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Rights v. Needs:

Dependency and Inequality in Divorce Policy

by

Gina A. Alderson

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A thesis submitted to the faculty of
Graduate Studies and Research in partial
fulfilment of the requirements for the degree of
Master of Arts
in Sociology

The Department of Sociology and Anthropology
Carleton University
Ottawa, Ontario
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JUNE, 1986

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RIGHTS, V. NEEDS:

Dependency and Inequality in Divorce Policy

submitted by Gina A. Alderson, B.A.

in partial fulfilment of the requirements for
the degree of Master of Arts

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ABSTRACT

In order to help explain the low socio-economic status of women in society, feminists have used the concept of female dependency as an analytic tool. A study of divorce policy shows that the assumption of dependency is also used by policy makers and the judiciary as a basis for social practises. Canada's divorce laws and their implementation can be seen to contribute to the low economic status of divorced women by assuming female dependency in the allocation of the financial rewards of marriage. Divorced women's access to a share of marriage assets is based on a judicial assessment of need, denying women the right to that portion of marital assets attributable to their non-financial contributions. When former spouses enter into relationships with new partners, the result is usually the loss by the former wife of access to those assets. These substantive inequalities built into Canadian divorce policy belie the formal equality espoused in divorce laws.

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labour force and the lack of economic value placed on their domestic labour are presented as the major causes of this status. The chapter also marshals evidence to support the view that divorced women suffer a lower economic status than do divorced men or husband/wife families. In three measures of their economic status--total incomes, standardized family incomes and the percentage of total incomes which is provided by government transfer payments--this is shown to be the case.

In Chapter II we establish the legal foundation of women's subordination through marriage. We examine in detail the history of married and divorced women's legal status. Current legal perspectives within which divorce law is set are also studied. It is argued that the state makes claim to a posture of non-intervention in family matters, but in fact intervenes directly and indirectly in ways which entrench the inferior position of women in the family. The past and present intervention by the state is shown to be based on an assumption of dependency.

In Chapter III we undertake an in depth analysis of the use of the assumption of dependency as a basis for decision making in divorce policy. This consists of a substantive evaluation of Canada's divorce laws and their implementation. Decisions on custody, property division and spousal support are discussed in the context of dependency. Most of this chapter is given to an analysis of the impact of new relationships on spousal support. The analysis indicates that the concept of dependency is not only

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INTRODUCTION

In 1984 the participation rate of women in the Canadian labour force was 53.5%, while that of men was 76.6% (Labour Canada, 1986:12). Women working in Canada in 1983 earned 60 cents for every dollar earned by men (Labour Canada, 1986:46). To assist in understanding such disparities, feminists have developed the concept of female dependency. They have shown that women are assumed to have access to the resources of male partners, and are therefore not rewarded equally for their labour. Dependency has been used as an analytic tool in studies on the economic and social position of women. In particular, dependency has been identified in research on labour force participation, rates of pay and domestic labour as a major factor in the lower economic status of women.

This thesis examines the use of the concept of dependency as an institutionalized social practice. The focus is on how the assumption of dependency is used as a basis for decision making in divorce policy and its implementation. Disputes in divorce settlements generally centre around three issues: custody and child maintenance payments, the division of property and spousal

support. The main contribution of this thesis is an analysis of the ways in which judicial rulings on these issues employ the concept of dependency. Chapter III provides an in depth analysis of judicial decisions in cases where new relationships (that is, remarriage or cohabitation, on the part of former spouses) impinge on spousal support awards. Here we find that women's access to the economic assets of marriage are based on need as determined by the court, rather than on rights based on their contributions.

Analysis of the historical position of women in the law documents their lack of rights to the economic assets of marriage. Before the 19th Century married and divorced women had few rights to marital wealth, even when they directly contributed to it. While this has changed so that women now have legal claim to those marital assets to which they directly contributed, they still have no rights to many of the assets accrued through their non-financial contributions to the family.[1] The economic assets of a marriage are conceptualized in law as consisting of two elements, income and property. In the case of income the husband's wage, usually called the 'family wage', is owned and controlled by the husband both before and after the marriage breaks down. A former wife may be awarded a portion of this so-called 'family wage', but this is subject to judicial discretion based on judges' perceptions of the wife's need for financial assistance. In no circumstances is the wife seen as having a right to the 'family wage'. The husband's wage is his sole property, even though it may be taxed by support payments.

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The fact that a former wife's access to the 'family wage' is based on perceived need, rather than on legal right, exemplifies the assumption of dependency embodied in divorce policy. This assumption is further emphasized in the judicial decisions regarding the impact of new relationships on support orders. New relationships on the part of either spouse tend to reduce or terminate spousal support. In general, a new relationship on the part of a former wife is viewed as a new source of income for her; that of a former husband as a new liability for him.

A former wife's right to property assets is also limited. In most provinces the primary income earner (the husband) has sole right to property not normally used by the family, such as investment income or business assets. We can see that in both income and property division the wife's contributions to the marriage are not accorded as high a value as the husband's.

The state perpetuates this unequal division of marriage assets, sometimes through discrimination embodied in the statutes themselves, but more often through the vagueness of its laws regarding divorce. By leaving divorce settlements to the discretion of judges the state condones the systematic discrimination against women currently reflected in court decisions. This thesis documents this discrimination and traces its origins to an assumption of female dependency in marriage.

In Chapter I, relying on feminist studies, we examine how the assumption of female dependency has contributed to women's lower economic status. Discrimination against women in the paid

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labour force and the lack of economic value placed on their domestic labour are presented as the major causes of this status. The chapter also marshals evidence to support the view that divorced women suffer a lower economic status than do divorced men or husband/wife families. In three measures of their economic status--total incomes, standardized family incomes and the percentage of total incomes which is provided by government transfer payments--this is shown to be the case.

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a useful analytic tool in explaining the impoverishment of women, but is also an important basis for discriminatory social practices.

The concluding chapter summarizes the major points raised in the preceding discussion, and then examines the Divorce Act, 1985, in light of what we have learned about the impact of the assumption of dependency. Finally, we briefly discuss the possibilities for developing a divorce policy which operates outside the framework of female dependency, and some of the difficulties associated with the development and implementation of such a policy.

FOOTNOTES

1.) The same limitations apply here to the rights of men. Throughout this thesis the effect of laws, policies and practices are discussed from the point of view of women. It is demonstrated clearly that women are far more likely to be in a position to suffer from potentially inequitable circumstances than are men.

CHAPTER I

DEPENDENCY AND ECONOMIC DISPARITY

Divorced women in Canada are disproportionately represented among the poor. Although the lower economic status of women is a generic factor in society, it is even more pronounced among divorced women. In this chapter we discuss what has been perceived as the major factor causing low economic status among women. We also document the relative poverty of divorced women.

Studies on women's work--their paid work in the labour market and their domestic labour--reveal that the major cause of women's economic woes is the assumption of dependency. In the labour market, the segregation and subordination of women is rationalized through the presumption that women rely on the labour market as a secondary source of income, first looking to their husbands for support. In the home, domestic labour is unwaged labour, and women do not receive any guarantees that the value of their work will be recognized.

Divorced women suffer from the consequences of this assumption for two reasons, 1) since the source of most people's wealth is income earned on the labour market, the labour market

position they obtained as wives greatly depreciates their current economic prospects; and 2) the assumption that women are dependent on their husbands, rather than equal partners, contributes to an unequal division of the economic assets of the marriage both during the marriage and after the marriage breaks down. In this chapter we are concerned with discussing what feminist scholars have pinpointed as the major cause of women's lower economic status--the assumption of dependency, and with documenting the low economic status of divorced women. In Chapters II and III we examine the degree to which the factor underlying divorced women's depressed economic status, the assumption of dependency, influences the laws regarding divorced women.

The Causes of Poverty

In examining the causes of the poverty of women feminists have targeted two areas: the inferior position women occupy in the labour market, and the lack of economic value accorded domestic labour.

Paid Labour

The disparity between the earnings of men and women is well known (Saunders, 1982). The difference between the average income of men and women is often explained in terms of education,

labour-force experience and the rates of pay for full and part-time work (Armstrong and Armstrong, 1984:42). But as we can see in Table I, the educational attainment of men and women is similar, the major difference being that women are more likely to have high school and post-secondary diplomas and less likely to have university degrees than men (Statistics Canada, 1984b:106. See also Boyd, 1985). At the same time Canadian women have higher educational certification and lower income than men in the same occupations (Wilson, 1982:90-104).

TABLE I

Educational Attainment by Sex, 1983

	Men	Women
0-8 years	21.3	20.4
High school	43.5	51.7
Some post-secondary	9.0	8.3
Post-secondary certificate or diploma	9.9	11.9
University degree	11.3	7.7

Source: Statistics Canada, 1984b Table 8, p.106.

With regard to labour force experience, it has been shown that married women are less likely to participate in the labour force than other women. For example, in 1983 the proportion of married women who worked was approximately 23% below that of single women (Statistics Canada, 1984b:44). We noted above the disparity in rates of pay between women and men. The distribution of women in full and part-time work is 73.8% and 26.2% respectively. For men, the figures are 92.4% working full-time and only 7.6% working part-time (Statistics Canada, 1984b:305; See also Saunders, 1982:235-238).

The most significant factor in the disparity in earnings between men and women is the segregation of women into those industries and occupations which are lower paying (Armstrong and Armstrong, 1984:18-56). There is ample literature to show that behind all of these factors there is an assumption that women have access to the 'family wage' of a male breadwinner, and that their labour should therefore not be valued on an equal basis (Barrett and McIntosh, 1982).

Divorced women are limited in their income potential in the same way that most women are. Recent statistics show that 62.4% of divorced and separated women are in the labour force (Statistics Canada, 1985:17). In a study of the socioeconomic status of divorced and separated women, Boyd found that "the average [1970] wage and salary income earned by married, separated and divorced women is 40%, 55%, and 63% of that earned by their male counterparts" (Boyd, 1977:58-62). A study of the

working poor, prepared by the National Council of Welfare, showed that the percentage of female-headed lone-parent families classified as working poor or other poor greatly outnumbered the percentage of male-headed lone-parent families in either category (National Council of Welfare, 1981: Table 48). For most of these women their wage earnings represent their primary source of income.

Domestic Labour

The lack of value placed on women's work is even more apparent with regard to domestic labour. In this section we show that women assume a disproportionate burden in housework and child-care activities, but there is no assurance that they will be compensated for this work.

Time-use statistics indicate that married women assume the preponderance of housework in families regardless of their labour force status. Among married men and women in the labour force, women spend about twice as much time on household tasks as men. The same ratio holds true for married men and women not in the labour force. (See Table II for a breakdown of time spent on selected activities) In those families where the woman is not in the paid labour force and the man is, we can speculate that the difference in hours spent on household tasks would be substantially greater.

TABLE II

Time Spent on Selected Activities, 1981
(minutes per day)

	In Labour Force		Not in Labour Force	
	Women	Men	Women	Men
Work-related	255	353	12	30
Child care	46	22	73	7
Housework	132	47	214	80
Household maintenance	7	26	8	38
Shopping	55	34	53	50
Total Household tasks	240	129	348	175

Source: Statistics Canada, Women in Canada, 1985:19.

These household tasks are time-consuming work, but they are not recognized in the economy as valuable labour. Although these activities contribute to the national income by fulfilling necessary and useful labour functions, they are not factored into any recognized economic calculations. They are not rewarded by any of the usual benefits associated with paid labour, such as sick leave, guaranteed paid vacations, unemployment insurance, and limits to work hours (Armstrong and Armstrong, 1984:75). While the work may be valued in the sense that it is missed when it is not done, in any scale of prestige among occupations, this type of work ranks very low. In the Pineo-Porter scale of occupational prestige in Canada, occupations which resemble aspects of housework are ranked low, and housewifery is not even included on the scale (Armstrong and Armstrong, 1984:80-81). In a study of the occupational prestige of housewives Fichter found that a housewife's prestige is positively related to but lower than that of her husband. So, for example, the prestige of a housewife married to a physician is greater than that of a housewife of a plumber, just as the physician husband is ranked higher than the plumber. The prestige of a housewife appears to derive not from the work she performs, but rather from the status her husband has attained and her symbolic value as a mother and wife (Eichler, 1977:155-165).

Despite this, the work performed by non-waged women has ensured a level of comfort that would be economically out of reach in most cases should husbands have to hire housekeepers.

In 1977, for example, members of parliament estimated the cost of hiring a housekeeper to replace a housewife to be between \$6,000 and \$10,000 per year. The median income of Canadian men in 1977 was \$9,080. Clearly the majority of working men could not afford to pay for the services they received (Kitchen, 1980:94). Fortunately for the husbands it is left to their discretion as to how they dispense with their 'family wage', and how they reward their wives for their services.

The gratuitous nature of domestic labour is reinforced by the state in the way it determines legal rights to the economic assets of the marriage, and in the way it assumes the availability of free domestic labour in some of its social programs. In regulating the economic rights of spouses the state generally holds that income is owned and controlled by the person who acquires it. A wife therefore has no legal access to the 'family wage' even though she may be putting in as many hours of labour as the husband and contributing to the husband's earning power. One might think that wives have a safety net in spouses' legal obligation of mutual support. In practice these rights are not applied during marriage and have limited application in divorce (Dulude, 1984:11-24). The pay-offs for the state, however, are the reduced social welfare costs commensurate with the allocation of social welfare to families rather than individuals (Eichler, 1983:317-330). By allocating welfare to families, the state has made women ineligible to receive welfare if they are married, cohabiting, separated or divorced, unless it

can be shown that their male partner or former male partner is unable to provide support.

In addition, the burden of care for children, the elderly and the disabled has become the responsibility of women (Wilson, 1977:171, and Kitchen, 1980). The inadequacy of programs to provide for the needs of these groups is premised on the availability of free domestic labour.

Given the pervasiveness of the view that women are dependents rather than partners performing domestic labour, it is not surprising that this view is imbedded in the laws regarding the legal rights of married and divorced women. This aspect will be discussed in the next chapter.

The Relative Poverty of Divorced Women

In this section we measure the economic status of divorced women relative to their male counterparts, and to husband/wife families. Although the poverty of divorced women has been decried by academics, the government and lobby groups alike, there are no recent empirical analyses establishing the relative poverty of divorced women. A number of publications have dealt with the financial impact of divorce on women (for example Finnbogason and Townson, 1985, Status of Women Canada; McKie et. al., 1983; and Statistics Canada's official publications based on the 1981 census). However, despite the availability of information from the census data, the low economic status of

divorced women is assumed in the literature rather than demonstrated.

