

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and the fact that it was not as explicit as the Appeal Court might have liked, the evidence of change in circumstances was clear and uncontested. In particular, the Supreme Court should be unwilling to impose burdens on judges with heavy caseloads who have developed an expertise which enables them to quickly grasp the global picture and apply the proper standard.

[48] Following *Pelech* v. *Pelech*, *ibid.* at 824.

[49] Although a complaint was made that the respondent had been denied the opportunity to cross-examine on the affidavit filed by the appellant, the point was not set out as a basis for upholding the Court of Appeal decision in accordance with Supreme Court Rule 29(3) (see para. 28).

[50] *Supra* footnote 12.

[51] See *Willick*, *supra* footnote 1 at para. 44, citing from para. 43 of Fraser C.J.A's judgment in *Levesque*.

[52] See *ibid.* at paras. 45-56.

[53] *Ibid.* at para. 54.

[54] Traditionally judicial notice has been restricted to notorious facts, indisputable matters of common knowledge, and matters of judicial notice and expert testimony have traditionally been treated as mutually exclusive. See for example the discussion in the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982).

Factors to be emphasised by those representing custodial parents in future cases:

(i) L'Heureux-Dubé J. was as concerned as the Alberta Court of Appeal in *Levesque* with the reluctance of courts to take into account the "hidden costs" or "soft costs" falling on the custodial parent;

(ii) Equally the assistance of the "Paras Formula"[55] was acknowledged, subject to the recognition that the formula works less well where there is significant disparity in income between the parents[56] or where one of the parties is near subsistence level;

(iii) L'Heureux-Dubé J.'s approach in all cases, not just those bordering subsistence levels, would be to deduct from each parent's total income a subsistence sum to ensure a realistic assessment;[57]

(iv) The children's needs are a priority to those of the parents so that child support cannot be treated as a residuary category ranking behind parents' debts,[58] high mortgage repayments,[59] or parental leisure activities, hobbies or holidays. This much is well established in the case law and statutes;[60]

(v) All the assets of both parents and their abilities to contribute towards child support should be considered;

(vi) A spouse's obligation to a new family cannot sever any obligation to the first family;

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[55] *Paras* v. *Paras*, *supra* footnote 43. The formula involves calculating the appropriate quantum of child support and then allocating this sum between the parents in accordance with their respective incomes and resources.

[56] J. Payne, *Divorce*, 3d ed. (Toronto, Carswell, 1993) at 93.

[57] *Supra* footnote 1 at para 58. This follows an approach of Trussler J. in *Murray* v. *Murray* (1991), 35 R.F.L. (3d) 449 (Alta. Q.B.) with which the Alberta Court of Appeal in *Levesque* had disagreed. *Levesque*, *supra* footnote 1 at 21 the Alberta Court of Appeal seemed to suggest that the approach should be first to calculate the parental support obligation and only then see whether the payer parent could afford to pay the sum so calculated.

[58] A distinction should perhaps be drawn between debts appropriately incurred during marriage for necessary items such as appliances and furniture, which one of the spouses will retain after separation and for which little could be obtained on resale, and items that could be sold for a profit or which could be regarded as luxuries.

[59] The reference to "high" mortgage repayments is crucial. Where mortgage repayments are reasonable (i.e. approximate to reasonable rental costs) they must be surely taken into account as must reasonable transportation costs if public transport is unavailable or its use is unrealistic.

[60] See for example *King* v. *King* (1990), 25 R.F.L. (3d) 338 (N.S.T.D.), *Murray* v. *Murray*, *supra* footnote 57, *Northcut* v. *Ruppel* (1989), 21 R.F.L. (3d) (Man. Q.B.). *Mitchell* v. *Mitchell* (1988), 18 R.F.L. (3d) 206 (Sask U.F.C.) and the Nova Scotia *Family Maintenance Act*, S.N.S 1980, c.8, s.35A which makes garnishee orders for family support a priority over all other seizures or comparable orders, save for orders made by the Supreme Court relating to maintenance.

(vii) The amount payable cannot necessarily be determined by what was spent on the child in the period post separation, as it may have been too low or reflected the available income;

(viii) So far as practicable the child's standard of living should reflect that enjoyed during cohabitation, but if this is not practicable then the child's standard of living should not fall below that of the non-custodial parent;

(ix) A contextual broad based approach will be sensitive to a growing awareness that the cost of raising a child has been consistently underestimated by the courts.

Statistics and Commentaries

L'Heureux-Dubé J. noted a Statistics Canada Report entitled *A Portrait of Families in Canada* which indicated that 13% of Canadian Families fell below the low income cut-off set by Statistics Canada.[61] Three fifths of Canadian single parent families fell within this group, the great majority of whom were headed by women.[62] While female-headed single parent families constitute only 6% of Canadian families, they represent 29% of all low-income families.

For the minority, there is a clear link between low child support and the difficult financial circumstances of custodial mothers. Support orders do not keep pace with inflation[63] nor do they represent a symmetrical division of income. Except in the poorest groups, men were only ordered to pay 18%[64] of their gross income in support (or about $250 per month) at a time when the cost of raising a preschool child in a single parent family varied between $350 and $790 per month depending on whether child care is utilised or not. The conclusion was that men are usually left above the poverty line whilst the majority of women with custody are left below it.[65]

A first step in calculating orders for the minority is to establish the actual cost of raising a child. In two studies cited by Zweibel, the cost of raising two children aged ten and four in Edmonton (at a no-frills standard) is $8,500, whilst in Toronto it would be $8,697.[66] Clearly this problem is compounded if judges

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[61] Statistics Canada, November 1993.

[62] While only 24.4% of male headed families fell within the group, 61.9% of female headed families was included.

[63] See the Canadian Department of Justice, Bureau of Review, *Evaluation of the Divorce Act — Phase II: Monitoring and Evaluation* (Ottawa: Dept. of Justice, 1990) at 81 which indicated that in their survey child support awards in 1985 averaged $470 p.m. and had only risen to $503 in 1988 whereas a 4% inflation factor would have produced a figure of $540 in 1988.

[64] A similar figure to the 20% found in 1983 by D. McKie, B. Prentice, and P. Reed, *Divorce: Law and the Family in Canada* (Ottawa: Statistics Canada, 1983) at 198.

[65] *Ibid.* at 103.

[66] "Child Support Guidelines" in *Family Law Voodoo: Economics for Women-Feminist Analysis Conference* (Ottawa: The Association, 1993).

and lawyers "thought small"[67] in assessing spousal or child support. Such an approach places a heavy burden of divorce on custodial parents and children.

