

**REFORM OF THE LAW OF CHILD SUPPORT:  
BY JUDICIAL DECISION OR BY LEGISLATION?  
(Pt. 2)**

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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/Territorial Family Law Committee's 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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#### V. *The Legislative Approach — The British Child Support Act 1991*

The British reforms stem from reasons similar to those in Canada: Governmental concerns, in relation to a soaring social security budget, primarily caused by a general increase in divorce, cohabitation and single-parentage.<sup>148</sup> Figures suggested that less people were receiving regular maintenance and instead were

<sup>148</sup> Figures suggest a three-fold increase in the number of divorces from 1970 compared with those of in 1989, Weitzman & MacLean, *supra* footnote 3; Judicial Statistics 1989, Cm 1154:57; Edwards and Halpern "Making Fathers Pay", (1990) 140 N.L.J., 1687. In 1989, 770,000 (two-thirds of single parent families) were dependent on income support, compared with a figure of 330,000 in 1980, although maintenance receipt did not grow in line. In 1981, around half of single parents were receiving maintenance but that figure had tumbled to less than a quarter by 1989. The cost of this, in real terms, rose from £1.4bn in 1981 to an incredible £3.2bn in 1989 (an in depth background study is contained in the Government's White Paper 'Children Come First' (CCF), H.M.S.O. 1990 Cm 1264, 2 volumes).

being forced to turn to the state for financial assistance.<sup>149</sup> Secondly, the government found deficiencies in the court system: awards were inconsistent, generally low, and did not adequately reflect the costs of child maintenance.<sup>150</sup> There was no automatic periodical review and many single parents, finding the system confrontational, unpredictable, costly and slow, decided not to proceed for a variation of the award.

The unpredictability of case-by-case court awards was found to be out-dated and so the Government turned to legislation in an attempt to implement a coherent, reliable solution to maintenance liability, assessment and enforcement. The legislation had to ensure that parents honoured their responsibilities to their children whenever they could afford to do so; to strike a fair and reasonable balance between the liable parent's responsibilities for all the children he or she was liable to maintain; the system had to produce fair and consistent results; maintenance payments had to be reviewed regularly to reflect changes in circumstances; parents' incentives to work were to be maintained; the public was to receive an efficient and effective service and dependence on state Income Support was to be reduced.<sup>151</sup> The combination of these political and moral ideals resulted in the *Child Support Act 1991*.<sup>152</sup>

The legislation is extremely complex and lengthy and brings into force a new administrative method of child maintenance calculation based almost entirely on the use of a mathematical formula, itself based on state income support levels with only limited scope for the exercise of discretion by those applying it.<sup>153</sup> Where the *Act* applies, the courts have only a limited residual jurisdiction. Instead the responsibility for assessment, collection and enforcement of child maintenance is administered by the Child Support Agency. This is a semi-independent Government agency, staffed by child support officers, headed by

<sup>149</sup> Court maintenance orders only accounted for 10% of single parents income, whilst income support accounted for 45%.

<sup>150</sup> Average weekly maintenance in 1990, for one child (up to 18), was £18 (see CCF at Vol.2/26, 4.1.1 - 4.7.18). One particular survey of English magistrates' courts found that 70% of registered court orders were for £7 or less per week (see Edwards and Halpern, *supra* footnote 148 at 1687). The National Foster Care Association's recommended allowance for foster-parents, for caring for one child (under 5), was £34.02 per week, illustrating how out of touch the courts were with the real costs of child care. There was also considerable variation in the maintenance awards as a percentage of the absent parent's income with awards actually decreasing, as a percentage of income, where there was more than one child. Awards were frequently made in terms of round numbers e.g. £5 or £10, giving the impression that the orders were being calculated at these figures for the purposes of convenience rather than to correctly reflect the costs of child maintenance (see CCF at Vol.2/27, 4.1.1 - 4.7.18).

<sup>151</sup> See CCF at Vol.2/i.

<sup>152</sup> 1991 c.48.

<sup>153</sup> For a damning criticism of the formula see the comments of Lord Simon, a former President of what was to become the Family Division of the High Court, during the passage of the Bill in the House of Lords Official Reports for Feb. 25th 1991 col 817: "It is just as incomprehensible as the ancient Egyptian hieroglyphs must have been to an illiterate peasant in the Nile Delta".

a Chief Child Support Officer whose duty is to advise them on their functions, keep the *Act's* operation under review, and to make an annual report to the Government. Performance-related pay is involved for the Agency's senior officers.

#### A. *The Basic Principles*<sup>154</sup>

The *Act* has as its main principle, the philosophy that the natural parents of a child should be responsible for the maintenance of that child. A child is deemed to be a 'qualifying child' under the terms of the *Act* where one or both of his parents are absent. Applications can only be made on behalf of natural or adopted children, with the court retaining jurisdiction mainly in respect of :

- (i) step-children and other children of the family;<sup>155</sup>
- (ii) cases involving "top up" where the income of the absent parent exceeds the statutory maxima ( currently in excess of \$110,000 p.a.);<sup>156</sup>
- (iii) cases where either the child or one of the parents is habitually resident outside the jurisdiction;<sup>157</sup>
- (iv) cases of children beyond the *Act's* age limits. These are 16 (18 where the child is unemployed) or 19 where the child is undergoing secondary education;<sup>158</sup> and
- (v) cases involving certain education, training or disability payments.<sup>159</sup>

The *Act* defines an 'absent parent' (hereinafter AP) as one who does not live in the same household as the child and the child has his home with a person who is, in relation to him, a 'person with care' (hereinafter PWC). A 'special case' exception exists where both parents are absent or both provide care.<sup>160</sup>

Both the AP and PWC may apply to the Agency in order that a child support officer can carry out a maintenance assessment and make arrangements for the subsequent collection and enforcement of that assessment. However, where the PWC<sup>161</sup> is in receipt of state benefits, she is bound to authorise the Agency to

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<sup>154</sup> For ease of understanding, the description of the major mechanisms of the legislation has been somewhat simplified and should in no way be taken to be wholly inclusive of all the provisions.

<sup>155</sup> Child Support Act 1991, C.48.

<sup>156</sup> *Ibid.* s.8(6).

<sup>157</sup> *Ibid.* s.44.

<sup>158</sup> *Ibid.* s.55.

<sup>159</sup> *Ibid.* s.8(7) & (9).

<sup>160</sup> The significance of this is expanded on later in this article.

<sup>161</sup> For ease of expression, the 'absent parent' (AP) is referred to as male and the 'person with care' (PWC) as female. Although the roles may be reversed, this is the position in the vast majority of cases.

make an assessment by completing a Maintenance Assessment Form.<sup>162</sup> The PWC must also provide, as far as is reasonably possible, information which will enable the Agency to trace the AP. This requirement may be waived where there are reasonable grounds for believing that the surrender of such information would be likely to cause risk of harm or undue distress to either the PWC, or any child living with her. If the PWC refuses to co-operate and is deemed to be withholding information e.g. refusal to identify the AP and the child support officer considers that there is no reasonable excuse for her doing so, he may issue a 'Reduced Benefit Direction'. The effect of this is to reduce the PWC's benefits by an amount equivalent to 20% of her personal state benefits allowance (approx \$18.00 at 1993-94 rates) for 6 months, and thereafter by an amount equivalent to 10% for a further 12 months. The reduction ceases either on the PWC's co-operation or at the end of the reduction period.

The maintenance formula is based on current state income support rates (social assistance)<sup>163</sup> which are regularly updated and so should provide a constant, accurate basis for determining maintenance payments. The formula is applied in the same manner to all maintenance assessment applicants, regardless of their financial situation, in order to eliminate inconsistencies, which was considered a fundamental failing of the previous system. The algebraic assessment is extremely complicated<sup>164</sup> and thus difficult to explain verbally (a computer is required even to make the most basic assessment) and so the following description deals with the matter rather superficially. Basically, a calculation is made to determine the amount required to care for the child on a 'day-to-day' basis — the 'Maintenance Requirement' (hereinafter MR). The MR incorporates all the state benefits which would be payable to the qualifying PWC in the circumstances. Subsequently, the assessable income of each parent is calculated by reference to the parent's income after the payment of tax, national pension contributions and half of pension contributions less the parents 'exempt income' (the parent's essential expenses which must be met before maintenance

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<sup>162</sup> Where a form is not completed within a reasonable time, an emergency assessment can be made at a higher level than is likely to flow from the completed assessment in an attempt to encourage the person concerned to complete the forms. Thus far the Government has been unwilling to use this power on a large scale basis in view of its political unpopularity and on December 21st 1994 (*The Independent*, December 22nd 1994) the Government announced its intention to shelve up to 350,000 cases in which forms had not been filled in as a practical response to the backlog the Child Support Agency was facing. Such a move obviously irritated those who had faithfully, if reluctantly, filled in the forms in a timely way.

<sup>163</sup> Income support rates are currently used for setting the level of prescription charges, legal aid rates, local government fees, etc.