The primary focus of this thesis is the use of the assumption of dependency as a basis for decision making in divorce policy. Before we go on to examine dependency in divorce policy it will be worthwhile to present some evidence as to the lower economic status of divorced women. Three measures of economic status are used here: total incomes, standardized family incomes and the percentage of total incomes which is provided by government transfer payments.[1] With these measures we can see how women are economically worse off than either divorced men or husband/wife families. Tables III and IV present data on income levels. This data allows us to gain insight on the effects of sex and marital status on total family incomes. By directly comparing the distribution of family types across a range of income levels, Table III shows clearly the ghettoization of divorced women into low income levels. Table IV indicates that even when divorced women with higher incomes are taken into account, divorced women as a group have a substantially lower income than divorced men and husband/wife families. Table V measures the amount of income available to each member (the standardized income) of divorced women's families against the median standardized income of husband/wife families. We see here that, even accounting for family size, divorced women and their families are much worse off than husband/wife families. Table VI presents data on the source of family income by family type.

Reliance on income from government transfer payments is used here as a measure of poverty. Again, divorced women as a group are seen to be relatively worse off. In this case they show a greater reliance on government transfer payments than do other family types. In Table I-1 divorced families are divided by sex and family status (that is, the presence or absence of children). We can see from the data that, on average, husband/wife families are better off than divorced families, and that among divorced persons women have lower total incomes than men.[2] For example, among divorced persons 42.6% of female-headed single parent families and 50.5% of unattached women (that is, women without dependent children) have incomes below \$10,000, while only 16.5% of male-headed single parent families and 36.4% of unattached men fall in that category. A mere 10.5% of married husband/wife families earn below \$10,000. This skewed distribution of wealth is also reflected at the upper end of the income scale where the proportion of single-parent and unattached women and men earning more than \$30,000 is 7.0%, 3.3%, 29.5% and 11.2% respectively. In contrast, 37.5% of husband/wife families have incomes above \$30,000.

This unequal distribution can also be shown using average incomes. As is indicated in Table IV, the average income of husband/wife families is more than twice that of divorced women.[3]

This bleak picture of the relative poverty of divorced women is also reflected in measurements of family income which account

for the number of people this money is intended to support. When total income is standardized by family size, we see that divorced women and their dependents must live on a fraction of the income available to the members of husband/wife families.

Table V presents a poverty index which rates the standardized incomes of divorced women as a percentage of the median of the standardized incomes of husband/wife families.[4] A percentage of up to 25 is rated as very poor, with percentages of up to 50, 75, 100 and greater than 100 rated as poor, near poor, comfortable and quite comfortable respectively. Using this measure we can see that fewer than 40% of divorced women and their dependents live as comfortably as the members of husband/wife families.

We have seen that, on average, divorced women have a lower income than divorced men and husband/wife families. Analysis of the sources of income provides additional data on the economic status of divorced women. Table VI shows that among single-parent and unattached divorced women, 23.4% and 18.8% respectively rely on government transfer payments for more than 50% of their total incomes.[5] Only 6.3% and 14.8% of their male counterparts, and 1.5% of husband/wife families are as dependent on government transfer payments.

The data in Table VI suggests that divorce forces a significant percentage of women and their dependents to rely on welfare and other subsistence level government transfer payments.

TABLE III

Percentage Distribution of Total Income by Family Structure, 1981

Family Income	Divorced Women		Divorced Men		Married Husb/Wif families
	Single- parent families	Unattached women	Single- parent families	Unattached men	
N	3043	2701	621	3215	223153
% Total	1.3	1.2	0.2	1.4	95.9
<5,000	16.5	27.5	7.6	18.7	2.5
5K-9999	26.1	23.0	8.0	17.7	8.0
10K-14,999	21.1	21.2	12.1	15.6	11.1
15K-19,999	14.6	15.3	15.9	15.4	12.5

(Continued)

(TABLE III continued)

20K-24,999	9.3	6.8	16.9	13.7	14.7
25K-29,999	5.4	3.0	9.2	8.2	13.6
30K-39,999	5.0	2.5	15.3	6.7	19.3
40K-49,999	1.2	0.3	7.4	1.9	9.4
50,000 +	0.8	0.5	6.8	2.4	8.8

Source: Statistics Canada, 1981 census, Public Use Sample tapes.
 Computations are by the author.

TABLE IV

Average Income by Family Structure, 1981

Divorced

Female-headed single-
parent families

\$13,860

Unattached women

\$11,360

Male-headed single-
parent families

\$24,920

Unattached men

\$16,810

Husband/wife
families

\$28,740

Source: Statistics Canada, 1981 census, Public Use Sample Tapes.
Computations are by the author.

TABLE V

Standardized Income(a) of Divorced Women as a Percentage of the
Standardized Income of Husband/Wife Families, 1981

Very poor	17.7
Poor	26.8
Near poor	17.1
Comfortable	16.3
Quite comfortable	22.2

(a) Standardized income is calculated by dividing the family income by the square root of the number of family members.

Source: Statistics Canada, 1981 census, Public Use Sample Tapes.
Computations are by the author.

The measures of poverty discussed in Tables III to VI help establish the low economic status of divorced women. In measures of economic status which account for income, family size and reliance on government transfer payments divorced women are found to be worse off than divorced men or husband/wife families:

TABLE VI

Percentage of Total Income Provided by Government Transfer
Payments, by Family Structure, 1981

% of inc. from govt	Divorced Women		Divorced Men		Married
	Single- parent families	Unattached women	Single- parent families	Unattached men	Husb/Wife families
	3052	2704	622	3229	224196
Total	1.3	1.2	0.3	1.4	95.9
0	9.9	66.8	19.5	69.4	57.9
>0-4.99	40.2	2.3	56.8	2.2	25.8
5-9.99	8.0	1.7	5.9	2.4	5.2
10-19.99	6.5	2.0	4.2	3.8	5.6

(Continued)

(TABLE VI Continued)

20-29.99	3.5	2.6	2.6	3.0	3.1
30-39.99	3.3	2.0	2.4	1.8	2.1
40-49.99	5.3	3.2	2.4	2.5	3.9
60-79.99	4.6	2.9	1.9	2.5	0.6
80-89.99	2.5	2.7	1.0	1.7	0.2
90+	16.3	13.2	3.4	10.6	0.7

Source: Statistics Canada, 1981 census, Public Use Sample Tapes.
Computations are by the author.

Conclusion

In reviewing the causes of the relative poverty of divorced women we found that the important underlying factor was an assumption of female dependency. Women in general were seen to be suffering economically both in the paid labour market and in their family relations, and these effects were shown to become most apparent after divorce. Women's low wages, part-time work and lack of upward mobility in the paid labour force, based on the assumption that they can depend economically on a male partner, become an even greater burden after divorce than during the marriage. The lack of economic value placed on the work married women do in the home, and the assumption that they depend on their husbands' 'family wage', are upheld by the state in its laws and policies. It is left up to the husband to decide how to share his income within the family, and he is in no way compelled to compensate his wife for her labour in the home. Upon divorce, what was viewed as the 'family wage' is now shown to be the sole property of the husband, and the wife has no legal right to a share of it.

Our documentation of the low economic status of divorced women has shown that divorced women fare poorly in the three measures of income used in this study: divorced women rely on government transfer payments for their income to a greater extent

than either divorced men or husband/wife families; they are represented disproportionately at the low end of the income scale and are under-represented at the high end relative to divorced men and husband/wife families; and, their family income relative to the number of people that income is used to support is much lower than that of husband/wife families. In the next chapter we will examine the history and the current legal position of divorced women. This will help us to understand the way the concept of female dependency has become imbedded in the law.

FOOTNOTES

1.) The data presented in Tables III to VI was generated from the 1981 Census, Public User Sample--individual file. This tape provided information on 20% of Canada's population (486,000 cases).

2.) Family incomes for female-headed, single-parent families, male-headed single-parent families and husband/wife families were taken from the variable Total Census Family Income Groups. Incomes for unattached women and men were taken from the variable Total Income. Income level ranges for Total Census Family Income Groups were recoded from codes provided in the User Tapes. Total Income amounts were recoded from the raw data into the same categories.

3.) For the variable Total Census Family Income Groups, cases in each income range were assigned an income value at the mid-point of that range. The average income was then calculated using these mid-point values. The raw data of the variable Total Income was similarly recoded, and average incomes calculated in the same manner.

4.) In this table, the square root of family size was used rather than the family size itself, to account for the diminishing costs of supporting each additional family member. The median of the standardized income of husband/wife families was used as a point of comparison because it best represents that amount of income available to members of most families. The designation of income ranges as "very poor" to "quite comfortable" were borrowed from Myles, 1984:44.

5.) The percentage of income provided by government transfer payments was calculated by dividing family incomes (as per Table III) by income, received from government transfer payments. Government transfer payments were calculated by adding the variables "OASGI" (Old Age Security, Guaranteed Income Supplement and Canada/Quebec Pension Plan Benefits), Family Allowances, Unemployment Insurance Benefits and Other Government Payments.

CHAPTER II

THE STATUS OF WOMEN IN THE LAW

The low economic status of divorced women and the major cause of that low economic status--the assumption of dependency--have been described in the previous chapter. In this chapter we look at how the principle of economic and social dependency is imbedded in the history of the law and in current conceptions of the law. First, we review the history of the legal status of married and divorced women. This provides us with the sequence of events that is the foundation of their current legal status. Secondly, we look at current legal conceptions of the proper role of the law, and the influence of these conceptions on women's legal status. Here we will see that the embodiment of the concept of the sanctity of the family has served to entrench the low economic status of women. Thirdly, we look at one aspect of divorce law in Canada which manifests current legal conceptions of the proper role of the law. The poor definition of divorce laws, and the unfettered judicial discretion which is used to fill the void created by vaguely defined laws, result from the reluctance of the state to intervene in family relations. It will be seen that the practice of judicial discretion abrogates

women's rights. In Chapter III we analyse the use of the concept of dependency as a basis for decision making in divorce policy, focussing in particular on those aspects which arise from poor definition of divorce laws.

Historical Development of the Law

There are several aspects of the law which relate to the legal status of divorced women. The two most influential have been laws relating to property and laws relating to one's status as a legal entity or person. In various periods of history these two aspects and their interrelation have been important in establishing the legal status of women. In these laws the rights of divorced women are directly related to and often inseparable from those of married women. For this reason, much of what we consider in the ensuing discussion of the history of these areas of law is law relating to married women.

The legal system in English Canada is based on the British legal system, while that of Quebec is based in part on the Napoleonic Code. Due to the significant differences between Quebec and the rest of Canada, I shall refer to the legal status of divorced women in Quebec infrequently. Since English Canada's legal system and its laws regarding married and divorced women were, until the 20th Century, based on English law, our analysis for the period up to the late 1800s will focus largely on the British experience.

Women and the Law in Britain

The concept of marriage as we know it did not exist before the 5th Century A.D., but the subordination of women through a marriage of sorts did. As a result of an economic transaction between a woman's father and her 'bridegroom', the husband acquired guardianship over his wife. The wife had no property or personal rights in the marriage. In 589 A.D. women were recognized as human beings with souls, and thereafter owned the land they brought into or acquired during the marriage. Since real property (land) was the only significant form of property, the protection the law provided was itself significant. However, married women still had no claim to personal property (everything but land, including money, personal paraphernalia, investments, etc.). Although they were elevated to the status of human beings, they were still not legal entities in any sense of the word. They could not represent themselves legally, and the husband administered the wife's property and represented her in every way except as owner of her real property (that is, he could not sell her land, nor could it be attached by his creditors). (Hahlo, 1973:456-457). While her legal status was marginally improved, the privileges accorded her husband with regard to her property and person still placed her in a position of dependency on him.

Records regarding legal developments from 900 to 1100 A.D., including those regarding the rights of married women, are very sparse (Hahlo, 1973:457), but it appears that the wife retained,

with a few improvements, the same status she had before 900 A.D.. She now had, in addition to a right to own (but not control) her own property, the right to pledge her husband's credit for household necessities, and the right, subject to her husband's consent, to contract out her own services. In medieval England women were excluded from many activities. So, for example, even if they were members of the nobility they could not sit in the Royal Court, or follow the King to war. These activities, among others, were duties commensurate with the ownership of property. Since husbands were obliged to assume these duties for wives who had property, they were also granted the privileges arising from these responsibilities. As a result, sole management and the rights to rent and profits from the wife's property were awarded to the husband (Holcombe, 1983:20).

Although these duties were abolished by the 17th Century, the laws regarding husbands' rights over their wife's property remained intact (Holcombe, 1983:34). However, property rights also defined the rights of a person. "Legally deprived of property, married women were also deprived both of power and of the civil rights of other citizens" (Holcombe, 1983:4).

The first major changes in the rights of married women came in the mid-19th Century. Although reform can be attributed in part to the tireless efforts of 19th Century feminists, it is thought that it was also due to the general reform of English law at this time. In fact many of the reforms of the laws regarding married women were related to those of English law in general.

Prior to the reforms, 19th Century England did not have one system of law. It had instead four separate bodies of law, three of which had a great influence on married and divorced women. Each of these bodies of law had its own set of courts, its own avenue for appeals, and its own staff (so, for example, a lawyer practising one body of law would be unqualified in another, as would judges presiding in these courts) (Holcombe, 1983:9).

Due to the overlapping jurisdiction of these systems of law and their very different bases, one could be obliged to bring separate proceedings in more than one court and could receive conflicting decisions on the same set of facts. By the mid-19th Century there was general agreement that these disparate, confusing, overlapping and often contradicting bodies of law should be fused into one system of English law. This reform was largely accomplished in the Judicature Act of 1873, which reorganized all courts into one court system, creating one single code of procedure (Holcombe, 1983:15-16). The reform had a number of elements. The most important changes regarding the legal status of married women were: 1) the elimination of the overlapping jurisdiction of common law and equity law, and 2) the transfer of jurisdiction over marriage from the church to the state.

In order to understand the significance of the reforms it is important to have an understanding of the legal system prior to the reforms. The legal status of married and divorced women will be explained as each body of law--common law, equity law and the

ecclesiastical courts is discussed below.

Common Law

Common Law, the largest body of law, was judge-made law. It originated in medieval times, evolving from the interpretations of Royal judges of feudal laws and customs, and the infrequent amendments enacted by parliament. Under common law, married women could not own personal property (such as salaries or wages). Real property, although technically theirs, was their husband's responsibility (Holcombe, 1983:18-24). The effect of the common law on married women was to deprive them of their rights over property during their marriage. "Since property and status went hand in hand in English law, wives were reduced to a special status, subordinate to and dependent on their husbands" (Holcombe, 1983:25). Because she had no legal existence, a married woman could not enter into legal contracts without her husband's consent. This severely restricted a married woman's ability to trade or even to support herself. A husband, by giving consent to his wife's ambitions to enter into contracts, waived his right to profit from the business, but remained legally responsible for it. Very few husbands saw this to be in their interests. In addition, a wife working for salary or wages had no guarantee that she would profit by her income; as this and all other personal property became her husband's property when they married.