As a first step to solving the problem of low assessment, L'Heureux-Dubé J. suggested, following Zweibel, that the hidden costs of child care which are absorbed by the custodial parent should be considered. These fall into four categories:

(i) indirect costs of the increased responsibility of child care falling on a single parent and the cost of time spent on child rearing and nurturing tasks;

(ii) increased direct costs of services purchased for the first time or increased as a result of the needs of the child, such as work-related child care, babysitters, free time for community, social and domestic commitments, assistance with household tasks;

(iii) the hidden costs associated with shopping and housing functions; and

(iv) the present employment opportunity costs.[68]

L'Heureux-Dubé J. distinguished between direct costs of child care such as clothing, leisure activities, schooling, pocket money, babysitting, transportation and access costs on the one hand and hidden costs such as the *additional cost* (emphasis added) of child care. As Bowman J. pointed out in *Brockie* v. *Brockie*,[69] the custodial parent's choice of accommodation is often determined by the need for play-schools, schools, recreational facilities[70] and the need to be home for the children which restricted overtime opportunities.

Time that could otherwise be used for leisure or earning extra income was often absorbed in household tasks such as laundry, house cleaning or cooking. L'Heureux-Dubé J. disputed the tendency to only value child-rearing costs if these are provided by an outside party — a tendency which can operate against mothers employed only part time or who are not working outside the home. Quoting from her earlier judgment in *Moge*,[71] L'Heureux-Dubé J. emphasised that the objective in the *Divorce Act* of recognising the economic advantages or disadvantages to the spouses arising from breakdown of marriage requires a recognition of the value of domestic duties in quantifying orders. Many costs absorbed as a shared intention of the spouses during cohabitation become

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[67] In many ways very little has changed since the British *Finer Report on One Parent Families* (London: H.M.S.O., Cmnd 5629, 1974) first suggested an administrative machinery for assessing support orders.

[68] *Valuing the Custodial Parents' Contribution : Dealing with Increased Monetary and Non-Monetary Costs Absorbed by the Custodial Parent* cited in D. Pask "Gender Bias & Child Support: Sharing the Poverty (1993) 10 C.F.L.Q. 33 at 83-84. See also C. Rogerson, "Winning the Battle, Losing the War: The Plight of the Custodial Mother After Judgment" in M. Hughes and D. Pask eds., *National Themes in Family Law* (Toronto: Carswell, 1988).

[69] (1987), 46 Man. R. (2d) 33 (Q.B.).

[70] See also the Alberta Court of Appeal's comments in *Levesque*, *supra* footnote 1.

[71] *Supra* footnote 12 at 862 and 864.

contested on breakdown of marriage. Hidden costs may also be present in assessing spousal support, but the factors are different in a child support case, and a fair apportionment of support requires recognition of the hidden costs to the custodial parent which are incurred as a direct response to the child's needs. Particular care is needed to be taken to identify certain opportunity costs which may fall on the parent long after they have ceased to have custody of the children such as lost career opportunities, or job skills which had become out of date as a consequence of child-care. These are really more appropriately dealt with in spousal support applications under section 15(7) (b) and 17(7)(b) of the *Divorce Act*. L'Heureux-Dubé J.'s approach results in the allocation of a higher proportion of the direct costs of child care to the non-custodial parent by way of compensating for the fact that the custodial parent will incur most of the hidden costs. Only by this means can the true total economic burden to be shared by both parents be properly apportioned. Given that the standard of living of the custodial parent and child are inextricably linked, any failure to recognise hidden costs of child care operate to depress the proper standard of living of both child and custodial parent or place an undue burden on the custodial parent.

The Alberta Guidelines and lacunae therein:

Despite the attention given to *Willick*, the unusual procedure of devising "guidelines" to flesh out certain gaps in the *Divorce Act* renders the Alberta Court of Appeal's decision worthy of scrutiny. While the Court of Appeal devised comprehensive "guidelines"[72]to establish a five step approach to assessing child support, it is important to recognise that the Court of Appeal chose not to address several common problems that practitioners meet in every day practice. One of these is the case where the custodial parent has some income earning capacity but chooses to be a full time custodian. Sections 15 (7) (b) and (d) of the *Divorce Act* expressly refer to the sharing of the financial costs of a child and, where practical, promoting the self sufficiency of each spouse within a reasonable time. A common problem is the case where the custodial parent can only get a low paying job in the service sector, often on a part-time basis, and a dispute arises over whether she must accept such employment. The parent with custody asserts that after paying the expenses of getting to work she is no better off than remaining on social assistance and less able to care for her children as well. No assistance was offered on this point which is a pity as the meagre facts of *Birmingham* suggest that, given the age of the children, there would be room for a variant of the argument not dealt with, namely whether the custodial parent was working a sufficient number of hours or was capable of holding down a more demanding job. Equally in the "Litmus Test" propounded by the Court of Appeal for determining whether the sum set aside by separated spouses for child rearing was reasonable, no account was taken for the day care or other costs incurred in enabling the custodial parent to work outside the home.

[72] *Supra* footnote 1 at 434.

The omission of this other disputed topic diminishes the value of the judgment for practitioners. The one suggestion that can be made in relation to both points in light of *Willick* is that any earnings made by the custodial parent will not have to be taken into account dollar for dollar, by way of reduction of child support, and that this applies with particular force where the custodial parent is already absorbing an undue proportion of the "hidden or soft costs" of child care.

By way of fleshing out the broad statutory grants of discretion contained in section 15 of the *Divorce Act*, the Alberta Court of Appeal felt it desirable to offer specific guidance on the fair sharing of child support costs between working parents. As in *Willick*, the philosophy was based on *Paras* v. *Paras*[73] and Kelly J.A.'s statement of the need to maintain the standard of living of the children over the maintenance of the parents' standard of living. In contrast to L'Heureux-Dubé J. in *Willick*, who started by allocating to each parent a protected subsistence level of income, the less desirable approach of the Alberta Court of Appeal was to first arrive at an adequate sum to support and educate the children. This sum was then divided proportionately between the parents according to their respective income and resources, so as to establish the sum to be paid by the non-custodial parent. Where increased living costs were occasioned by the parents separating, and some reduction in the standard of living was inevitable, the Court of Appeal suggested that the parents' standard of living should diminish rather than that of the child, perhaps down to subsistence level. Difficulties emerge with this approach for, as the Court of Appeal rightly suggests at a later point in the guidelines, it is virtually impossible to separate the standard of living of the child and parent with care in terms of housing, heating, and food. The principle becomes difficult to apply in practice. Nor does it deal with the proposition stated in *Richardson* v. *Richardson*[74] that though the custodial parent may indirectly benefit from child support, this cannot be used as a guise for the award of spousal support. Moreover, the concept of the maintenance of pre-separation standards of living was recognised in England as unrealistic and led to the amendment of the law.[75] Finally in England, even when an administrative formula was adopted for child support, the calculation of protected earnings which the payor parent was entitled to retain for their own living expenses, an incentive over and above welfare levels, was included as a way of encouraging payor parents to retain their jobs and limiting the risk of both families becoming a charge on the public purse.[76]

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[73] *Supra* footnote 43 at 134-5 see also Bissett-Johnson and Day, *supra* footnote 9 at 93-96.