<sup>164</sup> See Appendix 1 at the end of this article for the initial schematic representation of the formula by kind courtesy of Dr. Fran Wasoff, Department of Social Policy, Edinburgh University. For those wishing to follow the detail of the calculation see Hayes & Williams, *Family Law — principles, policy and practice*, (Toronto: Butterworths, 1995) at 546 ff or Barton & Douglas, *Law and Parenthood*, (Toronto: Butterworths, 1995) at 208 ff.

is paid'.<sup>165</sup> Finally, the total income and selected outgoings (basic essentials) of each parent are allocated in conjunction with the MR to arrive at a figure which the PWC is notionally contributing and which the AP should pay. The principle is that, subject to leaving the AP with an adequate "protected income" the MR should be met from the half of the AP's assessable income (akin to a marginal tax rate of 50%). This figure reflects the general resources of both parties and a child care element for the PWC and so the formula does have the facility to decrease or, indeed, increase the level of payment above the basic maintenance assessment depending on the relevant financial circumstances. In order to provide an incentive to the AP to remain in work and to feel that they are better off than being on income support, the AP is entitled to retain an extra £8 p.w. plus a further 10% of the difference between disposable income exceeds his protected income.<sup>166</sup>

The basic formula is displaced where the paying parent (AP) has the qualifying child in his or her custody for 104 days in the year.<sup>167</sup> This has led to considerable haggling between parents. Where a parent has a child for a month in the summer, a week at Christmas or New Year, a week at Easter and alternate weekends it is not difficult to see how close to the 104 day rule one could get. Haggling over the last few days to make the magic 104 days can produce considerable bitterness.<sup>168</sup>

The Agency is also empowered to deal with matters relating to collection, payment, arrears and enforcement. Where applicants are in receipt of state benefits, the Agency will automatically arrange a collection service. The Agency has a discretionary right to consider each case on its merits and can specify the arrangement which it believes is most likely to result in timely, full maintenance payments. Should this prove ineffective, it may make 'deduction from earnings' orders to the liable person's employers. The employer is then instructed to make the relevant deductions from the liable person's earnings and pay them directly to the Agency. The Agency also has the power to enter into agreements with liable parents concerning the payment of arrears. In cases where such agreement cannot be reached, interest is calculated on the sum until such time as the debt is satisfied. The last resort is for the Agency to approach the courts to seek a liability order to allow them to seize goods or effect bank account arrestment. If the bill remains unpaid for no acceptable reason, then the court may commit a liable person to prison for a maximum of six weeks.

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<sup>165</sup> This constitutes the income support that a person over 25 would receive (social assistance), the appropriate allowances for any children of the AP living with him together with reasonable housing costs The Child Support (Maintenance Assessments and Special Cases Regs), S.I.1991 # 1815 Reg.9).

<sup>166</sup> Child Support (Maintenance Assessments and Special Cases) Regs. 1992 Regs 11 & 12.

<sup>167</sup> Child Support (Maintenance Assessments And Special Cases) Regs. 1992 S.I. 1815 Reg. 1.

<sup>168</sup> See s.3 of the *Act* and Reg.1 of 1992 S.I. # 1815

Clearly assessment and enforcement of orders against self-employed payers is difficult.<sup>169</sup> The *Sunday Times*<sup>170</sup> raised a number of examples where it was believed that fathers were enjoying a standard of living beyond that which their assessed earnings for tax purposes would seem reasonable.<sup>171</sup> Either tax advantages were being carefully used or assets transferred into the names of new partners. The Select Committee on Social Security recommended the passage of new regulations in April 1996 and the introduction of a pilot scheme in Hastings to allow the C.S.A to ignore tax returns and certified accounts and where it appears that the men are living before their ostensible means they will be asked to explain how they can afford these luxuries. Failure to provide a satisfactory explanation would lead to adverse inferences being drawn by the C.S.A. Opponents suggested it would merely lead to vindictive ex-spouses spying on their ex-partners. The Chairman of the Social Security Select Committee was reported to be enthusiastic for the Inland Revenue to take over the collection of child support.<sup>172</sup>

Besides the automatic review of the maintenance assessment each calendar year, the *Act* allows for a number of other basis for review.<sup>173</sup> These are on the grounds either of a change in one or both parties circumstances, one or both parties belief that the child support officer has erred or indeed where the child support officers believe, themselves, to have made a mistake. In such situations, the maintenance requirement must be reviewed. In cases of any appeal,<sup>174</sup> an independent tribunal service sits to consider matter but further appeal can only

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<sup>169</sup> The National Council for One Parent Families was reported to be seeking judicial review against the Child Support Agency in a case brought by Denise Woodley of Ross on Wye after the Agency declined to pursue her former partner for £2000 in child support because he was self employed as a truck driver — *The Guardian* (19 December 1995).

<sup>170</sup> 28 January 1996.

<sup>171</sup> An example was given of a record producer who drove a Porsche, lived in a \$600,000 home where he employed a gardener and cleaner, who had been originally ordered by the C.S.A. to pay over \$475 p.m. only to have it reduced to \$200 p.m. and finally nothing after the C.S.A had seen his accounts.

<sup>172</sup> *The Scotsman* (2 February 1996).

<sup>173</sup> See S.I. 1992 # 1813 Reg.17.

<sup>174</sup> Any decision made by a Child Support Officer gives rise to a right of formal review and appeal. In most cases, a formal review must be requested before an appeal can be made. However, appeals against a 'reduced benefit direction' go immediately to a Child Support Appeal Tribunal, without the requirement of a prior review.

Since there is no appeal against the mechanical application of the algebraic formula the rights of "appeal" are restricted to the limited number of cases where there is an element of discretion such as what constitutes "reasonable housing costs" or where a mistake has been made in the calculation. This has occurred in a surprising number of cases either because a blank has been left in the somewhat complicated forms that absent parents or parents with care are required to fill in, or because changes in overtime, short-time working or other elements used in the calculation turn out not to be representative. A widening of the appeal mechanisms, in a narrow range of cases, was announced by the Government on January 23rd 1995 (See *The Times* 24 January 1995). The proposals for change are discussed in more detail in the main text *post*.

be made on a point of law to the Child Support Commissioner or, ultimately, to the Court of Appeal.

The above is a basic view of the mechanisms which operate within the *Child Support Act* and represents merely the 'bare bones' of the system, the meat of which is far more complex and convoluted and largely contained in regulations<sup>175</sup> some of which amend earlier regulations.<sup>176</sup> The legislation and its provisions are quite extensive and do not easily lend themselves to summarisation, particularly when the delegated legislation and policy seem to change frequently. That said, the following describes the problems faced, by APs, PWCs and even British practitioners, in relation to some of the *Act's* more contentious provisions.

<sup>175</sup> The current list as at February 1st, 1996 consists of:

1. The Child Support Act 1991 (Commencement No 1) Order S.I. 1991 #1431;
2. The Child Support (Information, Evidence and Disclosure) Regs; S.I 1992 #1812;
3. The Child Support (Maintenance Assessment Procedure) Regs, S.I. 1992 #1813;
4. The Child Support (Maintenance Assessments & Special Cases) Regs, S.I.1992 # 1815;
5. The Child Support (Arrears,Interest and Adjustment of Maintenance Assessments) Regs, S.I. 1992 #1816;
6. The Child Support Act, 1991, (Commencement No 2) Order S.I. 1992 #1938;
7. The Child Support (Collection & Enforcement) Regs. S.I. 1992 # 1989;
8. The Child Support Commissioners (Procedures Regs.) S.I. 1992 # 2640;
9. The Child Support Appeal Tribunals (Procedures) Regs. S.I 1992 # 2641;
10. The Finance Act (No 2) Act 1992 c.82 s.62 (Commencement Order) S.I.1992 #2642;
11. The Child Support (Collection & Enforcement of Other Forms of Maintenance) Regs. S.I. 1992 #2643;
12. The Child Support Act (Commencement No 3, Transitional Provisions) Order S.I. 1992 # 2644;
13. The Child Support (Maintenance Arrangements & Jurisdiction) Regs. S.I. 1992 # 2645;
14. The Child Support Fees Regulations S.I. 1992 # 3094;
15. The Child Support (Northern Ireland Reciprocal Arrangements) Regs S.I. 1993 #584;
16. The Child Maintenance (Written Agreements) Order S.I. 1993 # 620;
17. The Child Support Appeals (Jurisdiction of Courts) Order 1993 S.I.# 961;
18. The Child Support(Miscellaneous Amendments & Transitional Provisions) Regs. S.I 1994 # 227;
19. The Child Support Act 1991 (Consequential Amendments) Order S.I.1994 # 731;
20. The Child Support (1995) Order (Commencement No.1) Order (Northern Ireland)1995 #42;
21. The Child Support Act 1995 (Commencement No 1) Order 1995 # 2302;
22. The Child Support and Income Support (Amendment) Regs. (Northern Ireland) 1995 #162;
23. The Child Support (Misc. Amendments) Regs.1995 #123.
24. The Child Support (Misc. Amendment) Regs. (Northern Ireland) 1995 #19.

<sup>176</sup> For instance the Original Regulations were amended by the 1994 Regulations to:

- (i) phase in support for APs with second families who already had formal support agreements under the old system;
- (ii) helping those on protected lower incomes by a substantial increase in what can be kept after paying support;



## B. *The Maintenance Formula and Assessment*

One of the major failings of the previous system was that it was based entirely on court discretion and, as a result, there was no consistency in awards. The new formula-based approach aimed to remedy that situation by applying a set of rules and regulations which affected everyone similarly. The hope was to double the average weekly child support payment. However, the complexity of the formula does not lend itself easy to calculation and as a direct result, practitioners have felt obliged to invest in expensive computer systems to meet their clients needs in respect of maintenance enquiries. This has led to increased expenditure in terms of money and human resources to attain an adequate level of computer literacy and competency. It is hardly surprising that with complicated forms being required to be completed usually by three people, (the absent parent, their partner and the parent with care), that considerable numbers of the computer calculations made by the Agency have gone awry.<sup>177</sup>

Moreover the initial criteria within the formula made no allowance for a number of issues which may be considered fundamental to the fair and comprehensive assessment of the maintenance requirement. A number of the more important omissions are:

- (iii) increasing the proportion of income just above the protected minimum which APs may keep to strengthen work incentives;
- (iv) reducing the additional element of support where there are only one or two children;
- (v) reducing the amount paid for care as children grow older, by 25% at 11 and a further 25% at 14;
- (vi) waiving the \$80 p.a. collection fee charged to APs to cases where the PWC is on benefit, unless the Agency is actually collecting or enforcing the maintenance.

However, even these changes were not sufficient and the Government announced in January 1995 (see main text post) its intention to make substantially greater amendments.