The legal position of married women, set in medieval laws,

became much more restricted in the changed environment of the 17th Century for two reasons. First, prior to the 1700s many women escaped the problems which beset married women because they were unmarried in the eyes of the law. In the 17th Century 'married' women were members of guilds and engaged in commerce, and lower courts recognized and enforced their transactions (O'Donovan, 1979:137-138). Indeed, for many 'married' women proof of marriage did not exist. Until 1753 the solemnization of marriage in the Church of England (and the attendant registration of marriage) was neither legally necessary nor a widespread practice among unpropertied husbands and wives (Harker, 1978:245). According to Laslett, "Neighbours decided whether any particular association could be called a marriage" (O'Donovan, 1979:139). In the years following 1753 the restrictive legal status of married women affected a far greater proportion of the female population.

Secondly, the relative importance of real and personal property shifted. In medieval England personal property was an insignificant part of a woman's wealth. By 1900 it comprised, for many married women, the greater part of their inheritance (Holcombe, 1983:35), with the husband still maintaining control over it. As well his rights over her property remained intact even though the responsibilities associated with property which he had previously borne for his wife, such as military duties, no longer obtained.

In general, the responsibilities husbands bore for their wives were more than compensated for by the privileges they

acquired from them. Husbands legally owned their wives' personal property and controlled their wives' real property by virtue of being married. It must be stressed that the husband's ownership of the wife's personal property extended from the date of their marriage until the marriage was dissolved (a very unlikely event). Therefore, a deserted wife who, through her own industry, managed to support herself, could be repeatedly stripped of her income or savings by her husband, rendering her destitute. Those few legal obligations a husband had toward his wife before the mid-1800s were related to the husband's responsibility for, rather than to, his wife. The wife was thus caught in a double bind. Her husband's liability for costs she incurred prevented her from taking part in economic activity. At the same time, she could not sue her husband for support as they were one person in the eyes of the law. Such a system not only reinforced dependency; it created it. The rule of common law, though pervasive, was not complete. As we shall see in our discussion of equity law, a small number of women attained a certain amount of economic independence through inheritances designed to exclude their husbands. However, this should not be construed to indicate that these women were legally independent; they were not.

Equity Law

Some of the inequalities which the common law created for married women were addressed in the second great body of English

law--equity law. Equity, like common law, originated in medieval times. Originally an ad hoc measure by which the King awarded special relief to suitors, it became by the end of the 14th Century established recourse for those whose actions could not be accommodated by common law (Holcombe, 1983:10).

The main function of equity law regarding married women's property was to protect it from husbands, where common law placed it in the husband's control. Although equity law enhanced the economic position of some married women, it was developed to protect the interests of wealthy families, not women. These families were concerned that their wealth be protected from the squanderings of husbands, and that it return to their family rather than the husband's if no heirs were born. The rules of equity law evaded those of common law by settling property (of any kind, that is, land or money) for the wife's use under the management of a trustee. In those cases where the provisions regarding the trust did not contain provisions restricting its use, the trustee was bound to manage this property according to the married woman's instructions. Thus, these women were not only economically secure, they also had the power to enter into contracts (Holcombe, 1983:37-47). Although this greatly increased the freedom of these women by placing them in a position of economic independence, their legal rights remained almost nonexistent. They did not have the legal right to own personal property, or to manage real property; and regardless of their own economic independence, because the economic freedom they enjoyed

was attached to their property and not their person, they did not have a legal existence separate from that of their husband.

Ecclesiastical Courts

The final body of law directly affecting the legal status of married women was that controlled by the ecclesiastical courts. Prior to 1857 the church had exercised exclusive jurisdiction over marriage and the dissolution of marriage. Under canon law what we now refer to as marital separation was one of two forms of divorce. In the first form of divorce, the marriage could be declared invalid and therefore null and void. In this case both husband and wife reverted to their previous status as unmarried persons. Naturally, the common law rights of the husband were terminated. The second kind of divorce, divorce from bed and board, did not dissolve the marriage, it merely relieved the couple of the obligation to cohabit (Holcombe, 1983:94). To the modern reader this may seem to be an insignificant decree, but this was not the case. Unless one could obtain a divorce decree, one could be forced to cohabit with one's spouse on penalty of imprisonment. Since a divorce decree which invalidated the marriage was difficult to obtain, based as it was on proving a defect in the marriage that had existed from its inception (such as blood relationships, incompetence or insanity) (Holcombe, 1983:94), divorces which permitted parties not to cohabit could be a substantial relief. In a divorce from bed and board, the parties were still married, and the husband retained

control of his wife's property. She may not have been cohabiting with her husband, but she was still subsumed within his legal person. Few people obtained either kind of divorce because few could afford the expensive proceedings and fewer still could meet the exacting criteria.

The ecclesiastical courts showed themselves to be no more concerned about the welfare of married women than the common law courts. First, as we have noted, very few marriages were annulled. This left married women with two methods by which they could seek financial relief in the ecclesiastical courts: they could apply for a divorce from bed and board, or for a restitution of cohabitation. Neither method was very satisfactory. If a married woman became divorced from bed and board, assuming she hadn't committed adultery (which would prevent her from receiving any financial support), she would be awarded one-third of her husband's income (one-third because a woman was thought to be worth one-half as much as a man). However this was only payable during her husband's lifetime and until 1813, unenforceable. After 1813 it was enforceable through imprisonment of the husband. While this clearly provided the husband with an incentive to pay, imprisonment itself did not provide the wife with an income (Holcombe, 1983:95-96). Many women were merely deserted by their husbands and this was not viewed as sufficient cause for divorce. The only remedy open to these women was to apply for a resumption of cohabitation. Should the husband comply, it was unlikely that he would be generous to

his wife. If he failed to comply he would be imprisoned (Holcombe, 1983:32-33). In either case a married woman, even one who owned substantial property, could be rendered penniless.

By the end of the 17th Century it was possible to obtain a divorce by an Act of Parliament. This procedure ended the marriage and one's civil status changed from married back to single. However, divorce through parliament was complicated, expensive, and required divorce through bed and board in the ecclesiastical courts as the first step in this procedure. If the divorce applicant was the husband, he was also required to charge another man with adultery regarding his wife. Divorce through Parliament, though theoretically available to both men and women, was difficult for men to obtain and nearly impossible for women, mostly due to the double standard in divorce grounds. Women could only petition for divorce on grounds of adultery if they could also alledge another ground, whereas men were not so required. Men were granted nearly 134 such divorces in the 18th Century, and 90 in the 19th Century (before the reform of the divorce law in 1857). By contrast, women were granted 4 divorces by Acts of Parliament from the beginning of this practise in the 17th Century to 1857 (Holcombe, 1983:96). Clearly then, women who wished to regain the privileges of unmarried women were unlikely to be successful on their own initiative. However, parliamentarians were somewhat more lenient than the church in awarding spousal support; in divorces granted by Acts of Parliament even an adulterous wife would be granted alimony.

albeit at a bare subsistence level (Holcombe, 1983:96). In addition, those few women who were divorced by this method did regain control of their real property.

The effect of the stringent divorce law for women was to make divorce difficult if not impossible to obtain, leaving them subject to the laws regarding married women. For those few who would have regained their single status, the fact of being married would have stripped them of all their property except land, unless their families had ensured their property was kept separate through the rules of equity.

Ecclesiastical courts were abolished in 1857 when the state secularized jurisdiction over marital matters through the Matrimonial Causes Act. Although this law contained some distinct improvements for married women, it was mainly concerned with the general reform of law and was in fact the first amalgamation of laws into one system--the rest was accomplished with the Judicature Act of 1873.

Reform in Legislation

The period from 1857 to 1893 was marked by a series of statutory reforms directed at the legal status of married women. These involved major improvements in the legal rights of married and divorced women. We will see, however, that these rights remained circumscribed by the fact that they were based on the rights women had acquired through equity law. This meant that any rights acquired depended on the ownership of property, rather

than being a recognition of personal rights. Men and unmarried women, in contrast, had full personal legal rights.

The Matrimonial Causes Act of 1857 moved marital matters out of the hands of the church and into a newly created secular court system. This may have been a great step toward reform of English law, but it was a very small step toward increasing married women's rights. "The act stipulated that the practise of the new court should conform as nearly as possible to the principles and rules followed by the ecclesiastical courts" (Holcombe, 1983:98). Despite this intention one significant change was encoded in the new statute--desertion became grounds by which a wife could protect her property from her husband. Desertion, coupled with other marital offences, was now a ground for both judicial separation (referred to as divorce from bed and board in the ecclesiastical courts), and divorce. This not only allowed women more access to separation and divorce orders, it also constituted a change in the legal status of married women.

In the new courts a wife who was found to have been deserted without cause could apply for protection from her husband quite apart from separation and divorce proceedings. This protection, if granted, gave her rights equivalent to those of a single woman over any property she acquired after the desertion. Similarly, women who had obtained judicial separations were given control over any property they acquired after the separation (Holcombe, 1983:101-102). "The law was for the first time giving women the right to own and control their property" (Holcombe, 1983:103).

Married women could now achieve some measure of independence from their husbands so long as they had not committed adultery.

The new system brought an additional advantage. Since access to separation was increased, access to alimony was increased. This was still set at 1/3 of the husband's income. Although the rules of alimony varied for divorced women, in practise they too followed the 1/3 rule. An adulterous wife was regarded as ineligible to apply for alimony, but by the turn of the century this too had been overturned so that they were at least awarded bare subsistence. Although divorce remained very expensive and therefore inaccessible to all but a few (Holcombe, 1983:105), separation was expeditious and inexpensive and because of this, much more widely used (Holcombe, 1983:107).

These few changes in married women's rights, though a step forward, were very conservative in comparison with the reforms that were being tabled at this time. In fact the Matrimonial Causes Act of 1857 drew attention away from a much more radical bill regarding married women's property. The Married Women's Property Bill of 1857 proposed that married women be given the same right as unmarried women regarding the ownership, management and disposal of all their property (both real and personal) and that they and not their husbands be liable for the debts they incurred (Holcombe, 1983:91). In one stroke this would have shattered the two major constraints on married women: the restrictions on their rights to manage their own property, and the association of their legal status with that of their husband,

making them able to enter contracts without their husbands' sponsorship or approval. The Married Women's Property Act was finally passed in 1870, but the bill had been so modified as to constitute a very minimal reform. Although it provided an important change in that the separate property of poor women, unable to afford equity law, was protected from their husbands, property was defined in such a circumscribed manner as to be inapplicable in many situations. For example, a woman's money was not always recognized as her separate property if it was earned before or after the marriage (Holcombe, 1983:179). Even property which clearly did fit the parameters set out in the act could be stripped from women, as was seen in one court case in 1878. In this case, a judge dismissed a woman's attempt to sue her husband to regain ownership of her separate property on the grounds that the Married Women's Property Act was not intended "to enable a woman to prosecute her husband" (Holcombe, 1983:181).

Although the 1870 act was so convoluted as to constitute a legal quagmire, it was not reformed until 1882. The Married Women's Property Act of 1882 swept away most of the injustices mentioned above, empowering a married woman to both own and manage her property as she saw fit, and to avail herself of the same legal rights as if she were unmarried (so for example, she could sue her husband) (Holcombe, 1983:202-205). Although the Married Women's Property Act of 1882 is considered to be one of the most significant steps taken toward women's rights (Bartke, 1977; Holcombe, 1983:207, 219; Midgley, 1976) it had some

major flaws. A woman's power to enter into contracts was circumscribed in legal and practical terms. Unlike men and unmarried women, her legal right to enter into a contract was tied to the ownership of property. In addition, limitations were placed on the kinds of property accessible to creditors (for example, only the property a married woman possessed at the time of contracting was bound by that contract) (Holcombe, 1983:222-223). The Married Women's Property Act of 1893 expanded the married woman's contractual capacity by making her liable to her creditors to the full extent of her property, regardless of whether it was acquired after the time of contracting. However, it did not change the legal nature of her contractual capacity. This was still based on property rather than personal rights.

The reforms of 1857 to 1893 brought many improvements to the legal status of married women, the most important of which was the distribution of the right to manage one's own property to women of all classes (Bartke, 1977:50). The second most significant change concerned married women's legal right to own their own personal property.

As noted earlier, the improvements in the status of married women's property from 1870 to 1893 were based on equity law (Bartke, 1977:73; Holcombe, 1983:224). We have discussed above the implications for women of that time. It also has had some serious repercussions for 20th Century wives. Common law, faulty as it was, combined the economic fortune of husband and wife.

Equity law made a sharp division between the economic assets of spouses. The basis of this division, however, centered on attempts to retain estates within family lines. Married women did not enjoy greater rights under equity law; the legal ownership of their property rested with their family (that is, their forefathers or their heirs). The virtual absence of legal rights for married women under both systems may have obscured the importance of attaching legal rights to property. However by focusing on separate property, legal reforms had not spoken to the division of property acquired during the marriage. "As a result ... the married women's property acts ... in effect severed the economic unity of marriage without substituting anything in return" (Bartke, 1977:77). This restricted view of married women's rights had major repercussions in the 20th Century where wives often adopted the role of homemaker and therefore had no property separate from their husbands.

After 1897 Canada ceased to model its laws regarding married women on the English model. The following section thus focuses on developments in Canadian laws.

Canada

The marital property laws of Canada (except those of Quebec) were governed by those of England until 1897 (Bartke, 1977:49-50; Dranoff, 1977:47, 62). Thereafter, Canada did not follow the English model regarding law on married women's property and divorce. The paths of Canadian and English law in this area diverged, not

because Canadian laws and amendments departed from their English counterparts, but because Canadian law stagnated, barely changing from the late 19th Century to the late 20th Century, while England continued its reforms.

In Canada the jurisdiction over marriage and divorce is divided. The provinces control laws relating to marriage such as those regarding married women's property and legal separations. The federal government has sole jurisdiction over divorce.

The laws regarding married women in Canada have seen very few changes. Although each common law province adopted its own property laws and its own laws regarding marital breakdown in the form of separations, the effect, if not the legislation itself, was very similar for all provinces. "The general principles of the English matrimonial property laws were taken over in all the Canadian common law provinces" (Hahlo, 1973:465), just as the principles set out in the English Matrimonial Causes Act of 1857 were used to designate women's rights in marital separations (Dranoff, 1977:64-65).