[74] *Supra* footnote 10.

[75] See Law Commission Report No. 112 *The Financial Consequences of Divorce* (London: H.M.S.O., 1982) para. 6. Instead of the "minimum loss principle" the *Matrimonial and Family Proceedings Act*, 1984 introduced the concept of welfare of the children as a "first but not paramount principle".

[76] See below.

In cases within the guidelines, the five steps suggested by the Court of Appeal were:

(i) to calculate the combined gross income of the parents;

(ii) to calculate a reasonable cost for the upbringing of the child;

(iii) to apportion appropriately the cost between the parents;

(iv) to recalculate the adjusted assigned share in the light of tax consequences and make a presumptive award;

(v) to fine tune the presumptive award by adjustments related to the special circumstances of either parent.

The apparent simplicity of this approach is qualified by the fact that several of the terms used in steps (i) to (v) are terms of art that are given a special definition in the reasons for judgment of the Court of Appeal.

(i) *The calculation of combined incomes in child support cases involving two-income families:*[77]

(a) *Meaning of income:*

The Alberta Court of Appeal started with a broad, purposive interpretation of the words in section 15(8)(b) of the *Divorce Act*, saying that child support was to be apportioned between parents in accordance with "their relative abilities to contribute". This phrase should be interpreted to include assets (both present and future) as well as present income and ability to generate income now or in the future. "Income" is to be interpreted to cover whatever a spouse can generate by personal effort and by the prudent investment or sale of assets.

(b) *Gross or net income:*

Although the court stated that "gross" income was the least dangerous approach, it also recognised that discussion of tax, deductions, debts and other arrangements relating to net income had proceeded without the courts being provided with adequate documentation and proof. Such an approach is a line of least resistance and does nothing to encourage the full disclosure that a court has a right to expect of parties. However, where adequate proof is offered, the Court should examine whether the income was really discretionary income or not. For example, as has been suggested in relation to *Willick*,[78] some allowance should be made for the debt incurred to buy furniture which is a necessary consequence of separation. Often such furniture is liable to repossession if some allowance is not made in calculating discretionary income. Although there is a belief by some government officials and courts that lenders will be willing to reschedule debts, this may be

[77] Levesque, *supra* footnote 1 at 434.

[78] See *supra* footnote 57.

overly optimistic.[79] Likewise for a car, which is essential rather than convenient to the non-custodial parent's employment, or union dues which are essential to his or her retaining employment. The proper approach is to use after tax or other net figures but only where these figures are proven as necessary expenses by the party seeking to rely on them. Without adequate proof the courts should reject arguments based on net figures. This will encourage better lawyering. It is noteworthy that in *Edwards*[80] the Nova Scotia practice of working in "after tax" dollars seems to be differ from that referred to by the Alberta Court of Appeal.

(c) *Cohabitation:*

Where a parent remarries or cohabits the Alberta Court feel that the new partner's income is irrelevant in the calculation of income unless the child and the new partner have come within a legally recognised "child of the family" or guardian's obligation.[81] The *Birmingham Case* raised the issue of whether the wife's new partner had acquired such obligations and the point, often unclear, about the priority between the step-parent and natural parent in child support proceedings. Often families and lawyers differ on the matter.

(d) *Expenses incurred to generate income:*

The Court of Appeal was at pains to point out that, although certain expenses such as capital cost allowance are deductible by the taxpayer under the *Income Tax Act*, they should not necessarily be deductible in calculating child support which have different underlying social policies. The converse is also true and the Court of Appeal thought that certain expenses not deductible under the *Income Tax Act* such as travel expenses or the cost of necessary tools, might be properly deductible under the *Divorce Act*.[82] However, it said that any deductions were to be on a modest scale, and there seems to be some reluctance by the Court of Appeal to allow the payor parent the benefit of private as opposed to public transportation or to allow other employment expenses to be included in the calculation.

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[79] In the British context see the correspondence between Government officials and a solicitor referred to in the course of the article by D. Barry, "Payment of Child Support" (1993) 143 N.L.J. 1193.

[80] See *supra* footnote 1.

[81] The same does not hold true where the issue is one of expenses. It is commonly held that when it comes to the calculation of expenses the income of the new partner can be relied on to share rent and other household expenses with the non custodial parent thus freeing up the availability of income to pay child support on the part of the non-custodial parent. See further L. Weisman "Second Marriages and the Law of Support" (1984) 37 R.F.L. (2d) 245 and Davies, *supra* footnote 9 at 483.

[82] As will be seen later these expenses were not initially deductible under the U.K. Child Support legislation and this became a focus for criticism.

(ii) *Calculation of the cost of upbringing a child:*

(a) *The child's needs:*

In assessing the reasonableness of the hard costs attributable to child rearing, as opposed to apportioning the expenditure between parents, the Court of Appeal tried to establish a balance between what was best for the child and what was essential. If the examples given, summer camps and piano lessons, have a middle class ring it must be remembered that it is only in families with discretionary income that the problem presents itself. The Court suggested that a balance should be struck in terms of the combined gross incomes of the parents, and what the parents regarded as an appropriate standard of living for their child when they were living together, supplemented by evidence of what parents with similar incomes expended on rearing their children. This pays little regard for the fact that some diminution in the child's standard of living will be inevitable on the breakdown of their parent's marriage despite all reasonable attempts by parents to protect children against it.[83] The English courts tried for many years to operate a " maintenance in the standard of living" test for support but ultimately the English Law Commission recognised that this was not a suitable criterion[84] and the *Matrimonial Causes Act*, 1973,[85] was amended by the *Matrimonial & Family Proceedings Act*, 1984,[86] to make the welfare of the children the first but not paramount consideration for the Court in the determination of maintenance.[87]

(b) *"Soft" child care costs:*

The Supreme Court of Canada in *Richardson* [88] had earlier dealt with the overlap of spousal and child support, and the situation in which failing to vary spousal maintenance led to an indirect deprivation of the child. The converse argument, advanced by many husbands, is that awards of child support inflate the custodial parent's standard of living. One problem arising from the overlap between the standard of living of the custodial parent and child, is how to divide

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[83] Lenore Weitzman, following Chambers, indicated that women heading single parent families needed 75-80% of the money they received in a two parent family if the previous standard of living was to be maintained. (*The Divorce Revolution — the Unintended Consequences for Women and Children in America* (New York: Free Press, 1985) at 286. This is not, however, to defend the sort of orders that Weitzman found were made by American Courts which left women with a 73% decline in their standard of living in the year after divorce.

[84] *The Financial Consequences of Divorce*, *supra* footnote 75 at para. 17.

[85] U.K. 1973, c.18.

[86] U.K 1984, c.42.

[87] By inserting a new s. 23 and s. 23A into the 1973 *Act*.