<sup>177</sup> The latest figures derived from the Child Support Agencies Annual Report (H.M.S.O. July 19th 1995) suggested that only 46% of C.S.A. maintenance assessments were correct- the average over assessment being about \$25.00 p.w. Although £76,000,000 had been collected, the amount unpaid had risen from £94 million in March 1994 to £525,000,000. The client satisfaction rate was a low 44% against a target rate of 65%. Dissatisfaction with the Agency by "payer parents" was low, a fact confirmed by the CSA's attitude to overpayments. One such case concerned Keith Richards, a father of two children, whose maintenance requirement was overcharged by £1,450.53 (see *The Times*, 1 October 1994). The CSA declined to repay the money in a lump sum but instead are to deduct £1.49P for the next 18 years, from his weekly payments of £28.91. In a case reported in *The Scotsman* for Nov. 1st, 1995, an £8,000 over demand for payment was alleged to have driven a man to bankruptcy. When the Agency reviewed the situation it was found that monies had been deducted in pounds what it intended to take in dollars. Again, as in the case above the payer is not to get the monies back but will merely have them credited against future payments.

(a) *Contact Costs*

No consideration was originally given for the cost of contact between the AP and the child. It was effectively argued that this goes against the current Conservative government's moral agenda and, indeed, their own conclusions from research on children's needs.<sup>178</sup> This raised a possible challenge to this aspect of the assessment under the European Convention On Human Rights (ECHR).<sup>179</sup> The Convention requires action which interferes with or relates to private or family life to be reasonable, proportionate and non-discriminatory.

(b) *Debt*

The original formula took no account of any outstanding liabilities which AP's may have *exx.* bank loans or mortgages. In many situations, absent parents take on household debt following a separation or divorce settlement. Welfare organisations have expressed concern about the possible effects on an AP's second family or relationship — attempting to support a second relationship whilst paying support and carrying debt will obviously put the welfare of that subsequent family at risk. Concerns have also been expressed at the situation where the AP is in the process of repaying existing debt when he is assessed for maintenance. According to the CSA, "*as a rule, maintenance is treated as a priority debt which comes above all other debts. Maintenance obligations will therefore be taken into account by the courts when other debts are enforced*".<sup>180</sup> The Agency advised 'debt rescheduling' and whilst some lenders were sympathetic, others were not — there was no reason to believe that finance agencies, who have a right to repossess a car<sup>181</sup> used by the AP to get to work or to use for his work, would necessarily be sympathetic. Media reports have illustrated that this situation is common amongst APs, a number of whom have found the pressure overwhelming.<sup>182</sup>

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<sup>178</sup> Media reports aimed at highlighting this point and it would appear that they had little difficulty in finding examples. Granada's Television's 'World In Action', a national current affairs television programme, broadcast on the 1st November 1993, revealed injustices which had befallen a number of absent parents. One such AP, Frank Benardi, had been ordered to increase his £65 per month maintenance for his daughter, to £258. He told reporters that he would no longer be able to afford to pay the £80 ticket to fly his daughter to see him each month.

<sup>179</sup> See Articles 8 & 14 of the European Convention On Human Rights; See also Webster, "CSA Could Be Challenged In Europe" [1993] S.J. 1203.

<sup>180</sup> See Barry, "Payment Of Child Support" (1993) 143 N.L.J. 1193.

<sup>181</sup> For more detail see C. Ervine, *Consumer Law in Scotland* (Edinburgh, W. Green, 1995) at 215 ff. The English law on this topic is the same.

<sup>182</sup> National newspapers carried a suicide story on 25 March 1994, reporting that a Scotsman had taken his own life after the CSA more than trebled his maintenance bill. This was the sixth such reported, CSA-related suicide in the Agency's first twelve months.

(c) *Employment Disincentive*(i) *Travel Costs*

The initial formula made no provision for the inclusion of any legitimate costs incurred in travelling to work. This would appear ludicrous since one would expect there to be provision for such an expense, even if merely on the basis that it is only by working that parents are in a position to pay the maintenance requirement. Support for the inclusion of such costs was echoed by most welfare organisations, many of whom viewed the inclusion of travelling expenses in the formula more as a basic right than a benefit-in-kind.

(ii) *Child Care Costs*

The cost of child care has long been viewed as one of the strongest barriers to women wishing to enter the labour market. This applies both to the PWC, the AP and their partner. However, the formula made no provision for child care costs to be considered as a legitimate expense under 'exempt income'. It seems, in this instance, that the Government initially missed a real opportunity to allow a greater number of single parents the chance to become self-supporting.<sup>183</sup> It has further been recommended that the state should provide free child care, or at least child-care expenses. In the United States, tax relief has been available for child care costs since 1945 for single parents and since 1972 for married women.<sup>184</sup>

(iii) *Income Support Benefits*

Welfare organisations claimed to have been inundated with complaints from fathers who contended that the Agency was crippling them and that they would actually be financially better off on state benefits. It was even revealed that Citizen's Advice Bureau officers had actively encouraged APs to give up earning in the worst scenarios. Moreover many PWCs (predominantly women), in receipt of state benefits, saw little point in taking employment as they would lose financial help with mortgage costs, free school meals and health benefits which were available to them when they were in receipt of social assistance.<sup>185</sup> Although some PWCs might not have received regular maintenance payments,

<sup>183</sup> The 1990 *Bradshaw-Millar Report*, "Lone Parent Families In The UK", found that 91% of lone parents on Income Support wanted to take paid employment either now or in the near future. Their reasons for unemployment stemmed from the basic premise that they could not afford to work and pay a child minder to care for their children (see *Children Come First*, Cm 1264 at Vol.1/6).

<sup>184</sup> See Macaskill in "The National Council For One Parent Families", *From The Workhouse To The Workplace — 75 Years Of One Parent Family Life 1918-1993* (London: NCOFF, 1993) at 51.

<sup>185</sup> See the Preface by Emma Knights and Alison Garnham to the *Child Support Handbook* (London: Child Poverty Action Group, 1994).

many did receive assistance from former partners in the form of occasional purchases of food, clothing and household items. In the wake of the new maintenance assessments, it was unlikely that such gestures would continue. Equally, since child support is deducted pound for pound from income support, PWCs would only be better off if the child support took the PWCs appreciably above income support levels. If they were only left marginally above income support levels then the loss of the "passport" of benefits such as prescription charges, school meals, and the like, available when they were on benefit, left them worse off. To compound matters, even those APs in receipt of state benefits were still expected to make a contribution to maintenance of 5% of their personal benefit allowance (£2.20 at 1993-94 rates), despite the fact that this allowance was supposed to represent the minimum amount of money needed to survive on a weekly basis. Welfare agencies believed that the CSA caused so much disruption to family life that there should at least be a compensatory benefit to those receiving state assistance.<sup>186</sup> The Australian maintenance system entitles the payee in receipt of benefit to retain £7.50 for the first child and £2.50 for each subsequent child. In addition, the payee is allowed 50% of the difference between the assessed figure and the combined allowances for each child. The CSA created an almost unbelievable alliance of APs and many PWCs.

(d) *Clean Breaks*

Prior to the 1991 *Act*, it was relatively common, on the breakdown of a relationship, for the parties to agree that the husband would make over his interest in the former matrimonial property in exchange for a nil or nominal maintenance undertaking in respect of his spouse and children. In this way, the husband was freed of any mortgage and maintenance liability and the wife gained further equity in the property and was spared the trauma of relocation. Further upset was avoided by the fact that, in the event of the PWC's future financial hardship, the Department Of Social Security (state benefits agency) would pay the full mortgage instalments. Although the DSS could have pursued a husband for payments as a 'liable relative', according to Government research in '*Children Come First*', the DSS success rate in this area is particularly poor. Section 9(2) of the 1991 *Act* provided that, '*nothing in this Act shall be taken to prevent any person from entering into a maintenance agreement*'. At first it might appear as if there was an opportunity for 'opting-out' of the *Act*. However, section 9(3) made it clear that despite being able to enter an agreement not to involve the Agency, '*the existence of a maintenance agreement shall not*

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<sup>186</sup> The Family Law Bar Association and the Solicitors Family Law Association both advocated, in their submissions to the House Of Commons Select Committee, that a 25% proportion of the benefit should be made available to the payee. They proposed that this extra maintenance should be consecutive to, and not concurrent with, the maintenance and other income disregards, and should apply to state support recipients (see House Of Commons Select Committee on Social Security, 1st Report, *The Operation Of The Child Support Act* (London: HMSO, No.69).)

prevent any party to the agreement, or any other person, from applying for a maintenance assessment with respect to any child to or for whose benefit periodical payments are to be made or secured under the agreement'. The end result, arguably, led to grossly unfair situations for many APs, the majority of whom felt that they had already come to a "clean-break" settlement with their former spouse. However, the Agency contended that any settlement was between the two parties and, to that extent, did not apply to children. Attempts to reopen these "clean-break" settlements embodied in consent orders failed. *Barder v. Barder*<sup>187</sup> set out the criteria on which the court should base any decision to allow an appeal, out of time, against any previously arranged agreement. The only ground of relevance for our purposes is, 'the new events relied upon invalidated the fundamental assumption on which the order was made so that, if leave were given, the appeal would be certain or very likely to succeed'.<sup>188</sup> The message displayed by more recent case authority, however, was that once litigation was completed, leave should not be given to reopen the order, except in the most limited of circumstances. In *Crozier v. Crozier*,<sup>189</sup> the AP's argument was two-fold. Firstly, that the intervention of the Agency had led to a situation where he was being forced to pay twice over. Secondly, that the abolition of the court's wide powers of discretion under the 1991 Act constituted a 'new event' which invalidated the fundamental assumption upon which the order was made. The judge refused the application to have the order set aside out of time on the basis that the CSA represented a procedural change in the way maintenance was assessed, and not a new event per se. Given the fact that Parliament must have been well aware of the 'clean break' position prior to the Act's implementation, and considering the fact that the DSS can continue to pursue the AP as a 'liable relative', it was difficult to see how the judge could have reached any other decision. Those often affected most severely were APs who, having settled their previous marital relationship, had begun second families. The Law Society itself was particularly critical in this respect following public outcry that the Agency was operating unfairly, inflexibly and not in the best interests of the children.

Lastly, the legislation made no express provision for fathers who transferred their share of the family home to the custodial parent in the expectation of obtaining a reduced child support obligation. The courts held that there was no

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<sup>187</sup> [1987] 2 All E.R. 440 (H.L.); see also *Edmonds v. Edmonds* [1990] 2 F.L.R. 202.