We will first discuss those laws within provincial jurisdiction (property laws and separation laws). In order to avoid discussing the unique historical patterns of each province, we shall refer to the history of married women's rights in Ontario, as it is fairly representative of all provinces (Bartke, 1977:51). The reform of laws regarding married women's property in England were mirrored in Ontario's legislation. Ontario's Married Women's Property Acts of 1872, 1884 and 1897

were so similar to those of England (Married Women's Property Acts of 1870, 1880 and 1893) as to represent copies (Bartke, 1977; Holcombe, 1983). The restrictions these laws placed on Canadian women were the same as those discussed regarding English married women. All married women gained control over their separate property, and their legal status was disentangled from their husband's in that they were empowered to enter into contractual agreements on the strength of their own property. However, because married women's ability to enter into contracts was based on property rather than personal rights, they had not yet attained the same legal status as men and unmarried women. The period between 1897 and 1975 saw very few reforms of married women's property laws. Instead the debates regarding these rights were pursued in the courts.

By withdrawing a husband's rights over his wife's property, the married women's property laws had defined the rights of married women over the property to which they had clear legal title. However, these laws had not dealt with the ownership of property accrued during the marriage. In 20th Century Canada wives frequently left their careers temporarily, or permanently, in order to meet family needs. With the increased rate of marital dissolution, particularly in the form of divorce after the liberalized divorce law of 1968, the courts were faced with dividing marital property between former spouses. Frequently both spouses had contributed to the ownership and management of marital property. In still many more cases the labour of the

wife, although not directly linked to the purchase and management of the property, had freed the husband from other responsibilities enabling him to accrue assets. In view of the lack of legislation dealing with such property issues until 1975, the courts were faced with resolving these disputes. The basis for the resolution of such disputes rested on the court's ability to impute the intentions of the spouses when they acquired the property. In the absence of legislation, courts were free to interpret intentions as they saw fit. So, for example, courts in Saskatchewan appeared to be ruling that no matter how intensive the wife's non-monetary contributions, they did not entitle her to a share of matrimonial property. However, courts in Alberta appeared to be moving in the opposite direction, ruling that substantial non-monetary contributions should be recognized (Bartke, 1977:52-53). Generally speaking, most courts appeared to take the position that the strongest proof of intention was indicated by a direct monetary contribution (Cullity, 1972). In other words, you own what you pay for. As is noted above, this interpretation was not always applied before the Supreme Court of Canada ruled on this issue in the Murdoch Case in 1973. In fact, although only one judge in that case proffered a dissenting opinion, arguing that division of property should include consideration of the wife's non-monetary contributions, courts since that time have been prepared to weigh the value of housework and other unwaged work in their decisions. The Murdoch ruling, although it concurred with the majority of decisions in

similar cases, brought the issue of the division of matrimonial property to national attention. The Supreme Court ruled that the physical labour of the wife, although equal to that of her husband (as she undertook his duties for five months each year) was only the work of an ordinary rancher's wife. Thus it did not entitle her to a share of the property maintained by that labour. This ruling clearly showed the unequal position that married women had in the eyes of the law (Dranoff, 1977; Dulude, 1984). The recognition of the unfairness of these and other cases led to reforms of matrimonial property laws in every common law province.

By the late 1970s, due mostly to the Murdoch case, all common law provinces had reformed their marital property legislation. Although the non-monetary contributions of wives were not (and still are not, except in Quebec and Ontario) considered to entitle women to a half share of all assets accrued during the marriage, many family assets such as the family home, the car, cottage, etc., were divided equally.

The provincial legislation regarding legal separations, from the mid-19th century until the 1970s, also closely resembled English legislation. Although only four provinces adopted the English model of judicial separations, the remaining provinces enacted very similar legislation for marital breakdown (Dranoff, 1977:65). As a result, married women could obtain financial support from their husbands through the intervention of the court, provided that the cause of marital breakdown was not

their adultery.

Divorce law also closely resembled the Matrimonial Causes Act of 1857. Though technically the responsibility for divorce had been in the hands of the federal government since the BNA Act, it did not put in place legislation governing divorce until the passing of the Divorce Act, 1968 (Abols, 1980:405). The pre-confederation divorce laws obtained until this time (Mckie et al., 1983:34). All provinces except Ontario, Quebec and Newfoundland had passed legislation similar to the English Matrimonial Causes Act of 1857. The citizens of these three provinces were obliged to petition the federal parliament through Private Member's bills for their divorces. Although such a varied system created the potential for significant variance in provincial divorce laws, between 1867 and 1968 they remained very similar to each other and to the Matrimonial Causes Act of 1857 (Dranoff, 1977:63-65; Special Joint Committee of the Senate and the House of Commons, 1966-67:39-41). Canadian courts took a more liberal interpretation of some laws pertaining to property and divorce. For example, in Canada the grounds for divorce were the same for men and women. For the most part, however, the legal position of divorced women in Canada up to 1968 mirrored the legal position of English women discussed above. Through divorce these women regained control over their separate property and through their ownership of property, the right to enter into contracts.

The legal position of married and divorced women in Canada

in the late 1970s was very similar throughout the country. The Divorce Act of 1968 had enacted uniform legislation regarding the rights of divorced women (except property rights which were within the provinces' jurisdiction). Women now had access to divorce equal to that of men and they regained the civil status of unmarried persons upon divorce.

The rationalization of the unequal treatment of wives changed over time. The blatant discrimination of the law before the 20th Century was believed to be favourable to wives. In the words of one famous legal scholar, William Blackstone, "Even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England" (Brophy and Smart, 1985:vii; O'Donovan, 1979:137).

The attitude that women benefit by the protection extended to them and therefore benefit through their dependency has remained essentially unchanged. In 1950, Lord Justice Denning pronounced that the wife in English law was "the spoilt darling of the law and he [the husband] the patient packhorse" (Smart, 1984a:29). In the 1980s this good humored benevolence has changed to a more sharp-edged satire. Divorced wives are frequently charged with being alimony drones, and are reminded in the media as well as the courts that "marriage is not a licence to collect lifelong maintenance" (Payne, 1984:339; Smart, 1984a:241). Laws recognizing the equal contributions of women to marriage and thereby increasing their rights to the spoils of the marriage are

viewed as reverse discrimination, even though, as we shall see in Chapter III, women still do not receive the favourable treatment that men do in divorce courts. Women's claims to many of the economic resources of the marriage are viewed by judges as being based on demonstrated need rather than inalienable rights. Men, on the other hand, are presumed to have automatic rights to these same resources.

Throughout all the changes in the laws regarding married women discussed above, one feature stands out -- the economic dependency of married women on their husbands. The previous discussion of the legal restrictions placed on married women highlights the artificiality of their dependency. However this was not the position taken by legislators in the 18th and 19th centuries, and presumably not the view of the general public either. The economic dependency of wives on their husbands was thought natural, and even believed to be in the wife's interests as it relieved her of the rigors of management of her own property and responsibility for her own actions.

In the next section we examine the foundation of current laws regarding married women's rights. We will see that the assumption of dependency, although more subtly cloaked, still influences the course of legal decisions. The assumption of dependency permeates our current legal system in much the same manner as it was seen to pervade our economic system in Chapter I.

Canadian divorce laws are thought to treat men and women as

equals, and indeed, the laws are written in a gender neutral fashion. However, the fact that divorce law is developed and applied under the auspices of a private law system has placed limitations on the equal treatment of men and women. The next section discusses the private law conception of current laws and its negative effect on the legal status of married and divorced women.

Current Legal Perspectives

The previous section provided information on the legal position of married and divorced women. This historical backdrop helped facilitate some understanding of the state of current laws. It also provided information on the context within which married and divorced women's rights are currently viewed. In this section this theme will be continued by examining the general philosophy regarding the legal system within which laws regarding married and divorced women's rights are set. This will entail an examination of the current legal system governing married and divorced women and an analysis of the major problem this system creates in divorce policy--a reliance on judicial discretion. Examples of the substantive inequalities which arise out of this judicial discretion will be examined in Chapter III.

Public Law versus Private Law

Legal thought since the turn of the century has dichotomized the law into a variety of distinctions--state/society, public/private, individual/group, etc., (Kennedy, 1982:1349). One of the most influential of these has been the division of the law into public/private. In viewing a country's legal system from this perspective, one would consider private law to be that area of law dealing with family relations. The state is thought to take a neutral stance. That is, the state considers the family to be sacrosanct, and therefore exempt from the application of law as it normally applies to individuals. The public aspect of law in this perspective refers to legal regulation of individuals outside the context of the family (Olsen, 1983:1504).

Several criticisms have been leveled at this conceptualization of law. Feminists argue that the concept of the family as a cohesive unit serves specific interests by ignoring power relations within the family (Barrett and McIntosh, 1982). Legal scholars argue that the private/public distinction acts as a cover to justify domination and private control, and represses aspirations for alternative political arrangements (Mnookin, 1982:1432). They argue that the public/private distinction fails as a conceptual tool, and that its currency is better explained by examining its political value to its adherents (Klare, 1982:1362). One author has applied the criticisms of both of these schools of thought to the public/private distinction as it influences family law. Olsen

argues that the characterization of family law as neutral and non-interventionist is blatantly inaccurate.

The state is said to take a neutral stance toward the family ... when it ratifies preexisting social roles within the family. ... Thus it would be considered intervention for the state to treat the members of a family as juridical equals. ... The notion of noninterference in the family depends on some conception of proper family roles, and 'neutrality' can only be understood with reference to such roles. ... Thus 'interference' is not a simple description of state action or inaction, but rather a way of condemning particular policies, usually those aimed at changing the status quo (Olsen, 1983:1504-1506).

Clearly, then, the categories of private and public law more accurately refer to the kind of state intervention, not the existence of intervention per se. The effect of laws premised on the private/public distinction is to entrench the low economic status of women in the family through the guise of neutrality.

Despite this and other criticisms of the division of the law into public and private domains, [1] this way of viewing the law appears to have currency among policy makers as indicated both by their use of the concept in policy analyses, [2] and by its apparent influence over family law. When we look at how the public/private distinction has been applied to divorce law, we see that what is viewed as non-intervention is in most cases support by the state of the status quo in family relations; that is, support for the traditional role of family members. Divorce policy is applied by measuring the actions of spouses against those of an 'ideal' couple, the main characteristic of which is a

male breadwinner and a financially dependent wife (Barker, 1978; Smart, 1984b).

The application of state policies affecting divorced couples includes aspects which are seen as non-interventionist and ones which are recognized as interventions. Those policies directly relating to the divorce process are viewed as non-intervention. In settling divorce disputes, the court must rule on any issues that are not negotiated by the couple out of court. The three major issues beyond the granting of divorce itself are: division of marital assets, allocation of custody and the commensurate child support, and spousal support. As a result of the application of the breadwinner/dependent assumptions, in the vast majority of divorces most assets accrued during the marriage are awarded to the husband, and custody is usually awarded to the wife. Spousal support, where awarded, is based on demonstrated financial need, assuming that income should not be treated as a shared asset. These divisions are analysed in depth in Chapter III. Of interest here is their relationship to the private/public conception of the law. Generally, the state under this conception, views its arbitration of divorce disputes as being neutral in character, merely reinforcing the financial decisions made during the marriage. It is argued here that this posture of non-intervention amounts to indirect intervention, and has predictable results, primarily the reinforcement of the status quo in family relations.

Not surprisingly, the state applies the same traditional

model of family relations to its direct interventions. As a result, such interventions also tend to reinforce the status quo. When the state believes that the divorcing couple is not taking responsibility for the financial consequences of divorce, it intervenes to protect what it sees as the public's interests. This intervention would be viewed as justified by viewing it as arbitrating between the public and a family, thus placing the intervention under the auspices of public law.

In order to decide what actions on the part of spouses (or former spouses) unfairly advantage the family unit at the expense of the public, the state must and does ascribe to a set of assumptions about how a family should function. These assumptions tend to reinforce the dependency of wives on their husbands. So, for example, married and divorced women's access to social security is limited according to their marital status. Women who have marriage experience--that is, they are married or cohabit, or are separated, divorced or widowed--are not permitted the choice of defining themselves as economically independent by the law and other state institutions. Welfare policies and tax law automatically assume that the wife has access to the 'family', i.e. the husband's income. This unwillingness to disaggregate the family income is extended to include people who cohabit or are separated or divorced. For example, if a municipal or provincial welfare agent was able to prove or even have reasonable grounds to believe that a mother on welfare was cohabiting, both the mother's and the child's welfare would be

discontinued regardless of that man's relationship to them. Until recently, widowed women lost their survivors pensions when they remarried as it was assumed that they were dependent on their new husbands (Kitchen, 1980:93). Divorced women are eligible for welfare but the welfare agency is empowered to force the woman to apply for support from her husband, which will be deducted from the welfare payment.

These interventions on the part of the state set limits on the economic relationship between both spouses and former spouses. In effect, the state is, to some degree, controlling the character of marriage contracts. Although marriage is viewed as a private contract, it is the state which determines the nature of a marriage agreement. Contrary to popular belief, marriage is not simply a private contract between husband and wife. It is also a legal contract between them and the state (Barker, 1978:254; Mount, 1982:199-203; Smart, 1984b). Should a husband and wife wish to design the terms of their marriage contract themselves, they can do so, but the state can and does intervene. For example, a couple may design a marriage contract which absolves the husband of financial responsibility for the wife in the event of divorce. Should the wife subsequently apply for social security, that aspect of the marriage contract would be overridden by the courts. The Divorce Act, 1968 Section 11 provides the court an unfettered discretion to alter marriage contracts. In addition, common law conveys an implicit power to intervene in cases of fraud, duress, undue influence and public

policy (Law Society of Upper Canada, 1984:206-213).

It can be seen, then, that the state binds spouses to a specific form of economic compact. These policies, although recognized as interventions, are not thought to influence or control the family form, but they clearly do. In ways that the state views as non-intervention it has an even greater impact on the economic relations between spouses, and hence further controls the character of marriage contracts.

We noted earlier that the state views its arbitration of divorce disputes as following a policy of non-intervention. The clearest reflection of non-intervention is the judicial discretion encouraged by the poor definition of policy regarding divorce. The lack of clarity in the definition of policies can be seen in the vague and open-ended wording of the state's divorce laws. Although these laws have been drafted in a gender neutral fashion, they have not been applied in like manner. The incongruence between the formal legal equality drafted into the legislation and the inequality sanctioned by the application of the legislation is largely due to the unfettered judicial discretion that the Divorce Act, 1968 has encouraged. For example, in determining financial support and custody, the courts have been directed to consider conduct without being given any guidelines on what conduct is appropriate, how to weigh different kinds of conduct, or if the same conduct should be expected of men and women. These are significant omissions if the application of the law is to achieve its desired results, especially in view

of the courts' apparent view of the proper roles of men and women. This lack of clarity in Canada's divorce laws and their application is evident in all issues surrounding a divorce. We will see in Chapter III that the consequent application of judicial discretion directly contributes to the low economic status of divorced women. The vehicle for the unequal treatment of men and women is the biased allocation of rights to the financial resources of the marriage, in favour of men. In most provinces women have rights to a share of a limited set of marital assets, but beyond that have no right to a share of the family's resources. Rather, they are viewed as having needs which may be fulfilled by the resources of the former husband.