[88] *Supra* footnote 10 at 706, see Bissett-Johnson, *supra* footnote 11 at 162ff for more detail.

expenditures which cover both the parent and the child. Housing is the classic example. The Alberta Court of Appeal termed these shared costs "soft costs".[89] Two extreme approaches could be taken — either attributing all the costs such as housing to the child (a cost to the child approach) or attributing all the expenses to the adult, bar a child's personal room and board (a cost to the mother approach). The Alberta Court of Appeal started with the premise that the parent with care would in most cases acquire "child oriented" housing, with facilities that they would not otherwise acquire for themselves, such as indoor and outdoor play areas. In the light of this the Court favoured a "cost to the child approach" tempered by a reasonable shared use valuation. No guidance was given by the Court on the basis of what a reasonable shared use valuation would be, but one might assume something in the order of 50% to 66.6% attributable to the child was what the Court had in mind. If this is so, and is combined with the maintenance of the child's standard of living, one might interpret the Court as suggesting that the preponderance of the decline in living standard was to be experienced by the non-custodial parent. The incentive for the non-custodial parent to remain working in an adverse employment market is not very high in those circumstances.

Although the Court talked about the possible envy of the mother when looking at the adult—oriented building in which her ex-husband was living,[90] this should tempered by the reality of the resources available to a non-custodial parent who is expected to minimise the reduction in living standard of their child. A sense of proportion needs to be kept in mind in deciding whether the disparity in accommodation available to the parent with care of the child and the non-custodial parent (or vice versa) is unreasonable. Would it be unjustifiable envy on the part of the non-custodial father to covet the former matrimonial home in which the mother and child are residing pursuant to a "clean break" settlement, if the funds left to the father after paying child support merely allow him to subsist by living in a rooming house?[91] Can very disparate standards of accommodation be justified for custodial and non-custodial parents? In the context of second families, this has created enormous controversy in the United Kingdom.

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[89] The distinction between" soft" and "hard costs" is not exhaustive and one might also distinguish "indirect costs", such as the parent with care being "on call" 24 hours a day and having to pay for babysitters to have a social night out, and "opportunity costs" to cover the case where a working parent with care is unable to accept overtime or promotion because of their child care responsibilities. These sorts of costs were discussed by L'Heureux-Dubé J. in *Moge*, *supra* footnote 12 at 493 when she adopted the words of Bowman J. in *Brockie* v. *Brockie*, *supra* footnote 69.

[90] *Ibid.* at 390, para. 24.

[91] The father in *Birmingham*, *supra* footnote 1 at 398 signed over the house to his wife under a purported clean break settlement, but was clearly likely to have to pay quite substantial child support in the light of the "guidelines" when the case was reheard. He would only be able to claim poverty, so the Court of Appeal says at a later point in their argument, if reduced almost to a rooming house level of accommodation. Does such an approach encourage fathers to make "clean break" settlements or will they seek sale of the home?

(c) *Budgets as a Guide to Child Care Costs:*

The Alberta Court of Appeal emphasised that, all too often, custodial parents underestimated their post separation expenses. In part, this reflected an inexperience in budgeting in their new situation and, in part, a reflection of a budget of necessity in the new post separation situation. Currently, budgets rarely include indications of the pre-separation budget. In a cryptic comment the Court suggested that the budget of mothers at present were often no more than a claim for an income supplement for her.[92] This may be the root of the problem; many mothers would rather settle for the regularity of welfare payments topped up by the minimum of child or spousal support from their former partner, rather than face on-going, acrimonious dealings with the former partner that may interfere with reestablishing themselves in a new life and jeopardise the establishment of good access arrangements. The aspiration suggested by the Alberta Court of Appeal is that the Court of Queen's Bench, assisted by the Family Bar, will be able to devise model forms, procedures and budgets for given income levels. This will be difficult since the budgets will also have to reflect differing housing and transportation costs in different parts of the Province and possibly differing heating costs as well. This is a formidable task to assign to the Queen's Bench unless extra resources and expertise are made available to it. No doubt in an effort to limit demands on the judiciary, the Court of Queen's Bench was also urged to produce model orders to deal with both cost of living adjustments and also the assumptions on which support orders were made, in order to avoid unnecessary disputes about whether variation of the original order was justifiable due to a material change of circumstances. The debate on cost of living clauses has been long standing[93] but, whereas at one time it was reasonable to expect a payor spouse's income to increase at least with the cost of living, it is doubtful if such expectations apply today in times of cuts in public service salaries and the laying off of staff.[94] Indeed at a later point the Court of Appeal acknowledged that many people today are less optimistic about their future prospects and the vibrancy of the Canadian economy has stalled.[95]

(d) and (e) *use of expert witnesses and studies:*

Although there have been isolated examples of the calling of expert witnesses to assist a court in deciding appropriate "soft cost division" and average

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[92] *Ibid.* at 437, para. 28.

[93] La Forest J. in *Richardson*, *supra* footnote 10 at 723 was noticeably warmer towards such clauses than the majority.

[94] Practitioners will surely be reluctant to advise clients to sign such clauses if the effect may be to transfer to them the COLA responsibilities of their clients under the guise of a negligence claim.

[95] See at 446, para. 67 of the judgment.

expenditure patterns,[96] this is an expensive procedure which the Supreme Court of Canada has been loathe to sanction, and in *Willick* the approach of L'Heureux-Dubé J. implies an extended concept of judicial notice.[97] The use of publicly available studies has become commonplace[98] in the literature and involves less expense once the methodology in the study has become accepted and once judicial notice has rendered them authoritative.[99] The Alberta Court of Appeal referred to a number of studies and accepted reliance of them as appropriate once they fell within the *Moge* guidelines and provided that counsel were advised in advance that reliance might be placed on the studies. Evidence could then be called, and submissions made on the propriety of taking judicial notice of the studies in the particular circumstances.[100]

(f) *A formula for Child Care Costs:*

Although the formula approach has become popular in most American States,[101] in Australia[102] and in the United Kingdom,[103] the Court of Appeal recognised the problem of balancing both fairness and simplicity. The Court recognised that the California Scheme based on section 4721 of the *California Civil Code* involved fifty three separate terms or conditions. The exclamation mark added at the end of the sentence referring to the complexity of the fifty three terms and conditions would, no doubt, have been multiplied by an examination of the constantly changing British *Child Support Acts and Regulations*. The assertion that adoption of the Californian scheme involved value judgments and assumptions of fact which were incompatible with the judicial role, justified the Court's scepticism to such a scheme. Interestingly the Court of Queen's Bench was encouraged to develop and offer to litigants a model scheme that they might be free to accept or reject, notwithstanding that the differences in the best interest of particular children might differ widely in the face of a bewildering matrix of facts.