<sup>188</sup> The relevant British case law would tend to suggest, in contrast to *Edwards v. Edwards*, *supra* footnote 1 that the courts have taken the view that a 'new event', brought about by a change in the law, does not constitute a considerable enough impact to justify the reopening of the order. *Chanel v. Worth*, [1981] All E.R. 745 concerned a non-matrimonial consent order where it was held that a subsequent change in the law was not sufficient grounds to justify the order's revocation; see also *de Lasala v. de Lasala*, [1980] A.C. 546. In *Minton v. Minton*, [1979] A.C. 593, it was clearly stated that a 'clean break' was, to all intents and purposes, the final agreement and no further negotiations were to be entered into thereafter.

<sup>189</sup> [1994] 2 All E.R. 143 (Fam. Div.).

power to re-open such agreements.<sup>190</sup> The Government adduced two main arguments for this : (i) that parent's could not barter away the rights of children who were not parties to the agreement and (ii) the calculation of the benefit received was too difficult. The latter was not necessarily so, given that a rough and ready calculation of the benefit represented by the transfer of the husband's share in the house could be made even several years after the event and could be turned into a notional annual return during the period of the child's dependency.

(e) *Changes to the System*

In the light of overwhelming countrywide dissatisfaction with the operation of the Agency, a House Of Commons Select Committee was ordered to examine the Agency's workings in November 1993. It advocated increasing a number of the margins within the formula to try to offer both APs and PWCs some breathing space. Although, the Government indicated its intention to accept a number of these compromises, it was obvious that the formula continued to squeeze too hard in an attempt to gain the 'maximum yield'. The rigidity of the formula meant that the Agency was unable to take account of particular circumstances and, as a result, some children, especially those of a second family and stepchildren, suffered the consequences. A more reasonable approach would have been to allow for an element of discretion within the jurisdiction of a specialist court, specifically geared towards dealing with family matters. The Australian Government realised that the rigid adherence to one formula could produce unjust and unfair results and so an application for review can be heard by the Family Court of Australia which has the ability to consider matters such as 'clean break agreements', high matrimonial debt and travel-to-work costs.<sup>191</sup> There is a clear case for a system of review which allows for, in certain circumstances, a removal from the strict formula. Without such a safety valve, grave injustices were bound to continue.

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<sup>190</sup> *Crozier v. Crozier* *ibid.* There is anecdotal evidence of litigation by fathers against lawyers who advised the making of "clean-break" settlements when the import of the legislation was clear, even though at that stage the legislation was not in force. Some agreements expressly stated that "the clean break" agreement was to be null and void if an assessment under the *Child Support Act* was sought. The British case-law can be contrasted with that in Canada prior to publication of the decision in *Thibaudeau supra* footnote 130 mentioned in the first Part of this article.

<sup>191</sup> The Australian review system is carried out by an independent body, the Child Support Review Office (CSRO). Should a parent feel that he has been wrongly assessed for maintenance, he may appeal to the CSRO and a review officer may then decide to submit a 'substitution order' if he considers that adherence to the original formula is inappropriate. If, however, the officer declines to depart from the original assessment, the aggrieved parent may apply to the specialised Family Court Of Australia for further review, where the grounds for review are set out in law. Figures illustrate that only 1% of assessments have been reviewed, not the torrent that may have been anticipated. See Burrows "Child Support In Perspective", (1993) 90 Law Society Gazette 41.

Some of these criticisms were catered for on January 23rd 1995<sup>192</sup> when Mr. Lilley, the Social Security Minister, announced that the Government was to introduce further amendments to the existing law and regulations. These were expanded in the Government's White Paper "Improving Child Support".<sup>193</sup> The amendments were to include giving Absent Parents (i) a limited right of appeal against the assessment formula as a safety valve for genuine hardship cases; (ii) amendment of the rules to allow recognition of "clean break" settlements entered into before April 1993 by means of a presumption that ex-partners were entitled to half of any equity in excess of £5,000; (iii) recognition of high travel-to-work expenses (those over 10 miles) and high "contact costs"; (iv) a recommendation that fathers with step-children living with them be permitted to offset the housing costs of supporting their new children and family when calculating their liability to their biological children; (v) a cap of 30% on biological parent's net income by way of child support; and (vi) almost halving the maximum level of child support from £400p.w. to £250 p.w.

Amendment to the *Act*, as opposed to regulations, was necessary to deal with some matters including:

(1) the extension of the 1996 deadline, when separated parents with court orders, but not on welfare, were due to be fully integrated into the higher assessments resulting from the administrative process;<sup>194</sup>

(2) a limited system of "departures" from the maintenance assessment formula where the AP can show (a) that because of the special features of the case he faces specific additional expenses not taken into account by the formula and (b) that the departure is "fair" to both parents taking account of their circumstances;<sup>195</sup> The scheme is intended to cover (i) cases where the AP has exceptionally high costs of getting to work; (ii) cases where there are high costs of travel associated with keeping in touch with the child; (iii) particular expenses not covered by the formula such as long term illness to the AP or his dependant; (iv) exceptional costs of caring for a step-child; or (v) certain debts of the former relationship.

(3) the introduction of a "child maintenance bonus", payable when a recipient of child support works more than 10 hours a week, to encourage to seek or remain in work.<sup>196</sup>

<sup>192</sup> *The Times* (24 January 1995).

<sup>193</sup> 1995 H.M.S.O. Cm 2745

<sup>194</sup> *Child Support Act* 1995, s.18.

<sup>195</sup> In an article "Child Support: Reform or Tinkering"? [1995] *Fam. Law* 112 at 113, Judge Roger Bird talked of the fairness also accommodating the interests of the taxpayer.

<sup>196</sup> *Supra* footnote 2, s.10.

These matters found their way into the *Child Support Act* 1995.<sup>197</sup> Other matters were dealt with by regulation.<sup>198</sup> These included some relief for parents with very high costs of getting to work,<sup>199</sup> and an interim “broad brush provision”<sup>200</sup> to take “clean break” settlements entered into before April 1993 into account pending the introduction of the new “departure system from the formula” (to become effective by legislation in 1996.)

The suggestion that PWCs should be able to keep part of the child support without having it deducted pound for pound from social assistance was rejected, though from 1997 an incentive payment of £1,000 will be paid by the Treasury to encourage parents with care to return to work. Parents with care will also be compensated for the loss of certain social security benefits (family credit and disability working allowance).

### C. *The Transitional Period and its Effects*<sup>201</sup>

Originally if a court order for child maintenance was currently in force, no application could be made to the Child Support Agency until April 1996, a date now known to have suffered slippage in the light of the *Child Support Act* 1995. Under the original scheme applications, at that date, would only have been accepted according to the first letter of the applicant’s surname. This attracted adverse criticism on the part of APs, some of whom would have been forced to pay substantially increased maintenance much earlier than others. The problem lay with insufficient Agency funding which led to understaffing and, therefore, an inability to accept all applications at the same time. The Agency could, however, make an assessment, notwithstanding the existence of a court order, if the PWC was in receipt of the relevant benefits. Although the courts retain jurisdiction to vary or recall an order during the transitional period, they could not grant an order in an action commenced after 5 April 1993. Instead, the PWC must apply to the Agency for a maintenance assessment. Until the CSA actually makes a maintenance assessment, the courts possess jurisdiction to grant an order for child support actions which were begun before 5 April 1993. On that basis, a PWC (or child) can still apply to the Agency up until the point where the court grants an order. However, once the court grants an order, no

<sup>197</sup> For more detail see the annotation of the *Act* in Current Law Statutes, or the articles by Mantle, “Child Support Revisited” [1995] S.J. 788 and Judge Roger Bird, “Child Support Tinkering or Reform” [1995] Fam. Law 112.

<sup>198</sup> Child Support & Income Support Amendment Regs.1995, S.I. #1045.

<sup>199</sup> High costs assume travel in excess of 150 miles per week. Where over 150 miles per week are travelled, a flat rate allowance of 10 pence (20 cents) per mile will apply.

<sup>200</sup> The scheme only applied to transfers of capital (usually a share in the family home) of over £5,000 (\$10,000). Transfers above that amount would be divided into bands e.g. £5,000-£9,999, £10,000-£25,000, and over £25,000. The scheme would assume each of the ex-partners was entitled to half the sum transferred by increasing the exempt income of the payer by £20, £40 or £60 p.w.

<sup>201</sup> See Barton & Douglas, “Law & Parenthood” (Toronto: Butterworths, 1995) at 207 ff.



application can be made to the Agency until 1996 at the earliest. This was alleged to lead to an increased incidence of acrimonious divorces in situations where the PWC decides to abandon a child support claim in a divorce action and, instead, apply to the Agency for a maintenance assessment. It is likely that other claims for property or capital transfer will, thereafter, be stoutly defended and even previously agreed custody terms may be contested. It has further been suggested that where a divorce action has been based on two years non-cohabitation, an application to the Agency may well result in the defendant withdrawing his consent to the proceedings.

The original law, however, became liable to change as the Government announced in January 1995 that the previous 1996 deadline, when separated parents with court orders (but not receiving benefits) were to be fully integrated into the new higher assessments resulting from the administrative process, would be extended because of an inability of the system to cope with the workload.<sup>202</sup> The shortcomings of the start up of the system had been criticised by the Parliamentary Ombudsman, who had commented on the maladministration in undertaking a major initiative without a pilot project; with new, perhaps inadequately trained staff, who were a substantial part of the Agency's workforce; with untried procedures and technology; and where the quality of service was subordinated to sheer output.<sup>203</sup>

As has been mentioned under the heading "Basic Principles", the courts retain jurisdiction in certain limited cases. A strong body of opinion holds that judges should use the *Act's* provisions as a 'rule of thumb' when calculating transitional maintenance requirements, usually in variation proceedings. It would have been strange for the courts to continue to make orders based on the old system and in *E v. C*<sup>204</sup> it was stated that it would be far preferable to encourage parents to meet liabilities they must eventually face under the *Act*, sooner rather than later. Whereas the method of Agency assessment is potentially open to a system of swift review and appeal, current court procedure is cumbersome and expensive. Courts should also utilize their current jurisdiction to help phase-in higher maintenance levels in an effort to assist absent parents to adjust to the increased assessments. On this basis, the formal Agency assessments from April 1996 (or later) should not come as such an overwhelming shock. Further problems also existed where an applicant requested the court to revoke or discharge an existing order. The situation created the opportunity for abuse by those who wished to circumvent the due process (i.e. waiting until April 1996) and 'jump the queue'.<sup>205</sup>

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<sup>202</sup> See *The Times* (24 January 1995).