Conclusion

In this chapter we have seen that the concept that women are economically dependent on their husbands has permeated our legal system since its inception. The history of married women's rights before the 19th Century is more accurately a history of their lack of rights. Married women had little or no control over their own person or property and limited recourse against any mismanagement on their husband's part. As laws were liberalized over time, married women's rights increased. However, we have also seen that changes were slow in coming and very conservative in nature. In short, they were incremental changes which did not require or even signify a change in attitude regarding married

women. As a result the assumption of the economic dependence of married women was not erased from our legal system, but merely hidden.

We also noted that policy and legislation regarding divorce is viewed by the state in the context of a public/private conception of law. This means that the state views its divorce policy as non-interventionist, but we have seen that in fact the state intervenes in ways which support traditional roles of husbands and wives. The state may have laws which imply a formal equality between husbands and wives, but these laws are vague and require judicial interpretation. It will be shown in the next chapter that given the record of court decisions, both past and present, women can not rely on these interpretations for equal treatment under the law.

In the next chapter we examine the inequality perpetuated by poorly defined divorce laws. In particular, we focus on the effect of judicial discretion on spousal support awards in those cases where former spouses have entered into new relationships. We will see that judicial evaluation of the impact of new relationships varies according to which spouse enters the new relationship, and that this variance is explained by reference to the concept of dependency. This analysis shows how Canadian divorce policy, although based on a formal legal equality, has not created substantive equality. Through an examination of these inequalities we will come to an understanding of how the concept of dependency serves as a basis for actual social

practices, and how these practices, entrench the low economic status of divorced women.

FOOTNOTES

1.) For general criticisms of the division of the law into public and private domains see The Pennsylvania Law Review, 1982 V.13 # 6, a compendium of papers from a symposium on the private/public law distinction.

2.) For example, a recent Canadian policy study differentiated between private and public law systems dealing with divorce (Payne, 1982).

CHAPTER III

DEPENDENCY IN DIVORCE POLICY

Chapter I presented evidence to show that divorced women have a lower economic status than their male counterparts. Chapter II examined both the history of the legal status of divorced women and the position of women in the law at present. The most outstanding feature of women's legal status both past and present has been shown to be the state's creation of married women's economic dependency on their husbands. In this chapter I examine aspects of divorce policy which are based on an assumption of female dependency. In particular I argue that the view that women are and should be dependent on men influences decisions regarding the rights and responsibilities of divorced spouses. The application of the concept of dependency directly contributes to the low economic status of divorced women by underestimating the monetary worth of their contribution to the marriage. It indirectly contributes to their low economic status by encouraging and sometimes creating a dependent status.

Before discussing the state's use of the concept of dependency we will look at the vulnerability of the process of divorce settlements to such influences. When marriages break down the separating couple may settle disputes themselves, through the use of mediation services, or through the arbitration of the court. The courts have to settle disputes. Once a divorce has been granted, there are three major issues which may be contested: 1) custody and child maintenance payments, 2) the division of property and, 3) spousal support. The outcome of each of these issues is fundamental to the financial position of divorced spouses.

Statutes govern which of these issues the various courts may rule on, what evidence they may or may not consider and what remedies they may affect. The responsibility for these statutes is divided. The federal government is responsible for all aspects of divorce except the division of property, which is a provincial matter. [1.]

The concept of dependency becomes crucial in the settlement of disputes, in part because the federal statute regulating divorce (The Divorce Act, 1968) is vague and demands judicial interpretation (Payne, 1982). This is also the case for most provincial divorce legislation--Ontario and Quebec being notable exceptions, allowing judges less discretion (Dulude, 1984:33-39). In addition, judges have pointedly avoided clarifying this vagueness by endorsing one set of guidelines or principles. They have argued instead that each case is decided on its own merits.

In this chapter we shall see that with each of the issues to be settled, judicial conceptions of the proper roles of men and women do in fact act as guidelines or principles by which they settle disputes. We shall also see that, by and large, these factors show a consistent bias toward maintaining the traditional roles of husband as breadwinner and wife as dependent, and that they act to reduce the economic status of divorced women. The judges' preconceptions of proper roles are evidenced by the factors which are included or omitted from consideration in a decision and by the way these factors are applied.

In the case of provincial statutes, there is an additional problem of explicit discrimination in the legislation regarding the division of property--not all property which can be viewed as an asset of the marriage is equally divided.

The resolution of custody, property and spousal support each involves a complex process. Within these broad issues I have selected aspects of dispute resolution which show how the statute and the judicial application of the statute is based on a concept of female dependency. For custody, I discuss the influence of the notion of the best interests of the child, and the consequences of the application of this principle for divorced women. In the case of property, I discuss the kinds of property which are divided between spouses and the proportions of the divisions. In most cases, both of these aspects of property division have negative consequences for the economic position of divorced women.

Finally, for spousal support I examine the impact of judicial evaluations of new relationships on the spousal support order. The reported decisions clearly establish that a judicial bias exists which operates to reinforce the economic dependence of women on individual men. Women involved in new relationships are viewed by the courts as having acquired a new source of income in their new partners, whereas men are viewed as having incurred additional economic liabilities in their new partners. This section includes a detailed study of the effect of new relationships and constitutes a major focus of this chapter.

We will see in the following sections that settlements of custody, property and spousal support disputes usually bear two things in common; 1) the wife receives less than one half of the financial rewards of the marriage, and, 2) the reasoning behind each decision can be shown to be based on the assumption that wives are economically dependent on their husbands.

Custody

If the custody of dependent children is disputed in a divorce, the court rules on the awarding of custody, the terms of access and the provisions for financial support. The Divorce Act, 1968, specifies that "... the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make ... an order providing for the custody ... of the children"

(Divorce Act, 1968, Section 11). Clearly these terms are not sufficiently detailed to enable a judge to award custody. What then are the factors considered and, in what order of priority?

Although The Divorce Act, 1968 contains no direct reference to the best interests of the child, all authorities agree that "[t]he welfare and happiness of the infant [that is, the child] is the paramount consideration in questions of custody. To this paramount consideration all others yield. ... [Indeed, other] factors are relevant only insofar as they bear upon the welfare of the child" (Davies, 1984:521-523; see also Law Society of Upper Canada, 1984:134-135; McKie et. al, 1983:201-203). The Law Society of Upper Canada has advised prospective lawyers that what is meant by 'best interests' is the custody arrangement which comes closest to satisfying the social, psychological, emotional, economic and physical needs of the child (Law Society of Upper Canada, 1984:131). The factors considered as determinants of, or variables influencing, the child's welfare are numerous: sexual morality, age, health, stability, temperament, religious beliefs, station, aptitudes and prospects in the life of each parent; proposals for the maintenance and education of the child; parental ability to discipline and guide, express love and affection; financial means and wealth where there is great disparity between the parents; social arrangements as indicated by friends, neighbours, daycare; the stability of, and kinds of relationships each parent has with family, lovers and new spouses; and the age and sex of the child(ren), to name but a few

(Davies, 1984:523-539).

As numerous as these factors are, very few relate directly to the child. As is evident by the list of relevant factors, the court does not consider a child's welfare to be synonymous with a child's wishes, which are only to be taken into account to put the judge in a better position to determine the best interests of the child (Law Society of Upper Canada, 1983:142) and only then, if the child is thought to be old enough to appreciate the issues (Davies, 1984:533-534). As McKie et. al. have pointed out, the views of the child(ren) involved are, in the majority of cases, unheard and unsolicited. Their intellectual, moral, emotional or physical needs remain unassessed (McKie et. al., 1983:201-202). Clearly, then, most of the factors considered are evaluations of the parents and their surroundings. Since none of these factors are set out in The Divorce Act, 1968, and since judges as a group have failed to endorse a set of guidelines or principles (Payne, 1982:II-9 to II-11), a judge may choose to consider only what he, seldom she (Dulude, 1984:38), views as relevant. One can see that each judge's personal opinion (or in general, judicial discretion) is a major factor in the determination of custody orders (McKie et. al., 1983:203).

Because mothers get custody in the vast majority of divorces, [in 1973-74 mothers received custody in 84% of all divorce cases (Burtch et. al., 1980:8), in 1981 they received 85.6% of all custody awards (McKie, et. al., 1983:209)] it is often stated that they are favoured by the courts in custody

decisions. Closer analysis puts into question this statement, as insufficient evidence exists to determine which parent is usually favoured. The statistics which I have just cited include all divorces involving custody regardless of whether both parents applied for custody or not. A further breakdown reveals that in divorces that involved dependent children, 71.7% of the petitioners were women (McKie et. al., 1983:123), and less than 14% of these cases were contested. [2.] It is unknown what percentage of the issues being contested involved custody (McKie et. al., 1983:219). Therefore it is extremely likely that in the majority of cases, the wife applied for custody and the husband did not contest this issue. The custody award in such cases merely sanctions the status quo (Eekelaar, 1978:227-228).

In those cases where the parents battle for custody, the mother may or may not be the preferred custodian, depending on the age of the child. When the child is very young mothers are the preferred custodians so long as they do not work outside the home, or at least not full-time. However, should they work full-time, they are less likely to receive custody than working fathers who can provide a 'mother-substitute' [that is, another woman who can assume responsibility for the child's material care] (usually a new wife or a grandmother) (Atkins and Hoggett, 1984:95). When mothers do not work outside the home, all other things being equal, they are preferred over the father and the 'mother-substitute' (Davies, 1984:530-533; McKie et. al., 1983:201-203). This seems to indicate that mothers are

evaluated as custodians based on their adherence to the traditional mother role. This, in turn, is based on an assumption of dependency--most women do not have the means to support themselves while they devote themselves full-time to child caring. Fathers, on the other hand, are evaluated in their capacity as breadwinners rather than on the basis of their relationship to their family (for example, as child carers) (Delphy, 1984:93-105). The impact of these assumptions on custody decisions is unclear due to lack of information, but one pattern does emerge. For young children, judges show a preference for female care over male care, and, provided mothers are primarily engaged in domestic duties, mothers are preferred over 'mother-substitutes' (Atkins and Hoggett, 1984:95-96).

However, as children age and become less dependent, the picture changes. Children over eight years of age, especially boys, are thought likely to benefit from their father's guidance (Davies, 1984:532). Although there are no Canadian data on the pervasiveness of this phenomenon, at least one French study has shown that the courts usually favour the father to the extent that "[a] child who has been entrusted to his or her mother can then be handed back to his or her father" (Delphy, 1984:100). The justification for this change is that the child's interests are better served by the advantages that can be provided by the father's favourable economic position, even though these advantages were not considered to be important when the child was younger, and the previous custody arrangements would have been

largely responsible for the economic disparity between the parents (Delphy, 1984:100).

Thus it appears that women are awarded custody in most cases, primarily as a maintenance of the status quo (mother as child carer) where custody is uncontested. Where it is contested, and where the children are young, the mother is favoured as better suited. If she works full-time, a mother-substitute (another woman such as a new wife or a grandmother) is preferred. Once the children are older, the father is often preferred because he generally has greater financial means.

At the same time as women are usually awarded custody, they are also burdened disproportionately with the costs of child support. According to many studies, the fair sharing of the economic burden of child care has not yet been approached (Payne, 1982:11-54 to 11-55; Wachtel and Burtch, 1981:xv-xvi). In principle, parents are equally responsible for the financial support of their children, based on their ability to do so. In practise the burden falls on the custodial parent (typically the mother). The father is often obliged by the court to pay child support (Ryan, 1976:4), but average child support payments are usually too low to pay for necessities. For example, 80% of fathers who had received a court order, or who had made a child support agreement in Hamilton-Wentworth, Ontario, paid less than \$150 per month, per child in 1978 (Eichler, 1983:297). In a provincial court in Vancouver, the average monthly award between

1976 and 1978 was \$71 per child (Burtch, et.al., 1980:10.). These maintenance orders do not provide an adequate means of child support. The financial problems created by these meager support awards are compounded by a high level of default. Baar and Moore, in an evaluation of enforcement in Ontario, reported that 71% of Ontario's child maintenance orders were in arrears in 1977-78, totaling 33 million dollars.[3.] This debt involved 24,000 parents (Baar and Moore, 1981:95). Estimates of the level of default of spousal and child support in Canada range from 75% to 90%. [4.]

The fact that women are responsible for dependent children in the overwhelming majority of cases, the low level of child support they receive, and the high rate of support default, all act to further entrench the low economic status of divorced women. This effect is not limited to the relatively short period of time that the child(ren) is considered dependent (usually 16 years). Since most women in this position will not have the resources to purchase daycare, they will not have acquired the education and work experience needed to find work when their children are no longer legally dependent. In the meantime there has been no attempt made to compensate the work involved in child care (Delphy, 1984:93-105).

Property

The history of married women's property laws received attention in Chapter II. As we saw there, up until the late 19th

Century legally married women (with few exceptions) could not own property. The Married Women's Property Act, 1882 changed this so that they could. This law was adopted in Canada and retained essentially its original form until the 1970s. Essentially, it awarded spouses the property that they acquired with their own money.

The unfairness of this law was brought to national attention with the Murdoch case in 1973. In this case, the wife had worked alongside her husband for wages which were received by the husband. These wages along with other monies contributed to the purchase of the property, the ownership of which was being disputed. In addition to this work, over a period of 15 years the wife shouldered the husband's work every day for five months of each year while he was employed elsewhere. This work included haying, raking, swathings, quieting horses, dehorning, in short, anything that had to be done, in addition to her housekeeping duties. The wife's claim to one half the property was dismissed by each court which heard the case, including the Supreme Court of Canada. Their reasoning was that the work she invested was that of an ordinary rancher's wife and that the "words and conduct of the parties [did not indicate] their common intention that the beneficial interest was not to belong solely to the (husband)" [Reports of Family Law (R.F.L.), 1973 (13):185]. Since then every province and territory has enacted legislation more favourable to women. We will now look at that legislation.