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[96] See C.L. Brown "An Economic Assessment of the Costs of Raising Tara Z (unpublished, prepared for Chapman, Riebeek, Simpson, Chapman and Wanless) (27th July 1989) referred to in *Levesque, supra* footnote 1 at 439.

[97] *Supra* footnote 1 at 188ff.

[98] See for instance the studies referred to by L'Heureux-Dubé J. at various points in *Moge, supra* footnote 12.

[99] See *Moge, ibid.* at 496.

[100] *Ibid.* at 393, para. 30.

[101] Munsterman, *Child Support Guidelines: A Compendium* (Arlington: National Center for State Courts, 1991).

[102] *Infra.*

[103] See below.

(g) *An interim Litmus Test:*

Pending the production of the more detailed model forms, budgets and tests by the Court of Queen's Bench,[104] perhaps with the assistance of the Canadian Research Institute on Law and the Family at the University of Calgary, the Court of Appeal could only offer a provisional "Litmus Test" as a check for seeing whether the sum allocated for child rearing in a separated family was reasonable. The rough figure suggested was 20% of the parents' gross income in a single child family and 32% in a two child family. The test was admitted to be a rough and ready one which might be too low in low income families and possibly too high in high income families, and did not take into account the age of the child. The figure is justified by reference to Rogerson's article[105] and a number of cases[106] and certainly the old "one third rule" was the historic basis for quantifying spousal support.[107] It is sometimes forgotten that any child support was an additional sum payable over and above spousal support.

One shortcoming of the Court of Appeal's "Litmus Test", particularly for poor families, is a failure to recognise the usefulness of social security levels, and levels of child support as providing a "rule of thumb" of the appropriate child rearing costs, particularly at lower income levels.[108] In England, courts were given "base lines" by the circulation of Income Support levels for children of different ages as well as the recommended scales of the National Foster Care Association[109] and, when child support was largely taken over from the courts by the Child Support Agency in the United Kingdom, the social security figures provided the baseline for establishing child rearing costs as well as the protected income to which the non custodial parent was entitled to meet his responsibilities to himself, and any second family. It is likely that most family law practitioners, who represent wives, will have acquired, however reluctantly, an understanding of social security law. What is surprising is the limited recognition of this fact by the Court of Appeal in view of the recognition for more than twenty years of the relevance of social security payments in appropriate cases.[110]

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[104] A phenophthaleine test?

[105] "Judicial Interpretation of the Spousal and Support Provisions of the Divorce Act 1985" (1991) 7 C.F.L.Q. 151 & 271.

[106] Including *Blanchard* v. *Blanchard* (1987), 64 Nfld & P.E.I.R. 15 (Nfld T.D) and the earlier case of *Squires* v. *Squires* (1982), 42 Nfld & P.E.I.R. 148 (Nfld. T.D).

[107] See for example Davies, *supra* footnote 9 at 483-84 tracing the history of the rule from that of the old Ecclesiastical Courts. Certainly Lord Denning referred to the rule as a starting point in *Wachtel* v. *Wachtel*, [1973] Fam. 72 (Eng. C.A.).

[108] See s.12(2) of the *Nova Scotia Family Maintenance Act*, which makes the sum payable under the Provincial *Family Benefits Act* a minimum standard for support of a dependent child. But this must be tempered by recognizing the cut-backs in social security payments in Alberta and Ontario in very recent time.

[109] See Cretney and Masson, *Principles of Family Law*, 5th ed. (London: Sweet and Maxwell, 1990) at 387-88.

[110] See *Reiterbund* v. *Reiterbund*, [1975] 1 All E.R. 280 (C.A.) quoted by Davies, *supra* footnote 19 at 449.

(h) *Access costs:*

Unlike the initial approach of the British *Child Support Act*[111] the Alberta Court of Appeal were prepared to encourage the promotion of access to the child by the non-custodial parent. This is consistent with the principle enunciated in section 16 (10) of the *Divorce Act* that "a child should have as much contact with each spouse as is consistent with the best interest of the child". The means of adopting this into practice is by allowing the cost of access as a child rearing cost rather than deducting it from the income of the non-custodial parent. This affects the sharing of the cost of access in relation to each parent's ability to contribute to the cost. At the same time the court was unwilling to calculate access costs to include a lavishing of "treats" on the child by the non-custodial parent in such a way as to undermine the authority of the custodial parent or relationship to the child.

(iii) *Apportionment of child rearing costs:*

After calculating the combined income and a reasonable sum for the child rearing costs the Court suggested that apportionment should track the numerical relationship of the total income of the parents. Thus if the child rearing costs were calculated at $12,000 *per annum* and the mother's income was calculated at $12,000 and the father's at $48,000 (producing a combined income of $60,000) then the mother would be expected to contribute $2,400 and the father $9,600. This just meets the 20% Litmus Test.[112] The Court of Appeal preferred to talk in terms of gross rather than net income but I would submit that net income (after tax dollars) is a more appropriate basis for the calculation provided (i) the necessary proof of deductions is proved and (ii) if the court reserves the right to ignore deductions or expenses permissible for tax purposes but not consistent with the purposes of the *Divorce Act*.[113] Where inadequate proof of expenses is offered there is no alternative to using gross figures.

(iv) *Adjustments to apportionment*

(a) *Parental subsistence:*

The Court determined that only after the theoretical level of contribution had been established, did adjustments for special circumstances come into play. The Court of Appeal viewed such adjustments based on a plea of reducing the

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[111] *Supra* footnote 2.

[112] This shows how much adoption of the"Litmus Test" would alter existing awards. The effect of two children in the example given is even more dramatic in terms of existing awards. 32% of the combined gross income of $60,000 would be $19,200 p.a. child rearing costs to be apportioned between the parents.

[113] See heading (b) gross income above.

non-custodial parent below subsistence level with some reluctance, indicating that such a plea was in effect a subsidy from the custodial parent and child. "It was not in the best interests of the child to drive the non-custodial parent into penury, but neither is it in the best interests of the child to expose the custodial parent to both penury and exhaustion."[114] One factor that is relevant to the situation of too many demands on too little parental income, is the fact that social security law is more likely to pick up the slack if a custodial parent is reduced below the subsistence level than if the non-custodial parent is so reduced. One solution offered by the Court of Appeal to not reducing the custodial parent below subsistence level is to interpret the *Divorce Act* so that the duty of a parent to support children is not necessarily an immediate and present one. The liability, the Court suggested, could extend over a period of time and apply even after the years of dependency of the child presumably even as a debt against the estate of the payor parent were he to die.[115] The other policy recommended by the Court was that where poverty is an issue, the child should be protected as far as possible from its effects, and the poverty should be shared between the parents. However this suggestion is less easy to apply in practice in relation to accommodation, food and heating where these items are shared between the child and custodial parent. After offering the general thought that "subsistence adjustment should not drive the award paid so low that the subsistence level of the other parent or the child, falls below that of the parent seeking adjustment",[116] the court made specific suggestions:

(i) The party invoking poverty as a basis for adjustment should make full disclosure and satisfy the court that there was no way of avoiding incurring the expenses which raised the issue of poverty. The Court suggested that care of the children should be placed above luxuries and that in terms of living expenses cars and apartments should be displaced by a presumption of public transport and rooming house accommodation. It has to be admitted, however, that reliance on public transport is easier in Edmonton and Calgary than in rural Alberta and that some jobs may carry with them a requirement of the employee providing their own car.