<sup>203</sup> *Ibid.*

<sup>204</sup> See *The Times* (4 December 1995) in which Douglas Brown J. indicated that magistrates and judges should take Child Support Agency maintenance assessments into account when dealing with variation proceedings.

<sup>205</sup> Whereas the courts must at all times consider the welfare of the child, a recent English County Court ruling (Middlesborough County Court, 25 October 1993, Judge Bryant) decided that in this situation, the proper course of action was for the PWC to apply

In relation to the revocation of existing child maintenance orders, it is desirable there should be positive guidelines set out to determine when an order may be revoked, enabling a subsequent application to the Agency. There should also be a provision under the *Act* for non-benefit applicants to contract out of the *Act*, by agreement, in which case the courts would retain jurisdiction. In these circumstances, the case could only be referred to the Agency on both parties' agreement, upon the PWC's receipt of benefit or upon subsequent order of the court. With regard to separation agreements or 'clean breaks', the current situation fosters the potential for abuse for the post 1996 situation, when non-benefit PWCs with existing maintenance agreements will be eligible to call upon the Agency to ensure that they are able to enjoy both the proceeds of the previous original settlement and the newly assessed maintenance requirement. In this respect, the current Australian Child Support legislation deals with the matter in a much more realistic manner, by viewing transferred equity as a 'down-payment' on future assessed maintenance. The equity is converted into weekly amounts which are subsequently deducted from the AP's assessed maintenance payments.

#### D. *The Agency and Government Policy*

The original Child Support Agency proposals were rushed through the Parliamentary process and little time was allowed for consultation or advice. The Government dismissed the majority of initial criticisms and, consequentially, their original White Paper was left virtually unrevised. On October 29 1990, the then Secretary Of State for Social Security announced proposals to set up the Agency, assuring everyone that it would 'prevent maintenance becoming a source of conflict between parents'. Unfortunately, informed opinion was undervalued and in consequence the opposite effect has been achieved with relative ease. It is also increasingly obvious that the Agency has been, to a certain extent, underfunded and lacks both the resources and facilities to adequately carry out its tasks. The Agency has been particularly slow in processing applications — anecdotal evidence suggests that until recently even the most straight forward applications can take between six and twelve weeks to process. This is an unreasonable length of time given the fact that some PWCs may be receiving no maintenance or benefits during this period.

Few would disagree with the general principle that parents should be financially liable for their children. However, it would appear that the main aim of the 1991 *Act* has been to 'return financial responsibility for children from the social security system to absent parents'. The Government had particularly high expectations of the Agency, anticipating a saving of £530M in social security

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to the court for a variation of the existing court award and not to apply for a revocation during the transitional period. The matter has subsequently returned to the courts. See *infra* footnote 213.

benefits in its first year of operation. However, during the course of 1993, figures suggested that the Agency would fall some £130M short and so the 'Closing The Gap' Project was initiated.<sup>206</sup> A leaked memorandum spelled out how CSA officers had been informed that they were to pursue what have now been referred to as 'soft targets' — typically middle income, mainly middle class fathers who previously paid maintenance, either amicably or by court agreement. These men are easily traced, reasonably affluent and represent the most effective use of resources for the Agency. Amid massive media coverage of this issue, it also became apparent that in certain instances, CSA officers were working on a bonus scheme whereby the more money they saved the government in successful maintenance applications, the more money they received personally by way of salary bonuses.

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<sup>206</sup> Alistair Burt, Social Security Under-Secretary, claimed that the Agency would deal with 830,000 applications in its first year, resulting in a saving of £530M in Social Security benefits. In retrospect, the Agency was, perhaps, given overly-inflated targets to reach. In its first three months of full operation, 155,000 application forms were issued to PWCs and roughly 40,000 maintenance enquiry forms were sent to APs. Subsequently, just over half of each were returned. Only 4,000 actual assessments were made (see "Child Support Update", Welfare Rights Bulletin, #117 at 3). The Government, facing a rather embarrassing situation, realised that additional measures were required in order to ensure the Agency reached its expected year-end targets. It is rumoured that Ros Hepplewhite, the Agency's Chief Executive told the Secretary Of State for Social Security, Peter Lilley, that the Agency was going to fall £130M short of the expected amount. She was told that this was unacceptable. In order to put the Agency 'back on line', the 'Closing The Gap Project' was initiated in early August 1993. A leaked memorandum spelled out exactly how this 'gap' was to be filled. Mr. David Moody, divisional manager of the CSA for Wales and Merseyside, said that staff should target the more profitable cases where maintenance liabilities would be high. The memorandum contained the sentence, '*the name of the game is maximising the maintenance yield — don't waste a lot of time on non-profitable stuff.*' Rumours then began to circulate that the Agency's top priority was to meet Treasury savings targets, primarily by chasing fathers who were already paying some maintenance and whose financial status suggested that a formula-based assessment would produce a '*maximum yield*'. This hearsay proved well founded when the matter arose at the Commons Select Committee hearing, where it was admitted that £480M of savings would be retained by the Treasury with a mere £50M to be retained by the PWCs. See House Of Commons Select Committee on Social Security, *supra* paras. 24-37; see also "Chasing The Wrong Kind Of Guy" *The Independent* (5 November 1993).

On May 2nd 1994, the *Times* reported that in an initiative to encourage CSA staff to meet daily target quotas, it had even been suggested that they should physically ring a "target bell" at one of the CSA's national centres each time a "hit" was recorded i.e. each time a father was forced to commit himself to pay.

On Jan. 24th 1995 the *Times* indicated that the Child Support agency had collected £473 million since 1993 by making 400,000 assessments and tracing 58,000 absent fathers. As a result of changes to the scheme announced the day before the costs were increased from £50 million rising to £110 million in each of the three subsequent years thus reducing savings to the Treasury.

The current gap, as revealed on July 19th 1995 when the Child Support Agency's latest Report was published by H.M.S.O, revealed that according to the Government Auditor although the Agency had collected £76, million in 1994/5, the current unpaid amount had risen from £94.9 million in March 1994 to £1995 million in March 1995.

The public's initial expectations were significantly higher than they are now, having witnessed the faltering first steps of the Agency.<sup>207</sup>

Unfortunately, the legislation has not, as the National Council For One Parent Families hoped, increased women's power and resources. Rather, it has firmly been a political cost-limitation device, thinly, and rather poorly, disguised as a moral and social crusade. The net effect has been somewhat disappointing for the Conservative Government, since they have lost rather than gained the public's support and recouped far less money than they had hoped. The Agency has been far from a resounding success and has not served to advance the welfare of children. It has appeared to be motivated by a strong desire to reduce constantly spiralling Government spending and not by some inherent moral inclination to ensure that parents are aware of their responsibilities to their children. It may well have been more accurately named the 'Treasury Support Agency'. There are even allegations that the Agency in its haste to collect money, has breached Government privacy provisions aimed at protecting personal data protection. Apparently the Agency has been disclosing more

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<sup>207</sup> The original Chief Executive of the Agency resigned, having been described as a "scapegoat" for public outcry over the Agency's work. She has apologized because standards had not been acceptable and targets for raising money had been missed. The CSA had sent, in error, letters to happily married men alleging that they owed support for children of whom they had never heard. Many of these letters were opened by their wives and the CSA had been linked to several suicides by men who had received what they believed to be excessive demands for cash (*The Times* 3 September 1994). (In *The Guardian* for 19 December 1995 it was reported that a divorced father had killed himself and his four children after receiving a demand for £2,800.) In its second full year of operation, the CSA continued to foster extremely poor relations with the general public as a result of some questionable policy decisions. An interim assessment of £76 p.w. was made against an 80 year-old man, whose only income, a state pension, was only £61 p.w. (*The Daily Telegraph* 16 January 1995). The CSA was reported to be seeking orders against man who provided semen to impregnate a lesbian mother under an A.I.D. arrangement (*The Sunday Times* 3 July 1994). The CSA also tried to make a father, who had paid £6,800 to a surrogate mother, to pay support for the upkeep of twins born to the surrogate mother who refused to hand them over (*The Guardian* 7 September 1994). The Agency was criticised by the Parliamentary Ombudsman for a case in which a man was wrongly identified as the father of a child but took 6 months to acknowledge its error (*The Times* 19 January 1995). The Third Report of the Parliamentary Commissioner for Administration "Investigation of a Complaint Against the Child Support Agency" (1995) revealed that the Agency declined to compensate a married man wrongly accused of being the father of a child born outside marriage. Perhaps worse still, when a Strathclyde widower sought social security the Child Support Agency was reported to have sent him a form requesting details of his wife, who had died four years previously, so that she should contribute to the support of her children. (*The Guardian* 10 August 1995).

Nor has the recent reputation of the Agency been helped by the news from the House of Commons Select Committee on Social Security that, though the Agency had begun to turn the corner after a dire start, it was only a matter of time before its arrears in collection topped £1 million. (*The Guardian* 2 February 1996). The House of Commons Public Accounts Committee were reputed (*Guardian* Dec.21st 1995) to be gravely disturbed that despite 4 in 10 of the Agency's demands being riddled with errors, the accuracy target rate for 1995-6 had only been set at 75%.

information of an AP's financial information than is necessary thus enabling the PWC to easily calculate the earnings of the PWC's new partner and addresses of new partners have also been disclosed leading to attacks and damage to property by the PWC.<sup>208</sup>

### VI. *The 1995 Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support*

During the course of writing this paper the "Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support" was published.<sup>209</sup> Its recommendations were tentative having been written before delivery of the decision of the Supreme Court of Canada in *R. v. Thibaudeau* on the issue of whether or not the prior law under which support was deductible by the payer and includible by the recipient would be maintained. The recommendations form an interesting alternative to the British approach and have been briefly summarised.