The major change in Canadian property law in the 1970s was a recognition of the non-monetary contributions made by the wife. Although this was a significant improvement to the 'pre-Murdoch' legislation, there were still major problems. Wives were now entitled to one half of the matrimonial assets. However, matrimonial assets were defined, with some variation, as those normally used by the family, such as the home, car, cottage, private pension rights and RRSPs. They did not include assets such as investment income and businesses. This new legislation also made a weak attempt to recognize how non-financial contributions, such as child care and household management, enhanced the working spouses' ability to acquire assets not defined as matrimonial assets. They allowed for their division, but as in most legislation regarding divorce, the wording was sufficiently vague to require judicial interpretation. In addition, the legislation has, in many cases, openly solicited judicial discretion. In Ontario, for example, the legislation that was in effect before 1986 instructed the court to "make a division in family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable" [Family Law Reform Act, 1984, Section 4, (4)]. The outcome of this interpretation in Ontario and all provinces east has been that wives who have not worked outside the home, but who have assumed total home and child care provisions, are not automatically entitled to a share of non-family assets (Law Society of Upper Canada, 1984:8) and in

fact get little or none. The exception is Quebec, where since the early 20th century, wives have been awarded half of these assets (Stoddard, 1981:327-328). However, fewer than half of the wives in Quebec benefit from the property sharing because most couples opt out of this system, preferring instead to design their own marriage contract (Dulude, 1984:19). In the western provinces they usually get one-quarter to one-third (Dulude, 1984:35).

As can be seen in this division of non-family assets, businesses and farms were still regarded as products of the husband's work and the wife's contributions were under-valued unless they resulted from paid work she did outside the home. This division of assets implies that homemakers are not equal partners with their husbands (Dulude, 1984:34-36). Fortunately for those women living in Ontario, the government has recently recognized that the courts were reluctant to advance towards the principle that marriage is an equal partnership, and unlikely to adopt economic equality in marriage as a basic rule without a "clear and compelling legislative presumption" (Ministry of the Attorney General, 1984:7). Thus in 1986 Ontario joined Quebec by adopting laws which reflect the fact that wives and husbands both contribute equally, albeit differently, to the marriage. The statutes regarding the division of matrimonial property in Quebec and Ontario force judges to equally divide all property accrued during the marriage (that is, assets such as investment income, businesses, etc., in addition to matrimonial property) in Ontario, and all but private pension plans in Quebec. According

to the Attorney General's ministry official who recently drafted the legislation for Ontario, Bill 1, "creates the strongest standards in Canada--next to Quebec--for equal division of property when a marriage breaks down" (Globe and Mail, Nov. 19, 1985:A-12). It appears that these laws have effectively nullified the concept of dependency so far as matrimonial property is concerned. Certainly this has been the case in Quebec. In Ontario, the law has not yet been applied and as is clear at this point, it is the application of the law together with the law itself which has created inequality. In any case the Ontario government appears to have taken this into account and to have drafted the legislation in a manner which eliminates the concept that women are dependent on their husbands. By equally dividing the matrimonial property, Quebec's and Ontario's legislation has placed women on an equal footing with men, at least as far as this legislation is concerned.

The above discussion shows that in all but two provinces, women are not considered to be equal partners in the marriage, but that in these two provinces, property division is based on an assumption of equality. These laws are the most far reaching of all the divorce policies affecting the financial status of women.

However, property division does not represent a significant amount of money for the majority of divorcing women. Although we do not have Canadian data on the assets of divorcing spouses, an American study showed that the net value of assets of divorcing couples married less than five years, and from five to nine years

was \$3,000 and \$14,000 respectively (Dulude, 1984:33). As we can see from Table 1, about half of all Canadian couples who divorce were married less than ten years. For many of these couples, financial assets in the form of wages and salaries are more significant.

TABLE 1

Percent Distribution of Duration of Marriage of Divorcing Couples, 1969, 1979, and 1969-1979

Duration of marriage (in years)	1969 %	1979 %	1969-1979 %
Less than 5	13.2	23.7	21.5
5 to 9.9	21.3	30.7	27.4
10 to 14.9	18.0	17.2	17.1
15 to 19.9	14.9	10.3	12.3
20 to 24.9	13.3	8.1	9.5
25 or more	19.3	10.0	12.2

Source: McKie et. al., 1983: p.92.

In the next section we shall examine divorce policy regulating the division of income--spousal support. We shall see that although the financial pool provided by income affects a far greater number of ex-spouses than does property, recognition of equality between the spouses has not evolved to the same degree as it has in the division of property.

Spousal Support

Spousal support on divorce is an issue within the jurisdiction of the federal government. The Divorce Act, 1968, specifies that maintenance awards must be "fit and just having regard to the conduct of the parties, and the condition, means and other circumstances of each [spouse]". Just as in custody decisions, these factors are not sufficiently detailed to be applied without further interpretation. Other factors have been cited as being the ones often considered in making awards. The major factors considered relevant to spousal support are: the standard of living during marriage, age, health, needs, obligations and dependents, financial standing, income from employment, capital assets, savings, duration of the marriage and conduct (Davies, 1984:474-486). These factors can be viewed as guiding principles, since they suggest that awards should be affected by their consideration. (For example, an award in the case of a long-standing marriage may be larger than that in the case of a very brief marriage, all other things being equal).

These principles are applied in a manner which indicates a

very traditional conception of the expected roles of men and women. We shall see that the manner in which these principles are applied varies greatly, but that the result is uniform: the economic status of women is lowered. The primary assumption behind the application of these factors appears to be that spousal support is awarded on the basis of need, and is justified by the mutual responsibilities rather than the mutual rights contracted by the marriage relationship. Husbands and wives are thought to take on roles during the marriage (breadwinner and dependent) which are continued after the marriage because of the consequences of these roles. In this perspective wives, due to their role as dependents, are not equipped to support themselves and their husbands, due to their role as breadwinners, are capable of helping their ex-wives. However the husband's wage or salary is not due merely to his own efforts, it is a tangible asset of the marriage built up by the contributions of both parties. The wife's contribution is usually less direct than the husband's--for example, she assumes a disproportionate share of the household duties to allow the husband to spend more time and energy on his paid work--but it is no less real. By basing spousal support on need [5], judges deny wives a right to a portion of their husband's salaries, thereby undervaluing the unpaid work women invest in their marriages and reaffirming their status as dependent. A wife is not considered to have a right to a share of the assets she helped to build up, such as her husband's earning ability and status in the workforce, even if

she fulfilled her responsibilities as housekeeper and child carer. When a spouse is awarded spousal support it is to meet a need for ongoing maintenance (Davies, 1984:471-472). According to Payne,

Modern courts in practice seem to have awarded periodic payments to the wife when the facts met the following tests: (1) Has the marriage lasted a material length of time and has the wife looked after home and children during most of that period, even with less than perfect care? In other words, has the wife earned a right to be supported? (2) Does she need support and is she unable adequately to support herself? (Payne, 1984:393)

The terms within which the need will be met and the other spouse will be considered able to meet the need are based on the factors specified above. So, for example, a wife of reasonable wealth may be considered 'needy' because the standard of living which she was accustomed to during the marriage was much higher and the husband is capable of maintaining this standard (Davies, 1984:460). A much more frequent example is that in which the wife is forced to apply for social assistance. In both cases the wife is awarded maintenance because she is considered to be dependent.

In the past, wives were almost automatically awarded maintenance, since they had no rights to matrimonial property and usually no means of support of their own. In view of this dependence, the husband was assumed to be responsible for her maintenance at a level commensurate with his ability to pay. Once women attained some degree of rights to matrimonial property,

support came to be awarded more on the basis of conduct. If a need could be shown, and if the judge viewed the wife's conduct within the marriage to have met some standard of appropriateness to her dependent role, support would be awarded. In recent years conduct has played a diminishing role, but support payments have diminished in frequency and duration as well. A sample of divorce files from Supreme Courts in Calgary and Edmonton indicated that between 1972 and 1979 fewer than 5% of wives received periodic awards (that is, weekly or monthly payments rather than one lump sum payment) when there were no children involved in the marriage (Canadian Institute for Research, vol. I, 1981:2, 14). The lack of periodic awards is most likely due to the increasing popularity of the 'clean break' principle, whereby the recourse to one's spouse's means is severed at divorce. This is achieved by awarding no support or one lump sum (Davies, 1984:472). Some periodic awards are made as 'rehabilitative maintenance'. These are for a specified period (usually three years) to provide the spouse with an opportunity to gain the education and work experience needed to succeed in the workforce. It is thought that the move toward self support was brought about through the inclusion of mutual support in the Divorce Act, 1968.

Placing women under an obligation to support men emphasizes the obligations of women to become economically independent. Recognizing that a woman has the capacity, in some cases, to carry the double burden of support for herself and her partner, presumes more cases where she is able to carry the burden of support for herself alone (Law Society of Upper Canada, 1984:50).

However progressive the principles of 'clean break' and 'rehabilitative' maintenance are thought to be, they really are not any different than maintenance 'in perpetuum'; they are still based on the concept of dependency and the resulting (husband's) responsibility. Maintenance is still awarded because these women cannot support themselves. This attitude both ignores and hides the fact that wives who are not in the labour force have earned a portion of their husband's income. Changing the amount of time for which maintenance is awarded is not progressive because this still does not recognize the wife's right to her share of that mutually earned asset. This distinction between dependency and responsibility on the one hand, and rights to mutually acquired assets on the other, is exemplified clearly in the way in which judges factor new relationships of the spouses into their maintenance decisions.

We shall see that generally speaking, new relationships are believed to create new economic responsibilities for men and new sources of income for women. When a wife remarries the court discontinues the support obligation of the former husband because it is thought that there has "... been an increase in the former wife's means by virtue of her having acquired a new husband" (Davies, 1984:494-495; Law Society of Upper Canada, 1984:83). However, should the husband remarry "... the income of the husband's new wife is not to be treated as income of the husband" (Davies, 1984:483; Law Society of Upper Canada, 1984:84). This principle also generally applies to unmarried cohabitation. We

will see from the legal precedents analyzed in the following section that while some variation exists, judicial decisions are quite uniform in assuming women's dependency.

New Relationships

In this section we examine the effect of one variable--the existence of a new relationship on the part of either spouse--on the spousal support award.

In order to analyze judicial perceptions of the roles of men and women, and the effect of these perceptions, I undertook an analysis of legal precedents regarding the impact of new relationships on spousal support awards (64 cases, all of which are discussed in this section). Legal precedents in family law are as relevant to the determination of issues as are statutes. Precedents are decisions regarding the application of a statute to a particular situation (case). Once an interpretation is made it is viewed as the law regarding that particular situation, unless the interpretation is overturned by a higher court. In practical terms this means that all future cases must follow the first rendered decision. Uncertainty arises over the outcome of a given case, because it is rarely identical to any one precedent. It is the judge's duty to decide how to apply precedents to the case at hand.

The precedents analyzed in this thesis were found by selecting all legal precedents from 1969 to the present cited by two authorities: Christine Davies, 1984 and Julien Payne, 1982.

[6.] The selection of these two authors as authorities is based on their evaluation as such by lawyers in the field of family law and by the fact that these two authors presented a comprehensive study of cases, encompassing and often surpassing the lists of cases referred to in other articles on this subject. Three other relevant articles were examined for any cases not considered by Davies or Payne (Fodden, 1980; Weisman, 1983; Wilson, 1983). These sources were supplemented by including any precedents referred to in the precedents themselves. The criterion I used to include a precedent was whether the court in that case weighed the relevance of a new relationship in its maintenance decision. Where this was taken into account the case was analysed as to whether an assumption of female dependency influenced the maintenance decision. Indicators of an assumption of female dependency were: 1) judicial decisions which reduced the amount awarded in the maintenance order, or terminated the maintenance order because of the existence of a new relationship on the part of either spouse; 2) cases which indicated that the maintenance order would have been reduced or terminated because of the new relationship but for the judge's evaluation of the importance of other variables, such as the inability of the former wife's new partner to support her. Because the courts do not distinguish between cases settled pursuant to provincial laws (that is, spousal support between separated couples) and those arising out of the Divorce Act, 1968 in making their decisions, I included both. These precedents are thought to be representative of the

majority of maintenance decisions because all courts are bound by these decisions and because precedents generally "constitute the primary source of applicable legal doctrine" (Backhouse, 1981:214; Payne and Kallish, 1983-84:83-1203 to 83-1204).

The analysis presented in this section brings into relief the fact that a former wife's access to spousal support is based on need rather than right. Despite her past contributions, a new relationship can eliminate or reduce her access to a share of the income assets of the marriage. Even in cases which directly contradict this (6% of the cases considered), it should be remembered that spousal support is only awarded to meet an ongoing need, even if that need is not readily apparent.

The effect of new relationships on spousal support varied among the cases studied. However, among a number of salient features, one stood out very clearly: a marked difference between the impact of the new relationship on the part of an ex-husband and that of an ex-wife. When a woman enters into a new relationship, regardless of her wishes or the understanding she may have with her new partner to the contrary, she will usually be treated by the courts as that man's dependent. This rationale of dependency is behind the majority of decisions on spousal support, but its application does vary according to the circumstances of the new relationship. The circumstances are the form that the new relationship is seen by the judge to be taking. These circumstances may be classified as remarriage, common law unions, and relationships of indefinite duration (that is,

cohabitation not considered to constitute a common-law union). Within each of these circumstances the new partner's ability to support the spouse in question may or may not be considered, but overall there has been a clear difference in judges' evaluations of the consequences of the relationship based on whether the new relationship was on the part of the former wife or the former husband. We shall now discuss each of these circumstances taking into account the variation within each.

Remarriage by Former Wives

When a woman remarries she generally loses her maintenance order, sometimes through the fact of remarrying and sometimes through the new circumstances the remarriage creates. Fifteen of the 64 precedents examined (23%) involved the effect of remarriage of the former wife. Eight of the cases dealt with a former wife's remarriage, the remaining seven involved principles to be followed in the event of remarriage. In the majority of cases considered, a wife's right to spousal support was terminated due to the fact of her remarriage. In *Oxenham v. Oxenham*, *Neal v. Neal* and *Dailey v. McCabe*, the former husband's ability to provide spousal support was not evaluated, even though in the latter two of these cases, the new husband's means appeared very limited. In *Neal v. Neal*, although the judge acknowledges that the new husband is not in a position to support his wife, he concludes that it is, none-the-less, his responsibility. He also opines that both the former wife and her

new husband are capable of supporting themselves. In Dailey v. McCabe, it is acknowledged that the former wife's standard of living will be below that enjoyed during her former marriage if spousal support is rescinded. It is none-the-less thought appropriate to rescind the order because "Mrs. McCabe left the marriage as a dependent ... [in taking] the hand of Mr. Dailey in marriage.... she again [became dependent on her current husband]" [R.F.L., 1981(22):219]. "Divorce ended the marriage. The remarriage ends support flowing from it" [R.F.L., 1981(22):220].

In Lowe v. Lowe and Sampson v. Sampson, the judge appears to have placed considerable weight on the new husband's greater ability to support his wife and the former husband's lesser ability. In Lowe v. Lowe this appeared to be due more to the former husband's responsibilities for his new wife and step-children.