(ii) Before any downward adjustment of the non-custodial parent's contribution was made on the basis of poverty, other sources of income to the non-custodial parent should be investigated. The Court of Appeal expressly referred to contributions from social services and new spouses and the extended family. Each of these has problems. First, social security is more likely to supplement the income of a custodial parent than a non-custodial parent living as a single person. Second, there is now no legal obligation of support between the

[114] *Levesque*, *supra* footnote 1 at 444.

[115] Thus raising the constitutional issue of whether this was a law relating to marriage and divorce or a matter coming within the Provincial jurisdiction over succession. For the case law see Davies, *supra* footnote 9 at 495.

[116] *Quaere* whether the converse is true? It seems quite possible that the Court of Appeal would reduce the non-custodial parent below the level of living of the custodial parent on the basis of trying to shelter the child from poverty which produces an indirect benefit to the custodial parent.

members of the extended family and the non-custodial parent. The one case where there is some scope for application of this rule is that to the extent that the cohabitee or second spouse of the non-custodial parent is capable of sharing part of the living expenses of their partner they will be expected to do so - thereby freeing up the ability of the non-custodial parent to pay additional child support.[117] But is the Court of Appeal going further by suggesting that a new spouse may have an obligation to go out to work to help with family expenses and indirectly help support the first family?

(iii) That payment of child support is a priority to the payment of debts. This is a feature of some provincial laws[118] but still does not solve cases such as debts due on a car that is essential to the payor parent's employment, and which the lender threatens to repossess if payment is not made. The solution suggested by the Court of Appeal is that any deferral of the sum normally due should carry interest until paid.

(iv) That a judge should bear in mind that any reduction in the standard of living of the custodial parent can affect the child.

(v) That if the standard of living of the custodial parent and child must be reduced, access costs should be reduced prior to any reduction of basic living expenses.

(vi) The Court should be aware of the tax consequences of the award.

One might note in passing that with the current number of tax bands and the decrease in the highest marginal tax rates the potential for income splitting that used to exist at one time is now diminished.[119] Courts should be sensitive to changes in the law and counsel ought to be prepared to address these issues. In particular the aftermath of *Thibaudeau* v. *Canada*,[120] and whether the Supreme Court of Canada decision will dispose of the issue or whether the Government is moved to alter the law by amendment to the Income Tax Act, needs consideration. A number of countries do not allow the deduction of child support payments and the response of the Government to criticism of the decision may be by the simple elimination of deductibility by the payor.

(b) *Special circumstances:*

The Alberta Court of Appeal would have preferred to adopt a pragmatic approach to special circumstances as the basis for departing from the guidelines, and would have preferred to deal with them on a case by case basis. However, certain illustrations were offered, the expectation of an inheritance, a tradition

[117] See Bissett-Johnson and Day, *supra* footnote 9 at 96-97.

[118] See for example s. 34A(4) of the *Nova Scotia Family Maintenance Act*, *supra* footnote 60.

[119] See Bissett-Johnson and Day, *supra* footnote 9 at 102-103 for a brief explanation of "income splitting" under the old law.

[120] [1995] 4 S.C.R. 627. See the discussion of this case by L. Philipps, "Tax Law: Equality Rights: *Thibaudeau* v. *Canada*" *infra* 668.

of family support from grandparents, illness or disability on the part of a child or the opportunity to support a special talent in the child. A final factor seems to have been the unhappy recognition by the Court that whereas at one time people could project reasonable expectations of a steady or rising income as the basis for incurring expense before careers were established, such expectations were now questionable. This gloomy prognostication suggests that the parental support obligation may extend longer than ever, possibly by the route of interest on payments that could not currently be made, thereby extending the length of the obligation.

The Nova Scotia approach and second families:[121]

In *Edwards* the father had undertaken in the minutes of settlement to assume the majority of the obligations and had received the majority of the assets. The mother understood that the father needed time to sell assets in order to reduce his debt load. The minutes recognised that the father had paid $2,500 per month for three months and $1,500 for five months after the parties separation. No spousal support was paid. The minutes provided that, in future, child support of $1,100 was to be payable until further order.

Since that date the mother's income had increased from $26,500 to $37,767 whilst the father's income was more difficult to ascertain. Previously he had been an employed accountant but then moved to a partnership with another firm. His income was variously referred to as "gross" or "taxable" compensation. The actual income, omitting certain expenses, had risen to $84,971 in 1992, although sworn financial statements dated in June 1993 claimed an income of only $68,604. Grant J., the trial judge, was "uncomfortable " with this evidence of earnings especially in light of the father's projected income, in an application to the Bank, of $80,000 for the year to January 3rd 1993. The judge's discomfort was prompted by the opulent life-style enjoyed by the father after the divorce and his remarriage shortly followed by the birth of a daughter. His second wife was on leave of absence from Air Canada following the birth of her child and in receipt of unemployment benefits of $1,363 per month and it was unclear on the evidence whether she would return to work.

Since the marriage the husband had:

(i) sold the former matrimonial home and bought a new $230,000 house in his new wife's name, although he assumed liability on the mortgage. By the terms of a pre-marriage agreement the wife merely assumed a responsibility to pay rent of $300 per month;

(ii) the husband had incurred expenses of nearly $4,000 for elective eye surgery to avoid the need to wear glasses;

(iii) he had traded in his 1989 Honda and bought a $24,000 Pontiac Van; and

[121] *Edwards* v. *Edwards*, *supra* footnote 1.

(iv) he had bought a ring for his new wife worth $6,000 and spent a similar sum on the wedding and honeymoon.