#### A. *Older Children*

The Committee felt that since most children remained in school until age 18, the age limit of 16 fixed in section 2(1) of the *Divorce Act* was too low and should be replaced by the words "age of majority".<sup>210</sup> An exception under the relevant provincial law involved could apply in cases of children who have ceased to be dependent on their parents. Where there were reasonable circumstances making a child dependent on their parents such as education or health needs, the parent's obligation to support the child continued, but because of the widely varying circumstances involved, the formula set out elsewhere in this paper should not be applied to estimate the amount of child support. The courts should deal with such cases on an individual basis.

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In defence of Agency staff, it has to be admitted that they have been subjected to vilification, mail boobytrapped with razor blades, excrement, hypodermic syringes and murder threats. Understandably, moral is low and two out of three staff are alleged to be looking for another job (*The Times* 3 November 1994).

<sup>208</sup> *The Guardian* (22 July 1995).

<sup>209</sup> Communications Branch (Ottawa: Department of Justice Canada, 1995) ISBN 0-662-22967-3. Under new rules introduced by the Federal Budget, with effect from May 1st 1997, parents who receive child support will not have to pay tax on them. At the same time parents paying child support will cease to receive a tax deduction in respect of these payments. Allan Rock, the Minister of Justice, emphasised the new scheme would only be retrospective if the parties agreed to change to the new system or the other party went to court to seek to have the settlement altered to change to reflect new policy – a fact that would involve additional legal costs. (The New Child Support Package, Government of Canada, March 6th 1996).

<sup>210</sup> See Recommendation 3.3 of the Report. The age of majority seems to vary between 18 and 19 according to the Province involved.

## B. *Costs of Children*

In estimating the costs of expenditure on children the Committee rejected some of the economic models which had been presented in its earlier 1992 Research Report on "Financial Implications of Child Support Guidelines". Instead the Committee adopted an admittedly imprecise but reasonable percentage scale under which the additional expenditure necessary to maintain an equivalent standard of living was calculated for each additional adult or child member of a family. Thus if a single person living alone was taken as a figure of 100% a married couple would require 140% of the income of a single person to maintain the standard of living. If a child was added a 30% increase in income for a total of 170% would be necessary.<sup>211</sup> In dollar terms, if a single person's income was \$50,000, a married couple would need an income of \$70,000 (\$50,000 + 40% of \$50,000) to be as well off. If they had a child they would need \$85,000 (\$50,000 + 40% of \$50,000 + 30% of \$50,000). In the case of an only child, the child's income requirements would constitute 30/170 of the parent's total income (17.65%). Given that this scale is assumed to include all expenditures on children regardless of age, the Committee dropped its earlier preference for treatment of child care costs as a separate item.

## C. *Allocation of Support Between Parents*

In terms of the division of parental support between parents<sup>212</sup> the Committee was attracted by the concept that where parents were living in separate households each family member in the two households should enjoy a similar standard of living and if, the custodial parent had the lower income, an appropriate transfer should take place. In making the calculation all taxes, government subsidies, credits and deductions were to be included. This formula was termed the "Revised Fixed Percentage Formula".

The simplicity of the concept behind the "Revised Fixed Percentage Formula" became clouded by the fact of the effects of income tax and tax benefits such as G.S.T. tax credit for those with low incomes. To make the necessary calculation a computer generated table was necessary and is set out in the Report. The example given in the Summary Version of the Report<sup>213</sup> is highly revealing, and posits that for the two-thirds of custodial parents whose ex-spouses earn more than they do, the child support would always compensate them for the inclusion of the award within their income. The conceptual application of the formula underlying the computer formula to a separated family in which the mother had custody of the child would be as follows:

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<sup>211</sup> Hence the title "40/30 equivalence scale".

<sup>212</sup> That of the non-custodial parent will be notional in contrast to the actual payment made by the non-custodial parent.

<sup>213</sup> *Supra* footnote 209 ISBN 0-662-22968-1 at 6

$$\frac{\text{Disposable income of the father}}{\text{Needs of the father}} = \frac{\text{Disposable income of the mother}}{\text{Needs of the mother \& child}}$$

Assuming that the father's income was \$50,000, the mother should be given a notional equivalent income of \$50,000. The formula determines the amount of the father's after tax income<sup>214</sup> to be transferred to the custodial household.

$$\frac{\$50,000 \text{ less taxes, less child support}}{1.0} = \frac{\$50,000 \text{ plus child support, less taxes}}{1.4}$$

The Summary goes on to state that in this example the value of the child award would be \$8,458, or about 16.5% of the father's gross income and all non-custodial parents earning \$50,000 with one would pay child support in this amount.<sup>215</sup>

If the custodial parent was caring for 2 children then the child support payment for a non-custodial parent earning £50,000 would be \$13,938 or 28% of gross income. There follows a series of tables<sup>216</sup> indicating the awards against non-custodial parents with incomes of \$8,000-\$150,000 gross incomes calculated on both a tax deduction/inclusion basis and no deduction/no inclusion basis — in other words both outcomes of *Thibaudeau* were catered for.<sup>217</sup> No doubt given the "disposable income" element in the formula, future tables will be produced with a column to recognise differing Provincial tax rates. As was pointed out in the *Levesque*<sup>218</sup> decision, the policies behind family law and tax law do not always coincide, nevertheless, at the lower end of the income tables, the preparation of such tables might minimise the high volumes of mistakes that might otherwise occur, as well as speeding the processing of cases. The Revised Fixed Percentage Formula, based on the 40/30 formula favoured by the Committee, was apparently the most effective of several formulas in equating

<sup>214</sup> Income was to be widely defined (see *ibid.* at 24) to include not merely earned income, commissions employment or ownership benefits, income producing assets, interest on capital, and payments in lieu of income such as unemployment insurance, social assistance, disability payments, and previous spousal support payments. Income could also include an element of attributed income to cover deliberate unemployment or underemployment and in kind benefits such as housing (Recommendations 4.1.2 and 4.3.). In order to enable accurate information to be used as the basis of child support applications parents were to be required by legislative provisions to produce accurate detailed financial information relating to the parent's current position and that of the last 3 years.

<sup>215</sup> *Ibid.* at 6.

<sup>216</sup> Summary *ibid.* at 8-9.

<sup>217</sup> Under new rules introduced by the Federal Budget, with effect from May 1st 1997, parents who receive child support will not have to pay tax on them. At the same time parents paying child support will cease to receive a tax deduction in respect of these payments. Allan Rock, the Minister of Justice, emphasised the new scheme would only be retrospective if the parties agreed to change to the new system or the other party went to court to seek to have the settlement altered to change to reflect new policy — a fact that would involve additional legal costs. (The New Child Support Package, Government of Canada, March 6th, 1996).

<sup>218</sup> See *supra* footnote 1.

the income of the non-custodial and custodial parent where the income of the non-custodial parents earns more than \$30,000 per annum.<sup>219</sup> However, it would decrease the level from current awards where the non-custodial parent earned less than \$15,000 per annum. For this situation the Committee recommended a modified formula to deal with low-income families and the tables using the modified low income formula are set out in the Main Report.<sup>220</sup> The Committee recognised, however, that no formula, however modified, came close to eliminating poverty because many of the families were close the poverty line prior to divorce.

#### D. *Protected Income*

A crucial factor was the calculation of a protected amount below which the non-custodial parent's income could not fall. The Committee felt that either the basic personal deduction threshold chosen by the *Income Tax Act* of \$6,744 or the Provincial or Territorial social security level in the non-custodial parent's residence might be acceptable.

The choice of the Provincial/Territorial social security threshold does in some way reflect the different living costs in different parts of Canada in a way that the *Income Tax Act* personal exemption does not, though the recent pressures on Provincial welfare levels raise queries about the suitability of that approach. Other elements of local differences in living costs were basically irrelevant to the 40/30 equivalence scale on which the formula was based.

It is worth noting that the United Kingdom solution of providing an incentive to the non-custodial parent by allowing him to keep a small addition above social security levels was not explored by the Committee. In the United Kingdom this was felt desirable to keep the paying parent in work and, as was seen above, led to the inclusion within the paying parent's protected income certain high travel costs in getting to work, a factor not commented on by the Committee. Nor did the Committee discuss the desirability of allowing the custodial parent to keep a small part of the child support without deducting the sums dollar for dollar in the calculation of social security. This would enable the paying parent to see that the child is in some way benefitting from the payment in a way that does not occur with dollar for dollar deduction of support from social security payments. There is surely a case for including unusually heavy costs of travelling to work with the non-custodial parent's income as the British Government was reluctantly forced to do in January of 1995. Failure to include this element may make it unprofitable for the non-custodial parent to remain in work.

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<sup>219</sup> For low and middle income non-custodial parents the results were comparable to court awards in a sample of 869 cases researched by family court staff at the request of the Family Law Committee. Court awards tended to be more generous where only one child was under consideration.

<sup>220</sup> *Supra* footnote 209 Appendix B1 ff.



E. *Weight to attach to the formula in Court Proceedings — rebutting the presumption*

The Committee suggested that the formula ought to operate as a rebuttable presumption that would apply unless the result would produce undue hardship to the non-custodial parent. A threshold test of denying any application of the undue hardship test where the non-custodial parent had a higher standard of living than the custodial parent was suggested by the Committee. Four, presumably non-exclusive, criteria were suggested by way of illustration of extraordinary circumstances:

(i) Existing Child Support Orders.

All the children of a parent should be treated equally so far as possible. Given the preference of the Committee for basing support on gross income rather than disposable income an existing child court order might cause hardship for the non-custodial parent. Where paying under an existing child support order and a current order created undue hardship, the courts might consider deducting the whole or part of an existing court child support order from the custodial parent's income before applying the formula for current children. What is not clear is the status of orders for "children of the marriage" under s. 2 of the *Divorce Act* and corresponding Provincial Maintenance legislation. Are step children only to be henceforth a secondary responsibility of the non-custodial parent as in British legislation with primary responsibility resting on the biological parent, or do biological and step-children rank equally?