As with cases where the judge did not consider ability to provide spousal support, the assumption in these cases is that the wife must look first to her new husband for support. When this fails she must look to a former husband; state support is her last recourse. This further emphasizes the breadwinner/dependent relationship that is engendered through marriage and the durability of this relationship through successive relationships. So, for example, in Lucieer v. Lucieer the former husband's appeal to terminate spousal support was dismissed because his former wife had not been successful in applying for support from her second husband. (from whom she was

also divorced). Similarly in *Beqqs v. Beqqs*, where both parties were financially secure, but the former husband's income was about four times that of his former wife and her new husband, spousal support was awarded for a period of six years (to be terminated in 1987). This award was considered to be so anomalous as to require an annotation by the editor of a leading journal reporting legal precedents in family law (*Reports of Family Law*). He evinced considerable surprise that support was awarded where the wife had sufficient means and a new husband to assume responsibility for her. If she had had to resort to social security for support, the annotation would not have been required. McLeod argues that only under "old law" (by this he appears to mean laws in effect before the Divorce Act, 1968) should a former wife who is remarried be granted maintenance where she is not in risk of applying for social security (McLeod, 1981:165-166).

This view appears to be mirrored in all the precedents on new relationships, with the exception of *Beqqs v. Beqqs* and *Richards v. Richards*. In *Richards v. Richards*, the wife's remarriage did not terminate the spousal support order. While these two cases appear to be anomalies, closer study reveals that as far as an assumption of dependency is concerned, they are not. It must be remembered that spousal support is only awarded to meet an ongoing need even if that need is not readily apparent. No account is taken of the wife's right to a share of her former husband's assets by virtue of her contribution to his ability to

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MICROCOPY RESOLUTION TEST CHART
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earn more than she. In *Beggs v. Beggs* and *Richards v. Richards*, the award of spousal support from a former husband was not presented as a substitute for the current husband's responsibility. Indeed, in *Beggs v. Beggs* the trial judge goes to considerable length to reaffirm that the wife and her new husband produce a combined income which would tend to eliminate the former husband's responsibility. [R.F.L., 1981 (24):169]. It is submitted that these awards were intended to supplement the support provided by the current husband. In either case the wife appears to be evaluated as dependent.

In all the cases in which remarriage had not occurred, but in which suggested principles to be followed regarding spousal support were proposed, the judge flatly stated that support should be terminated (*L. v. L.*, *Gilbert v. Gilbert*, *Connelly v. Connelly*, *MacNeil v. MacNeil*, and *Schmidt v. Schmidt*). In *Swalm v. Swalm* and *West and Brower v. Brower*, the principle of rescinding spousal support upon the remarriage of a former wife was embellished to terminate maintenance orders where a woman "establishes a relationship with a man whereby she is either being supported by him or ought to be supported by him".

We saw that in seven of the 15 cases examined the judge viewed the remarriage of a former wife as automatically terminating spousal support, and included a clause to this effect in the spousal support order. In three other cases (*Oxenham v. Oxenham*, *Neal v. Neal* and *Dailey v. McCabe*) it is clear that this principle was applied, even though no direct reference was made

to this effect in the support order. In *Lowe v. Lowe* and *Sampson v. Sampson* the principle of terminating spousal support on the basis of the remarriage of a former wife may have been important. However, it is equally clear that the judges also assessed the former husbands' low income as an important factor. In the remaining three cases (*Beggs v. Beggs*, *Lucieer v. Lucieer* and *Richards v. Richards*) remarriage appeared to be only one of a number of intervening factors. Thus, in 10 of the 15 cases remarriage on the part of a former wife effectively terminated spousal support. Her presumed dependence on a male partner was the determining factor.

Remarriage by Former Husbands.

We shall now examine the effects of remarriage by the husband on spousal support orders (a total of 25, or 39% of the 64 precedents examined). We have seen that, by and large, remarriage by a former wife has tended to absolve her former husband of his responsibility to support her. The reasoning appears to be that where he is able, and sometimes in spite of his inability, the new husband should pay for the upkeep of his wife. Where it was the former husband who remarried, we shall see that, where his resources could not provide for two families, his new family was given priority. However, where the former husband was able, and the former wife demonstrated a need (that is, she was financially needy and did not have a partner to rely on) he was made responsible for spousal support. In keeping with the

principle evinced above, just as a former wife is considered to be dependent firstly on her current partner, and secondly on a former husband, the new wives of previously married men are considered dependent on their current husbands.

The difference occurs where the husband's ability to pay is limited. Whereas if the wife remarries she is automatically cut off from the maintenance or only gets it if her new husband proves unable to support her, if the husband remarries and has limited income, the former wife is the first to lose support. In both cases the wife's right to a share of her former husband's assets is denied. This disparity is further compounded by the fact that divorced men are more likely to remarry than divorced women (Dulude, 1984:27). It is worth noting that in cases where a husband remarried his ability to support his former family was investigated, whereas when a wife remarried support was frequently cut off without an investigation of the means of the new husband. The judicial explanation of this inconsistency is based on the assumption that the husband and wife of the new marriage must be sufficiently unencumbered to allow the new wife to assume a dependent role. Only then will the new family unit prosper, and "[i]t is in the public interest that the new family unit be given every opportunity to succeed and prosper" (R.F.L., 1972 (8):16). As a result "... the new family is often 'preferred' to the old, because there is simply not enough money to go around. In such cases, the state furnishes minimal subsistence directly to the old family, leaving its former

provider free to voluntarily support the new family, typically at a higher level." (Glendon, 1980:63). Two exceptions to the above statements were noted. In *Osborne v. Osborne* and *Hilton*, the husband's new family was viewed as a burden he voluntarily assumed and thus not sufficient reason to reduce spousal support. In *Connelly v. Connelly*, the husband's remarriage is given very little attention. It is merely stated that maintenance will be rescinded when the wife remarries.

When a man remarries it is automatically assumed by the courts that he should, and does, support his new wife. In those cases where the man was considered unable to support both families, his current family usually took precedence. In *Oxenham v. Oxenham* and *Low v. Lowe*, spousal support was terminated. In the first case this was clearly related to the fact that the wife remarried. In the second case it appeared to be due to the husband's limited means combined with his responsibilities to his new family. In *Turner v. Turner* and *Seadon*, *Coghill v. Coghill* and *Re Feehan* and *Attwells*, maintenance is reduced to \$1.00 payments. In the case of *Turner v. Turner*, the award of \$1.00 per year was set because the man's income of \$400.00 per month was needed to support his new wife and two children. One of these children had been awarded child support which was not being paid from his biological father. [7.] At the same time, Mr. Turner's responsibility to his former family was not completely absolved. The award of \$1.00 per year was no doubt intended to keep the maintenance action 'alive', so that the former family would be

able to apply for support should his means increase. In three more cases, spousal support was decreased, though not as dramatically. In *McQuilkin v. Dawson*, *El-Sohemy v. El-Sohemy* and *Grini v. Grini*, the former husband's modest means combined with his new responsibilities were viewed as just cause to reduce spousal support in the first case, and to terminate it in a specified period of time, for the other two. Only in the case of *Osborne v. Osborne* and *Hilton* does the former family take precedence over the new family. In this one case the income of a remarried man was allocated to the former family even when it appeared it may have been needed by the new family. It appeared that the judge believed the new wife could help meet any financial shortages by joining the workforce.

In the remaining 15 cases regarding remarriage of a former husband, he was evaluated as capable of supporting both families. In seven of these cases, the man's new wife was also earning an income. In six of the seven, spousal support was awarded against the husband's income (*Fenn v. Fenn*, *Auzat v. DeManche*, *Winters v. Winters*, *Graf Finck von Finckenstein v. Grafen Finck von Finckenstein*, *Tobin v. Tobin*, and *Ceszyry v. Ceszyry*). In each of these cases the new wife's income was not used in deciding whether to award maintenance to the former spouse, nor in setting the amount. It is interesting to contrast this procedure with that used in assessing wife's means--which are considered to have increased by virtue of having acquired a husband (Davies, 1984:494-495).

In one case, *Roberts v. Roberts and Davis*, the new wife's income appears to have been taken into account in assessing spousal and child support. The judge does not state that he is using the new wife's income, nor does he mention that the increase in total maintenance exactly matches that portion of the former family's income that came from welfare payments. He does state that he is "... strongly of the view that the public should not be called on to subsidize the amatory adventures of the [former husband]" [R.F.L., 1976 (24):236], and he does use total gross incomes to assess maintenance. Evaluation of the figures leaves little doubt that the new wife's income at least partially covered the increase in the maintenance award, which in turn exactly matched the amount of support previously provided by welfare payments. This appears to be an anomalous case, and the use of the former husband's new wife's means may well be based on the judge's obvious distaste for the former husband's conduct (as evidenced by numerous remarks) combined with the former wife's need for social assistance. In the other eight cases either the new wife was not working or no mention was made of her work status (*Swift v. Swift*, *Poste v. Poste*, *McKellar v. McKellar*, *MacDougall v. MacDougall*, *Belof v. Belof*, *Hall v. Hall*, *Beggs v. Beggs* and *Horlock v. Horlock*). The husband was judged capable of supporting both wives. In two of these cases some variation did exist. In *Belof v. Belof*, the support order was reduced from \$25.00 per month to \$10.00 per month to accommodate his responsibility for his new wife. In *MacDougall v. MacDougall*,

the order is not varied but the principle behind this decision is not clear. The judge states that "... the former husband ...[may not] bring about a reduction in his maintenance obligations ... by voluntarily increasing his other obligations" [R.F.L., 1973(11):271]. At the same time, the judge advises us that the husband's expenses related to his new family were not substantially argued, implying that if they had been it might have altered the order.

In eight of the 25 cases considered in this section, the husbands' remarriage effectively terminated spousal support. In 15 others the husband was judged capable of supporting both families. In only two cases, Osborne v. Osborne and Connelly v. Connelly, was the remarriage of the former husband not considered to be a significant factor in settling spousal support.

The legal precedents regarding the remarriage of a former husband reinforce the general principles found in legal precedents regarding the remarriage of a former wife. In each case, women are treated as dependent on individual men, firstly their current partners and secondly on their former partners. Also in each case, the wife's need of, rather than her right to, support is the criteria applied. We shall now investigate judicial use of the concept of dependency in new relationships that take the form of unmarried cohabitation.

Cohabitation

In the introduction to this section on the effect of new relationships on spousal support, I explained that the application of the concept of dependency varied according to the circumstances of the new relationship: remarriage, common law unions, or relationships of indefinite duration. We have discussed the effect of remarriage by a former wife or a former husband. When new relationships take the form of cohabitation, rather than remarriage, the application of the concept of female dependency shifts. Women are still forced by the courts to direct their first claims for spousal support to their current partners, but men are not similarly directed to place priority on the financial upkeep of their current families. The explanation of this difference appears to be based on two factors: the courts' abhorrence of common-law unions, and their archaic view of wives in general. The courts do not place a premium on the preservation of the family unit which has not been formalized through legal marriage. Judges do not view it to be in the public's interest that this type of family unit be encouraged to prosper; quite to the contrary, they argue that, "... common-law relationships are generally repugnant to the family unit. To foster, endorse or encourage common-law relationships is to diminish the presence of the family unit in our society, and anything which diminishes that presence diminishes our society" [R.F.L., 1976(3):80].

This explains why former husbands are directed to support

families created through legal marriages over common-law unions, but not why former wives now in common-law arrangements are not directed to seek support from their former legal husbands first. This divergence can be partially explained by examining the courts' treatment of women. Up until the early 1970s court orders often included a provision for the termination of support to a wife who had ceased to lead a chaste life (referred to as a 'dum casta' provision) (Davies, 1984:495). Although such provisions are no longer legal, they are mirrored in many of the courts' actions. Although most judges are subtle in applying their updated 'dum casta' provisions--simply directing women to look to their new partners for financial support--some clearly articulate their views. So, for example, Goodridge J. stated that where a wife "... chooses to share her life, her home and her body with another man ... she forfeits her right to periodic maintenance to the same extent as if she remarried" [R.F.L., 1976(3):78].

Cohabitation by Former Husbands

Outside of marriage, the form of cohabitation of the former husband, be it a common-law union or a relationship of indefinite duration, will not change his support responsibilities as they are defined by his former marriage. In the 18 precedents regarding unmarried cohabitation of the former husband (28% of the total 64 cases), this was the case. What variation that did exist among the cases appeared to be based on the wives' actions

and the husbands' income levels. In those cases where the former wife was not awarded maintenance, other factors overshadowed her presumed dependence. So, in two cases, she had also cohabited (Denney v. Denney and Watt and Barnard v. Barnard) and in two others she was deemed to have contributed to the marital breakdown by not fulfilling her wifely role (Powell v. Powell and Harris v. Harris). It is submitted that these activities on the part of these three women had ostracized them from the 'benefits' of the wifely role. In each case the judge's decision not to award maintenance was not based on a concern that the burden of the former wife might cause the current union to diminish as was the case with remarriage. In Denney v. Denney and Watt, although only the former husband was cohabiting at the time of the maintenance trial, the fact that the former wife had cohabited for a period of three years appeared to be the dominant factor in deciding spousal support. The spousal support arrears that had built up during the former wife's cohabitation (\$7200.00) were cancelled, and the future award was set at \$5.00 a month. The judge based the cancellation on the former wife's cohabitation, and the low award on the husband's inability to support himself and his former wife. It is submitted that the husband's relative affluence, as made apparent during the trial, puts into question the extent to which this was the real rationale used in the decision.

In the 12 cases where the former wife performed her wifely duties adequately, she was awarded spousal support. In Ireland

v. Ireland, Prytula v. Prytula, Gosney v. Gosney, Eggleston v. Eggleston, Weir v. Weir, Whiten v. Whiten and Gilbert v. Gilbert, the judge clearly states that the husband bears no legal obligation to support his new cohabitant. A new cohabitant is viewed as being "...a mere interloper, who has no rights whatever with respect to [the former husband's] ...resources" [R.F.L., 1982(27):212]. In the cases of Bessette v. Bessette and Doerksen v. Doerksen, spousal maintenance is not awarded because it has not been requested. In both cases, however, the judge states his willingness and even his belief that spousal support should be awarded, in view of the fact that these women are in receipt of social assistance. In Stevenson v. Stevenson, the judge did not evaluate Mr. Stevenson's ability to support both his former wife and his cohabitant of five years. He merely asserted that based on Mr. Stevenson's infidelity to his former wife he had a responsibility to support her. It is important to note that Mr. Stevenson would also have been deemed legally responsible for the support of his common-law wife had she filed for spousal support. In Schmidt v. Schmidt it is not clear to what degree the husband was assessed capable of spousal support, but the judge did explain that this ex-husband could not evade his legal responsibility to his former wife through the voluntary acquisition of additional responsibilities in the form of his cohabitant and her children [R.F.L., 1976(26):238-239]. However, as we have seen, the voluntary acquisition of additional responsibilities through remarriage is seen in quite a different

light.