To compound Grant J.'s unease with the accuracy of the husband's figures the appellant's firm had been unwilling to have its books looked at for privacy reasons.[122]

In contrast the wife's home was valued at $110,000, she walked to work, bought used clothes, and had to resign a family membership at a Sports Club. The trial judge believed she would have little chance of saving for her older years. The trial judge had been unwilling to allow the husband to reopen his case by introducing fresh evidence as to the financial statements of his partnership for the last three years. Grant J.'s decision was affirmed by the Court of Appeal who noted that the information was already in his possession at the time of trial.[123]

On the issue of quantum the Court of Appeal emphasised that the children were those of a rising professional man and the family enjoyed an excellent life-style. They reiterated the view expressed in *Paras*[124] that children had priority over the parents' right to maintain their pre-separation life style. Given the mother's inability to save and the risk to the children if the mother became ill or was made redundant, a notional, contribution from the mother of $800 per month was reasonable. In contrast the father seemed to have an ability to pay based on his past gross income which was reduced by a number of tax write offs not available to most tax-payers.[125] The husband had for example withdrawn $35,900 from his partnership capital account in order to pay down a mortgage and then replenished the capital account with a loan. Given these tax write offs the Court was prepared to believe that the husband had more than $4,200 per month by way of income. Even after the child support order the husband was left with disposable income of $3,000 per month or so. Although the husband claimed a deficit of $25,000 *per annum*, based on child support of $13,000 *per annum*, the Court of Appeal found this inconsistent with his high standard of living and lacking in credibility. The husband was invited, if there was a deficit, to sell his expensive home, or if he and his new wife wished to keep the home then she might have to return to work. "[W]hen she moved in she was aware that he had two children by his previous marriage to whom he had obligations. The new wife is a partner of the new family and must, in my view, carry her share of the liabilities."[126]

Although it appears that the court is suggesting that the second wife should contribute to the husband's child support obligation it later transpires that she should make a greater contribution to the household expenses and thus free the

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[122] See *Matrimonial Property Act*, R.S.N.S 1989, c.275, s.14(3).

[123] The other factors noted by the court included the fact the evidence had to bear on a decisive issue; be credible; and be reasonably expected to affect the result.

[124] *Supra* footnote 43 at 331.

[125] This part of the judgment seems reminiscent of the Alberta Court of Appeal's comments at 435 para. 15 in *Levesque*, *supra* footnote 1.

[126] *Edwards*, *supra* footnote 1 at 19.

husband to make greater provision for his children by his first marriage. Here a rental of $300 per month for a $230,000 house was inadequate, especially where the wife owned a home of her own with an equity of $88,000 which was rented for $6,600 *per annum*, shares in Air Canada,[127] and a 1987 Honda of her own. The Court adopted the six factors mentioned by Professor Macleod in his annotation to *Greco* v. *Levin*[128] and the statement of Mason J. in *Snelgrove-Fowler* v. *Fowler*[129] that the new spouse of a non-custodial parent is charged with a child support obligation which is fixed not only against income but also against all profit, except property exempted for the purpose of earning a livelihood. As in *Willock* the Court took the view that once the threshold test of change was established, a court under section 17(4) of the *Divorce Act* was not restricted to the extent of the changed circumstances. Only a searching and far reaching investigation into the parents' means would establish what is in the best interests of the children. The Court did, however, state that were the decision of the Federal Court of Appeal in *Thibodeau* v. *M.N.R.*[130] to result in the payee of support receiving it free of tax, a court would have to carefully review the payments received by the payee. This is in marked contrast to the English cases dealing with the effect of the reforms wrought by the *Child Support Act* on "clean break arrangements".[131] The Court concluded by reviewing the *Levesque* decision and noting that the order of the trial judge came within the range of the *Levesque* litmus test and upholding the trial judge's decision. In so doing, they rejected the appeal against the order for $11,517 (including disbursements). Part of the reasoning involved noting that after a four day trial the husband was almost totally unsuccessful, the wife had offered to settle for an amount less than the one ultimately awarded whilst the husband had offered to settle for $800 per month — less than he had been previously paying. The

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[127] The wife did not know how many she had and professedly placed little value on them a fact which may have considerably weakened her (and her husband's position).

[128] (1991), 33 R.F.L. (3d) 405 at 406 (Ont. H.C.J). The six factors cited are:

(i) a payer cannot avoid his and her obligation to his or her first family by forming a second family.

(ii) a person who becomes involved with an individual subject to a support obligation must accept that person in his or her weakened financial condition.

(iii) if a second relationship results in increased child-care obligations, the court should not prefer the children of one relationship to children of the other.

(iv) a court should not divert so much money away from the second family that it becomes unable to function.

(v) a natural parent's support obligation should take precedence to that of a step-parent.

(vi) remarriage does not entitle a payee to support; however, a court is entitled to assume that the second partner is able to meet the dependants' ongoing living expenses.

[129] (1993), 13 Alta. L.R. (3d) 432 at 442 (Q.B.) This case does not appear to have been cited in the Alberta Court of Appeal though in other jurisdictions appears to be highly regarded.

[130] (1994), 114 D.L.R. (4th) 261 (F.C.A.).

[131] See above in the discussion in the section on the British *Child Support Act* 1991 on the possibility of variation based on a change in the law.

length of the trial was primarily caused by the husband's conduct[132] or that of the new wife who declined to divulge her financial position in a timely way. The Court of Appeal again supported the view of Mason J. in *Snelgrove-Fowler* v. *Fowler*[133] that full financial disclosure of each second family unit's financial position was crucial.

Some final comments on the *Edwards* decision. First, there seems to have been no consideration of the *Willick* approach of deducting a modest subsistence living standard from both spouses before splitting child care costs between the parents. Paradoxically, this approach would require most custodial mothers to contribute less to the support of their children because their excess of income over subsistence will be less than that of the non-custodial parent.[134] The $24,000 figure for support of two children in this case is much higher than commonly found in Nova Scotia,[135] and the debate remains open as to how far a non-custodial parent, who is meeting a maintenance obligation, can so arrange his affairs so to minimise attempts to increase child support obligations.

IV. *Analysis of the Judicial Approach*

To most family law practitioners *Willick* is not an everyday case. Most would like clients (or defendants to sue) whose gross income was $154,000 *per annum* and had quadrupled in a two year period and who had a home in Palm Springs. Few would argue with the conclusion that a change of such size was material in variation proceedings, that the husband was obliged to increase his child support since his ex-wife's income largely consisted of child and spousal support supplemented by a little part-time work. What is less clear is what lessons can be gleaned for more run of the mill cases. It is noteworthy that *Willick* does not represent some of the more difficult problems of assessing child support *de novo* or on variation. This was not a case where the priority of the payor's obligation to his children in a first and second marriage had to be assessed,[136] or his obligations divided between those to his absent biological children with whom he does not live, as opposed to obligations to his step children with whom he does live.[137] The nearest L'Heureux-Dubé J. came to discussing these matters

[132] He had failed to produce documentation which a judge at a pre-trial conference had ordered him to produce.

[133] *Supra* footnote 129.

[134] See *Willick*, *supra* footnote 1 and Pask and McCall, "How Much and Why? An Overview" (1989) C.F.L.Q. 129 on which L'Heureux-Dubé J. relied.

[135] See *Syvitski* v. *S* (1988), 86 N.S.R. (2d) 248 (Fam. Ct.) where a figure of £16,680 was arrived at — though some allowance for updating would be necessary.

[136] There is a case for suggesting that all children have an equal claim for support from their father see Fodden "Poor Relations: the Effect of Second Families on child Support" (1980) 3 Can J. Fam L. 207, though the arithmetic in the cases seems difficult to reconcile with this view.