(ii) Custody of Other Children.

Where the non-custodial parent has custody of other children from a previous relationship the formula may create hardship for the non-custodial parent's household and courts were to be given freedom to consider deducting from the non-custodial parent's income a sum to cover the cost of supporting children living with the non-custodial parent.

(iii) Second Families.

The Committee recognised that a parent, usually a father, often had children of their current partner by a previous relationship living with them whom they are supporting. The costs associated with supporting such children might be a basis of arguing "undue hardship" before assessing the support obligations to the biological children of their first family. However, before any such costs were deducted the court should compare the living standard of the two families on a needs and income basis.<sup>221</sup> If the first family is living at a lower standard of living the complete deduction of costs of supporting a step-child would be inappropriate. However, some deduction may be necessary to prevent the second family's household being subjected to undue hardship. What is again not clear is the differentiation between the obligations of the natural parents in the

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<sup>221</sup> Including the earnings of the new spouse.

second family (both custodial and non-custodial) compared with the obligation of the step-parent. The courts, it was suggested, should be wary of allowing a new partner in either family of becoming voluntarily unemployed so as to depress the income of the family for the purpose of improving the effect of the formula on their position.

(iv) High Debt Loads.

Unlike the initial British position the Committee properly recognise that in some situations one spouse, possibly as a result of a “clean break settlement”<sup>222</sup> might be left with a high debt load that had been reasonably incurred for the benefit of the family or to earn income. Although the Committee recognised that the courts might deduct such debts from the non-custodial parents income and modify the operation of the formula if not to do so would result in undue hardship. However, such debts should be repaid in an orderly way and the court should specify a date for their repayment after which an award based on the formula would become payable. In practice it is likely the courts will wish to see whether any rescheduling of debt is possible so that something by way of child support is payable in the meantime.

(v) Contact

The British Government in 1995 was finally obliged to recognise that in certain cases very high access costs might be involved in maintaining the contact between the non-custodial parent and his or her child. The Committee realised that unless some recognition of these costs was made by way of variation of the formula a child might lose contact with the non-custodial parent, a process which may well be contrary to the best interest of the child. The problem in such cases will be balancing the emotional value to the child of access against a tangible reduction in living standard.

F. *Exceptional Child expenses*

(vi) Although most health and medical costs are covered by provincial and territorial health plans certain expensive dental and drug costs or costs for educational or psychological expenses for special needs children may be outside such schemes. The Committee, therefore, recommended these unusual, as opposed to routine, expenses should be taken into account apart from the formula and the costs shared according to the parent’s income provided that the custodial parent provided the appropriate complete statement of expenses. Any modification in the application of the formula would merely be for the period of the need. It will be recalled that the need to address this sort of problem was finally accepted by the British in 1995 though more in the context of the exceptional expenses of natural or step children in the care of the payer spouse. This case may require further attention in Canada..

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<sup>222</sup> Specific mention of the ability of the court to deviate from the formula in cases where assets were not divided equally can be found at 47 of the main report, *supra* footnote 209.

### G. *Divided — Shared Custody*

Just as in Britain cases of divided custody require separate treatment. In Britain the cases where the non-custodial parent has care of the child for more than 104 days it had been recognised that such cases required special treatment. The Committee recognised that shared custody increased the costs of child care by as much as 50%. However, they thought that where one parent only had care of a child for 30% of the year the existing formula should apply. Above this threshold, and especially where the child spent more than 40% of the year with each parent departure from the formula was necessary. In making its award the court would recognise the increased costs of shared custody, the relative living standard of the two families and whether one parent was making most of the purchases of clothing and school supplies. In case where each parent had custody of a child of the union a balancing payment from the parent with the higher costs of living would be called for.

### H. *Variation*

In an attempt to avoid the costs of variation proceedings the Committee recognised that Provincial Governments explore the administrative costs of reviewing orders along with reviewing jurisdictional and constitutional difficulties. If periodic review was undertaken on a yearly or bi-yearly cycle the Committee favoured the reapplication of the formula rather than the imposition of a cost of living clause which might not reflect the change in circumstances of the parents. An attempt was made to limit the burden on support enforcement offices by requiring a 10% threshold of change before variation would be permitted. In order to see whether the threshold had been met the custodial parent and the Crown were to be able to seek financial information from the paying parent. Although there was a suggestion that an administrative process, subject to an appeal to the courts, would keep down the costs of varying awards this author suggests that the Canadian Courts may be reluctant to cede powers normally vested in courts to administrative agencies.<sup>223</sup>

### I. *Transition*

The Committee was conscious of the fact that where existing orders were different than existing court awards there would be pressure by a parent benefitting from the new scheme to try to take advantage of this. With some hesitancy, and while promising to keep the matter under review, the Committee recommended that in the best interest of the child higher existing orders should continue to apply unless there had been a change in circumstances. Where the new award would be higher than an existing award then an application to change the award should be permissible, though subject to a proviso that the application

<sup>223</sup> For an extreme example see Laskin C.J.'s unwillingness even to allow the transfer of s.96 powers to non s.96 judges let alone an administrative body. *Reference re Family Relations Act (B.C.)*, [1982] 1 S.C.R. 62.

only be permitted where a 105 variation would occur. This threshold would keep administrative costs down.

### J. *Constitutional, Jurisdictional and Conflict of Laws Problems*

The constitution divides responsibility for child support between the Provinces which have powers over child support generally (regardless of whether the child's parents were married), and the Federal Government which has responsibility for child support in the context of divorce. The result of this provides a potential incentive for parents to "legislation and jurisdiction shop" by invoking remedies under Federal or Provincial legislation which give them the highest award. To counter this the Committee suggested certain options including:

- (i) making a Provincial formula, if adopted, applicable in *Divorce Act* cases; or
- (ii) preferring the Provincial formula in *Divorce Act* cases if it would produce a higher award.

The Committee did not mention the case where a non-custodial parent has a choice of two Provinces in which to initiate divorce proceedings under section 3 of the *Divorce Act* (either the Province in which they or their spouse have been habitually resident for 12 months). Presumably if there was a desire to limit "forum shopping" the choice of law rule could be restricted to the Province in which the non-custodial parent was resident. Alternatively by analogy with the rules on "legislation shopping" a spouse might be permitted to seek the higher level of award on the basis that this would benefit the child.

### K. *Legal Costs and Enforcement*

As in Britain, the Canadian Government has been concerned at the high level of Government expenditure on social assistance for custodial parents and children as a result of an increase in the divorce rate, low court awards and the failure of parents to meet support obligations imposed by courts. The Committee felt that legal costs of support proceedings ought in part to be met by the non-custodial parent.

Although the Federal Government passed its *Family Orders, Enforcement Assistance Act* and the *Garnishment, Attachment and Pensions Diversion Act* and the Provinces adopted complimentary legislation, problems still remain including dealing with self-employed non-custodial parents and getting up to date information about parents in default of their support obligations. A series of ongoing proposals is set out in Appendix D of the Main Report.

### *Conclusions*

- (i) The British experience suggests that legislators should not assume that wide acceptance of the principles behind the report will translate into acceptance of

the detail of the report especially if awards go up substantially for non-custodial parents earning more than \$30,000 per annum. In Britain the *Child Support Act* went through Parliament with virtually no opposition. It was only when the legislation began to operate (much of the detail was in regulations) that politicians became aware of public unease with the legislation.

(ii) Men on low earnings will probably resent the low threshold at which child support becomes payable as well as the fact that this low threshold makes travelling expenses and other work related expenses difficult to meet.

(iii) Many women will also oppose the proposals. Second wives will probably be unhappy about the Recommendation 10.1 that, although in general a new spouse's income should be disregarded in the determination of child support, it may be relevant in cases of undue hardship. Equally women recipients of child support (and perhaps men paying it) will be unhappy if increased child support is deducted dollar for dollar from social assistance.

(iv) an amalgam of these elements makes for a strong body of opposition which will be compounded, if;

(v) the new system is implemented without time for adequate training and without adequate administrative back up. British experience suggests the desirability of introducing these sorts of changes by pilot project to avoid overloading the system.

#### VII. *The Disadvantages of the British System — a guide to those considering the imposition of formulas in Canada*

On balance there is something to be said in favour of formulas as opposed to litigation provided that their limitations are recognised:

- \* the inclusion of too many variables makes a formula difficult to operate; and
- \* some residuary role for the courts is necessary for hard cases.

If a Government wishes to set up a formula scheme it should adopt a holistic approach to the impact of the scheme on the whole of family law (including property division, custody and adoption) and not merely concentrate on child support. It is difficult, for example, to encourage comprehensive mediation if some items such as child support are not on the table for negotiation.

The following represent a few pointers from the British experience.

1. It is better for a Child Support Agency to take on a limited range of cases first such as those arising for the first time after the appointed day. Overreaching an Agency's capabilities to process large numbers of cases has caused considerable "teething" problems in Britain.<sup>224</sup> Many of the forms need refinement if they

<sup>224</sup> The Parliamentary Ombudsman criticised the Government for the failure to implement the *Child Support Act* only after doing a pilot study. He also criticised the Government for having new staff, perhaps inadequately trained, forming a substantial part of the workforce, where the procedures and the technology supporting them were untried

are to be filled in by people with only a limited amount of guidance available to them. Refining these forms and procedures is easier if the Agency is not being swamped with cases during a start up process involving a learning curve.<sup>225</sup>

2. The *Act* should not be retrospective. The Australian experience here is preferable to that in England. The initial failure to take “clean-break” settlements into account in reducing the child support assessment gave rise to enormous resentment by both husbands and second wives.<sup>226</sup>

3. Given that income levels often change on a seasonal basis it is important to remember that several calculations per year may be required in each case. It appears that in Britain this fact was overlooked and there may have been an assumption that merely an annual cost of living calculation would be necessary after the initial calculation. In recent years it cannot even be assumed in Britain that the AP's income will have kept pace with the cost of living index and even in a more buoyant economy people may require recalculations to cover seasonal factors such as winter short-time working and summer overtime. This point has important repercussions for work loads of Agency staff.

4. Although there is a temptation in Government to concentrate on a large “take” to reduce public expenditures, and to offer performance related pay to Senior Agency Executives to generate income, it is probably easier to sell the concept to the community if the children and PWC can be seen to be better off. Some disregard of child support in assessing social security benefits avoids a situation in which the PWCs (and the child living with them) are actually worse off as a result of the implementation of a scheme which is allegedly for the benefit of children.<sup>227</sup> Given the number of separated and divorced people it is politically unwise to antagonise the AP (generally men), their partners, and PWC (generally women).<sup>228</sup>

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and where the quality of service was subordinated to throughput (*The Times* 19 January 1995). The Ombudsman referred to a catalogue of shortcomings including (i) failure to respond to correspondence; (ii) inadequate advice; (iii) delays in assessments and (iv) delays in payments to the parent with care. He also criticised cases where men had been wrongly identified as the father of a child simply because they had the same name as the father and which had taken six months to clear up.

<sup>225</sup> After Parliament rose for the Christmas recess in 1994, the Government, in a written answer announced that it was shelving 350,000 cases to clear a backlog (*The Independent* 22 December 1994).

<sup>226</sup> For the Australian scheme, inter alia, Parker [1990] Fam. Law. 210; Burrows, “Child Support In Perspective”, (1993) 90 Law Society Gazette 41; Rae, “Caring Parents And Absent Parents”, (1993) 143 N.L.J. at 554.

<sup>227</sup> On the 21st of December 1994, Thorpe J. was reported (*The Times* 22 December 1994) to have held in a case that the algebraic formula used by the Child Support Agency could not be challenged on the basis that it was not in the best interests of the Absent Parent's step-children. The Child Support Agency was reported to have argued that it only had to notice the welfare of children in passing. Thorpe J. was reported to have said of the Child Support Agency's argument that the title of Child Support Agency seemed “hollow indeed” and that he had considerable sympathy with the AP.

<sup>228</sup> It is hard to underestimate the lengths to which some men will go to avoid supporting their children. So many men in Britain denied paternity of their children that the C.S.A. was reported to be taking 25 men per month to court to establish paternity and had

5. The “deduction rate”, akin to a “marginal tax rate”, by which income in excess of that needed by the AP for a minimum standard of living is divided between child support and increasing the AP’s standard of living should be set at a lower level than the current 50% in Britain.

6 Realistic allowances should be made for the cost of earning income e.g. reasonable travel expenses, and some assistance with contact costs. In Britain the exceptional costs necessary to depart from the formula are arguably too high.

7. Attempts should be made to temper ideological considerations with the money generated after the expense of collection. In several cases the U.K. scheme has required very small sums to be included in the complex calculations, the cost of calculation and collection of which cannot easily be justified.<sup>229</sup>

8. More attention needs to be given to the impact of the scheme on second families. One should also examine whether the scheme is having unsought side effects such as persuading APs to consent to the adoption of their children simply as a way of reducing their support obligations. Given the high breakdown of second marriages this is not necessarily in the interests of the children concerned.

9. The impact of child support on matrimonial property division needs to be carefully considered. If high child support assessments are made, it is unlikely that in future transfers of the non-custodial parent’s interest in the former matrimonial home to the custodial parent will take place. This may result in the home being sold which is not necessarily in the child’s best interest.

10. The term “Absent Parent” is particularly infelicitous.

Despite all the disadvantages of the British system there is something to be said for the consistency and savings to the legal aid and administration of a justice of an administrative rather than court based support system. Such a system, however, can rarely devise a workable system in which laypeople have to fill in complicated forms and have the contents of these fed into a very elaborate formula without there being some court based back up. A simpler formula

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come to a commercial arrangement with suppliers for a bulk cut-price purchase of D.N.A tests that would otherwise have cost £8000 to test a family (*The Sunday Times* 9 April 1995).

<sup>229</sup> Some examples suffice to explain the problem. Absent parents in receipt of social assistance are expected to make some contribution, however modest, to the support of their children which both reduces the payer parent below subsistence level and involves considerable collection costs. In *The Observer* (8 January 1995) it was announced that a £1.00 per week interest payment on a savings account in favour of a young girl had to be aggregated with her father’s income with whom she lived in calculating the support to be paid by the father to his other two daughters. The Social Security Minister Alistair Burt announced that it was the CSA’s policy to take children’s savings and pocket-money into account. In another case the paper-round earnings (£5.00 p.w.) of a teenager has also been taken into account. No doubt there is a case for not allowing large amounts of money to be placed in the name of a child so as to permit a benefit to their parent, but where modest amounts are involved taking such monies into account destroys any attempt to teach a child either how to manage money or to become an entrepreneur by taking a part-time job.

covering the majority of cases plus a right of appeal to the courts for more complicated cases such as those involving clean-breaks or some second family arrangements, as in Australia, is probably necessary. Given the variety of living costs in different parts of Canada, some Regional Institutes, independent of Government, which can evaluate up-to date housing and other costs involved in any formula would also be highly desirable.

Proper law reform probably makes it desirable to have all the elements of the economic breakdown of marriage or relationship allocated to one Government Department, to avoid a situation in which the desire of a Department responsible for keeping social assistance expenditure within manageable limits does not produce unsought consequences elsewhere in the system. For example high periodical child support payments may make courts less willing to order the transfer of the matrimonial home to the custodial parent. A sale of the matrimonial home may become a consequence of an administrative system for child support. Equally, high child support orders may make father's only too willing to consent to their children being adopted by the custodial parent and a step-parent as a means of escaping liability.<sup>230</sup> Whether either of these possible consequences are in the best interests of the children concerned seems debateable. Given that some of these matters in Canada straddle the Federal/Provincial/Territorial constitutional responsibility for family law, special care needs to be taken in devising the appropriate holistic model for reform.

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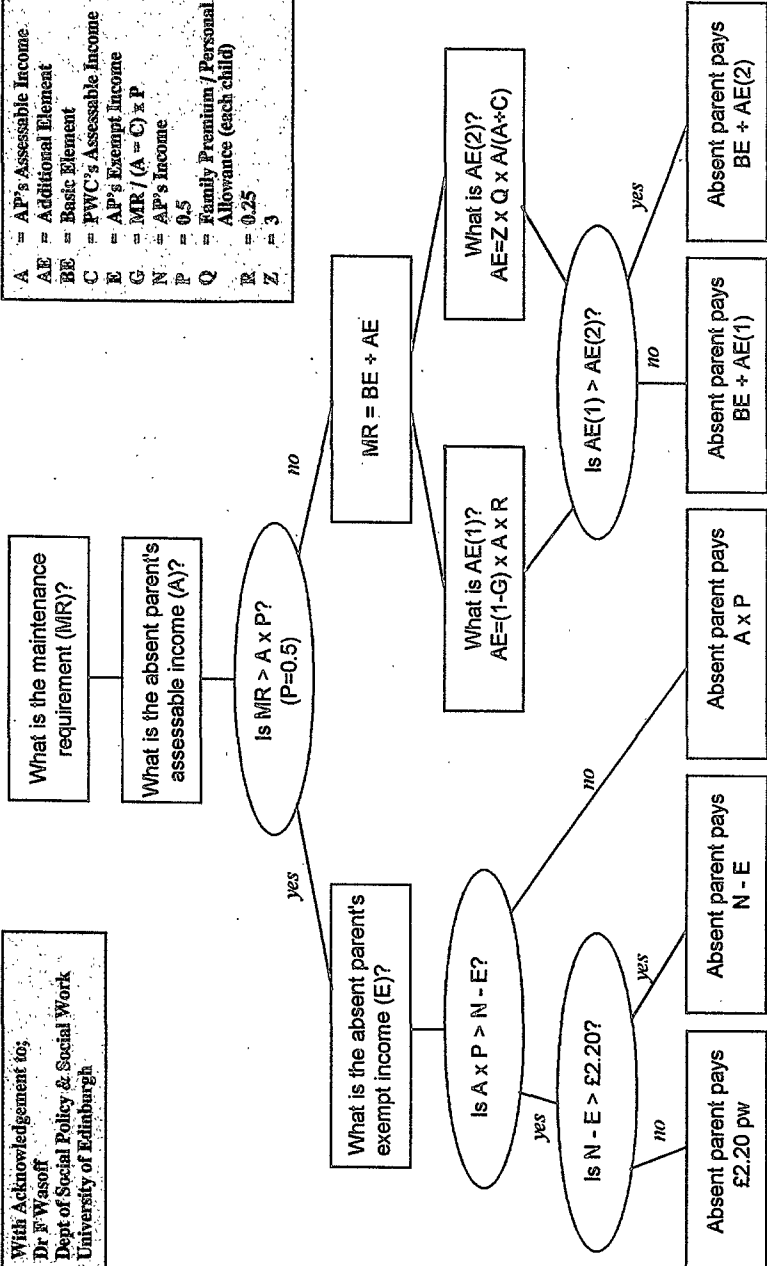
<sup>230</sup> In the Consultation Paper on Review of Adoption Law produced by the Department of Health & Welsh Office in October 1992 concern was expressed at the high incidence of breakdown of second and subsequent marriages. The recommendation was made (subsequently not acted on) that provision should be made for a step-parent adoption order to be undone where the marriage ends in death or divorce and the child concerned was under 18.



The Child Support Act 1991: Assessment Formula

With Acknowledgement to:  
 Dr F Wasoff  
 Dept of Social Policy & Social Work  
 University of Edinburgh

- A = AP's Assessable Income
- AE = Additional Element
- BE = Basic Element
- C = PWC's Assessable Income
- E = AP's Exempt Income
- G = MR / (A - C) x P
- N = AP's Income
- P = 0.5
- Q = Family Premium / Personal Allowance (each child)
- R = 0.25
- Z = 3



Poor Rich