[137] It is a matter of note that the obligations to a "child of the marriage" under ss.2(1), 15(2) and 17(1) of the *Divorce Act* 1985, as amended, do not indicate whether a step-father's obligation is a primary one (as it clearly is in the U.K. under the recent *Child*

was the comment that "a spouse's obligations to a new family cannot sever any obligation to the first family".[138] The alarming level of poverty amongst children in single parent families is real but was not central to the facts of *Willick*.

However, much of L'Heureux-Dubé J.'s judgment is directed to the problems of more usual cases such as the need to recognise each parent's right to subsistence by reserving such a sum before seeing how, in the context of the remaining income, a realistic assessment of child support from the total available income is to be achieved. What is a reasonable standard of living might be put into more concrete terms by up-to-date, local, expenditure surveys and percentages of incomes expended on housing, heating, clothing, transportation, food and the like in relation to families with differing incomes. What is less obvious is whether the courts have this sort of information before them, despite the attempt by the Alberta Court of Appeal in *Levesque* to encourage the Court of Queens' Bench and Family Law Bar to devise model budgets for given income levels.[139] The expenditure surveys referred to by the Alberta Court of Appeal[140] were several years out of date and the figures used by Provincial Social Service Departments to establish housing benefit are usually at least one year in arrears. However it appears that the courts in Alberta now have up to date budget figures to rely on. Federal Guidelines[141] may lack the local knowledge essential to determine whether a payor parent can make do with public transportation for their job or whether private transportation is necessary.[142] The 1995 Federal/Provincial Report, dealt with later, attempts to finesse this problem.

A few tentative suggestions can be made for everyday cases:

(i) The minority judgment in *Willick* and the Court of Appeal decision in *Levesque* make it probable that, in future, orders will be increased (or varied upwards) to ensure that the "soft costs"[143] or "hidden costs"[144] are covered, in

Support Act), a secondary one or one of equal priority. Consider the case of a man now living with a new wife and her children by a previous marriage in respect of whom there is a child support order from the wife's former husband. Assume that the man is obliged to pay his ex-wife child support for his biological children. If the money coming into the man's home from his step-children's father balances his payments then out to his children, the child support procedures have incurred administrative costs at no gain to the custodial parents and step-parents concerned. However, if the money coming into the home from the step-children's biological father is less than the outgoings to the man's first family then financial tensions are clearly produced. This has been at the root of the debate in Britain about the balance of support rights of first and second families.

[138] *Willick*, *supra* footnote 1 at para. 59.

[139] *Ibid.* at 438, para. 32.

[140] See *supra* footnote 1 at paras. 26 and 36.

[141] See the 1991 and 1992 Reports of the Federal/Provincial/Territorial/Family Law Committee and the 1995 Report of the Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support dealt with in the Second Part of the Article.

[142] See *ibid.* para. 63.

[143] To use the Alberta Court of Appeal term in *Levesque*, *supra* footnote 1 at 436.

[144] To use the term found in *Willick*, *supra* footnote 1 at para. 72.

so far as the payor parent can afford it. Orders may become bigger. How much bigger will depend on the realities of what payor's can afford. In this sense, the fact that all the cases involved high income families makes it difficult to apply their *rationes* to families with more average incomes.

(ii) Desirable though it may be to have COLA clauses in separation agreements or minutes of settlement, there is little guarantee that the income of the payor spouse will increase at the same rate as inflation. At present, when cuts in salaries of public service workers are common and there is a move towards part-time employment in service industries for both men and women, *Willick* represents a far from representative case. A lawyer for a payor spouse would do well to restrict "cola" increases to cases where the income of the payor is expected to increase by the full extent of the costs of living. This is particularly true where the future position in relation to the rate of tax is unclear. Such COLA agreements should be limited in time.

(iii) The suggestion made by the Alberta Court of Appeal in *Levesque* that a child support should constitute 20% or 32% of the family's gross income, according to the number of children, is highly questionable. A better test for employees (as opposed to the self-employed) is to use after tax income. There is anecdotal evidence that initially payor parents were seeking agreements from payee parents in Alberta to accept less than the amount of child support fixed in a court order in the belief that the enforcement mechanisms were unlikely to catch up with a payor in default.[145] Withholding Provincial driving licences from those in arrears with support payments that recently proved to be an effective low cost means of securing payment of arrears.[146]

(iv) There are dangers in payor/non-custodial parents or their lawyers adopting an unduly negative "fight to the death" approach. This clearly rebounded against the husband in *Edwards*. Offers by non-custodial parents to settle for less than the current order is fraught with danger save where there is clear evidence of reduced income.

(v) Tax arrangements by the self-employed aimed at reducing taxable income are likely to receive close scrutiny from the courts.

(vi) It seems likely that a reserved income will be allowed to the second family to live at a modest level prior to calculating the non-custodial parent's support obligation. In calculating this reserved or protected income a second spouse will be expected to make appropriate contributions to the family income and expenses which may involve them in seeking employment.

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[145] See the Federal *Family Orders & Enforcement Assistance Act*, R.S.C. 1985, c. F-1.4 and its Provincial counterparts. The mere existence of legislation will not guarantee enforcement if Government financial restraint has adversely affected the staffing of those empowered to enforce the legislation.

[146] See the remarks of Alan Rock to the C.B.A. AGM in Winnipeg reported in the Globe & Mail (21 Aug. 1995). The withholding of Federal pilots & fishing licences and passports was contemplated by Mr. Rock for men in arrears of support payments.

(vii) Care should be taken when settling child support orders to ensure the terms of the agreement indicate:

(a) cases where the needs of the child are not being met by the parents because the income of the payor parent does not permit this;

(b) future factors which are demonstrably within the contemplation of the parents at the time of the making of the agreement, and which are intended to be an exception to a rule allowing a reopening of the agreement on the basis of the needs of the child; and

(c) factors relevant to spousal support and which are only to permit reopening of the agreement on the basis of a *radical change of circumstances.*

(viii) contested variation proceedings are likely to be longer than at present, although evidence from Alberta does not reveal such a trend at present.

(ix) given the difference in approach of black letter judges and those with an expansive sociological approach, the need to "know one's judge" becomes even more important than usual.

Outstanding problems include the extent to which an incentive should be given to the non-custodial parent to prevent them simply declining to work. In a tight job market it may be difficult to know what to do with a parent who decides that it is hardly worth working. If the expenses of getting to work and other employment expenses are not allowed for, the result may be that the non-custodial parent "throws in the towel" with the result that both the first and second families become a charge on the public purse. But of course the judicial practice of "attributing income" may prove salutory.[147]

[147] For example *McGee* v. *McGee* (1994) A.J. No. 319, *Parsons* v. *Parsons* (1994) A.J. No. 582 and *Rymut* v. *Rymut* (1995) A.J. No. 865 all as yet unreported.