The case of Vey v. Vey follows the pattern outlined above in that spousal support was awarded. The award of spousal support is anomalous in that the assessment of the former husband's ability to provide support appears to be based on the assets of his cohabitant (who, over the course of the trial, became his wife). Although this can be partially explained by the repeated reference to the "reprehensible" conduct of this man and his "inamorata" (D.L.R., 1979(97):79), it is certain that the means of a new wife are not generally to be used as a husband's income, and that there is even less justification for using the means of a cohabitant (Davies, 1984:483).

In two cases, Lafonde v. Lafonde and Blackey v. Blackey, the husband's income is very limited, but spousal support is also set low, making it difficult to assess the extent to which one family has been preferred over the other.

In summary, in 12 of the 18 cases considered here the former wife received spousal support despite the fact that her former husband was cohabiting. It is made clear in most of these cases that the determining factor was the nature of the former husband's new relationship, and not the wife's rights. In the six remaining cases either she did not get support or the support was set very low. In Denney v. Denney and Watt and Barnard v. Barnard the wife also cohabited. In Powell v. Powell and Harris v. Harris, the former wife appeared to have ostracized herself from the wifely role. In all four of these cases the former wife

was viewed as being undeserving. In the last two cases it was difficult to determine what effect cohabitation had on the spousal support award.

Cohabitation by Former Wives

We have seen that where a husband cohabits, judges place more emphasis on the former wife's actions than on the former husband's in determining spousal support. We shall now examine the effect of cohabitational patterns in new relationships of former wives. There are a total of 16 precedents (that is, 25% of all precedents considered here) regarding the effect on maintenance orders of unmarried cohabitation on the part of former wives. [8.] In general, we shall see that regardless of the length of time a former wife cohabits (in a new relationship), she is expected to be her new partner's dependent during the period of cohabitation, and if possible, afterwards.

In two of the cases where a woman cohabited long enough to have been considered to have entered a common-law union, the judges emphasized her legal right to her new partner's income. In *Morrow v. Morrow*, it was stated that the wife had been cohabiting long enough to have acquired a legal right to her cohabitant's income. She was instructed to direct any financial need she may have had to her cohabitant. This also appears to be the logic behind the support order awarded in *Barnard v. Barnard*. Although the judge did not see fit to provide this explanation in his judgement, during the case he stated that cohabitation is a

factor which must be considered, and that under Ontario law she would be eligible for support from her cohabitant in another two years. Support was awarded for a period of two years.

In both of these cases the former wife's claim for spousal support was treated not as a right but as a responsibility to be shared, or rather shifted, between her former husband and her cohabitant. In *Ewart v. Ewart* the judge does not appear to have considered the cohabitant responsible for the financial upkeep of the former wife. In other cases, even though the cohabitation between the former wife and her new partner had not met the conditions of a common-law union, the new partner was designated as responsible for the maintenance of his cohabitant. In more than half of the precedents regarding cohabitation of indefinite duration, the former wives' cohabitants' ability to provide support was not even assessed. In those cases where this was evaluated and they were deemed financially able, spousal support by the former husband was denied.

We will first discuss those cases of cohabitation of indefinite duration where spousal support was settled without investigating the financial situation of the former wives' cohabitants. In five of these eight cases the judges supported the view that spousal support be denied to former wives who cohabited. In *Denney v. Denney* and *Watt and Hall v. Hall* the wives were no longer cohabiting at the time of the trial. However, for that period when they did cohabit, the spousal support was retroactively cancelled. These judgements appear to

be in accord with the sentiments of one former husband; as one presiding judge fondly quoted, "[the former husband's] attitude appears to have been that there was no percentage in it for him, as the horseplayers say, to keep on buying oats for dead horses" (R.F.L., 1972(8):226). In Carter v. Carter, although the wife was not cohabiting, she was deemed to have been "engaged in an affair that was tantamount to living together" [R.F.L., 1978(3):365] and was therefore awarded less support. In Neilson v. Neilson the former wife had spousal support from her former husband terminated due to her cohabitation with another man, even though the judge stated that the former wife should not have been expected to work full-time due to her child care responsibilities [R.F.L., 1981(16):205]. Clearly he expected the cohabitant to provide for her upkeep.

The belief that women who cohabit do not need or deserve spousal support was evident in most cases. In one case the maze of assumptions regarding the rights and responsibilities regarding former spouses bears some sorting out. In Chaffey v. Chaffey the wife was awarded lump sum maintenance, but it is clear that the presiding judge, Goodridge J., viewed this as a reward for contributions to the marriage, to be distinguished from periodic maintenance, which is designed only to cover need. This case is somewhat confusing in that the judge appears to approach the issue of spousal support from two contradictory positions. The award of lump sum maintenance appears to be to reward the wife's non-monetary contributions, such as

housekeeping. This award would usually have been allocated in the division of property. The judge based his decision on the absence of such legislation in the province of P.E.I. (where the case was heard) [R.F.L., 1976(3):76-77]. This is a rather bold step to protect the rights of wives in acquiring at least some portion of the wealth created by the marriage.

At the same time, Goodridge J. expressed very conservative views on the rights of married women, stating that it is "... repugnant to all accepted social principles that a spouse should be required to maintain or contribute to the maintenance of a former spouse who has remarried or entered into an economic or other relationship resembling marriage with a person of the opposite sex" [R.F.L., 1976(3):80]. In this case the former wife was denied periodic spousal support because she had shared "her life, her home and her body" with another man, and had therefore forfeited her right to maintenance [R.F.L., 1976(3):78].

In three cases, spousal support was not terminated. In two of the precedents the judge emphasized the former wife's lack of legal recourse to her cohabitant's income (Seeman v. Seeman and Belanger v. Belanger). In the case of Moul v. Moul, the judge insists that in order to successfully apply to vary spousal support, the former husband must indicate that his former wife's financial position has changed, and that a change in marital status is not sufficient evidence.

Finally, we discuss those precedents regarding cohabitation of indefinite duration on the part of the former wife, where the

judge referred to the new cohabitant's ability to provide support. In *Lawless v. Lawless* and *Wiebe v. Wiebe* the former wife's cohabitant was judged capable of providing support. In one case, maintenance was denied because it was thought that she could not show need, and that her inability to show need had resulted from her failure to make full disclosure of her "paramour's" financial position. The woman was declared to be in a position of "substitute dependency" (*Lawless v. Lawless*). In the other case, spousal support was denied because it was thought that it would enrich the former wife's cohabitant's resources at the expense of her former husband (*Wiebe v. Wiebe*). Apparently in this judge's mind the woman was incidental to the economic relationship between these two men.

In two of the precedents, spousal support was awarded despite the woman's cohabitation with another man. In these cases the cohabitant was not able to support the former wife (*Misener v. Misener* and *Horlock v. Horlock*). In *Faulkner v. Faulkner*, while the judge is very clear that the evidence alleging that the former wife was cohabiting was insufficient to warrant that conclusion, he based his decision to continue maintenance on the decision taken in *Ewart v. Ewart*, and he stated that he would not have rescinded the maintenance order even if he had found that the former wife was cohabiting.

Of the 16 precedents discussed regarding cohabitation of former wives, in all but two cases the decision of whether or not to award spousal maintenance was clearly based on the concept

that these women were dependent--either on their current cohabitant or on their former husband (Ewart v. Ewart, Faulkner v. Faulkner).

This discussion of spousal support in cases where a former wife has entered a new relationship of cohabitation has provided information on some of the variation in judicial use of the concept of dependency. In a large majority of the cases the courts made it clear that they believed that the new partner should be designated as economically responsible for a former wife. In those few cases where the cohabitant's ability to provide support was investigated and found lacking, the woman was designated as dependent on her former husband. In cases regarding the cohabitation of a former wife, as with those relating to the remarriage of a former wife, the woman is considered to be dependent on an individual man be it her ex-husband, new husband, or new cohabitant. We have seen that the framing of the issue of spousal support is based on a presumption of the responsibilities of men/breadwinners for their dependent wives. The occupational status and earning power of husbands, built up during the course of a marriage and at least partially attributable to the contributions made by a wife, are not considered to be assets shared by former spouses. The award of spousal support is based on ability to provide support and on need. However, both of these criteria are also influenced by the concept of dependency evident in judicial evaluations of the importance of new relationships. Furthermore, we have seen that

in most cases the effect of new relationships, regardless of whether they are on the part of former wives or husbands, has been to drastically decrease or terminate spousal support for the former wife. Clearly this augments their low economic status.

Conclusion

This chapter has reviewed some aspects of divorce policy which, through their assumption of female dependency, act to the detriment of women. Specifically, we have focussed on court decisions in divorce trials which reflect this assumption. We have seen that the assumption of dependency has worked in two distinct ways to disadvantage divorced women. Firstly, it has led to a consistent underestimation of the worth of their non-monetary contribution to the marriage. Secondly, it has led to court decisions which further entrench a dependent status by encouraging and sometimes creating that status.

We first showed that divorce laws leave the divorce process vulnerable to the assumption of dependency through their apparently deliberate vague and open-ended wording. We then looked in some detail at how the discretion conferred upon judges by these vague laws resulted in decisions which showed a presumption of female dependency. Court decisions involving custody, property and spousal support disputes were each examined and were shown to rely on the assumption of dependency in a uniform and predictable manner.

In the section on custody we found evidence to question the

commonly held belief that women receive preferential treatment in custody settlements. First we found, that although mothers do receive custody in the majority of divorces, this is usually agreed upon by the spouses, and therefore merely reflects existing child care arrangements. Where custody is disputed there is some evidence to suggest that mothers tend to receive custody of young children, who require more support and attention, and that fathers will often be awarded custody of older children. Sometimes the father will replace the mother as custodian after some years due to his more favourable economic circumstances, even though the previous custody order may well have contributed to the difference between the mother's and the father's financial position. Secondly, we saw that the award of custody placed a disproportionate financial burden on the mother because of insufficient child maintenance awards and the high rate of default. The frequency with which women receive custody together with the meagre child support they are awarded and the high rate of default all tend to diminish the already low economic status of divorced women.

In our examination of the division of property we saw that a restricted portion of the marital assets is divided between spouses when the wife was primarily engaged in domestic labour. We also saw that earning power, the most valuable marital asset of most families, is not viewed as an asset and therefore not subject to division. The distribution of family assets to be divided between spouses as set out in most provinces.

legislation, combined with the limited value judges place on the unpaid labour of wives, has meant that divorced women get less than the share of assets they have earned. Clearly, the basis for ignoring and devaluing a wife's non-monetary contributions is the assumption that married women are their husbands' dependents.

Finally we considered the impact of spousal support. By excluding the 'family wage' from the division of assets, and by viewing spousal support as a short-term measure to enable wives to become self-supporting, judges effectively limit women's access to the 'family wage'. Our examination of the impact of the new relationships of spouses, underlined the limited conditions under which wives may be considered in need, and husbands may be considered obliged to provide support. We also saw that need and ability to provide support were defined on the basis of female dependency. Women in new relationships are viewed as economic liabilities on men and, conversely, men in new relationships are viewed as sources of income. The effect of the assumption of female dependency has often been to reduce or terminate spousal support to former wives.

The evidence supporting the conclusion that a former wife's access to the income assets of the marriage is based on her dependent status is very strong. In most cases the assumption of dependency was applied in a very open and direct manner. In some cases the judge even declared his reliance on the assumption of dependency in his judgement. In the remaining cases the assumption of dependence, while not openly applied, was evident

in the decisions reached. Such was the case where the judges based their decisions to award maintenance on the husbands' perceived ability to pay rather than on an evaluation of the wives' claim to a share of the assets. In the concluding chapter we view the evidence gathered here in the broader context of the role of state divorce policy in promoting female dependency, and the resulting low economic status of divorced women.

FOOTNOTES

- 1.) All provinces do have legislation regarding support and custody matters in cases of separation. In most cases the decisions regarding support and custody made within separation orders are merely ratified by the divorce courts. However where federal legislation conflicts with provincial legislation, the federal legislation is paramount (Abols, 1980).
- 2.) This figure was calculated from Table 6, p.220, McKie et. al., 1983.
- 3.) This sample does not measure child maintenance arising out of divorce. It represents all child maintenance orders including provincial orders (71.9% of the orders were provincial) and excludes orders made in higher courts than the Family Court. (For details of the sampling procedure see Baar and Moore, 1981:97.) In view of the fact that most divorce maintenance orders are enforced in Family Courts, and since few additional mechanisms for enforcement are available to divorce maintenance orders made in higher courts (at a significantly higher cost); it is submitted that the percentage of default reported here should be regarded as a good indication of the rate of default.
- 4.) The 75% estimate is found in Ryan, 1976:21. An estimate of 90% was given to the author by the data archivist for maintenance orders for the Ministry of the Attorney General in British Columbia during an interview.
- 5.) I have only come across one reference to any Canadian cases which treat income as an asset to be divided between spouses, and this paper refers to only one case in Canada--this was in Dulude, 1984:39.
- 6.) I have only referred to precedents set after 1968 because the Divorce Act, 1968 set out new criteria which judges were to use in setting support orders. This, together with the strong emphasis the Divorce Act, 1968 placed on formal legal equality, brought about a change in focus; spousal support was no longer automatically awarded. (For a discussion of this change see pages 76-77 this chapter.)
- 7.) Unlike situations where women and children in receipt of welfare are forced to initiate action on defaulted orders, this order was left in default. Just as this man's first responsibility was seen to be his current family, their primary provider was that man.
- 8.) The total percentage of precedents examined is greater than 100% because ten cases fit in more than one category (Barnard v. Barnard, Beggs v. Beggs, Denney v. Denney and Watt, Hall v. Hall,

Oxenham v. Oxenham, Schmidt v. Schmidt, Horlock v. Horlock,
Connelly v. Connelly, Lowe v. Lowe and Gilbert v. Gilbert).

CONCLUSION

We have seen that the economic position of divorced women as a group is very low, and that divorce policy in Canada contributes to their depressed status. The history of the legal status of married and divorced women is a history of laws and policies which have systematically prejudiced the legal and economic status of women. In the 18th Century married women had no legal rights to any property of the marriage, including that to which they directly contributed. Although divorce in the form of an annulment of the marriage at least reinstated their right to that property for which they had clear legal title, such divorces were virtually unattainable due to their expense and their rigid criteria.

In the late 20th Century laws regarding divorce formally aspire to principles of equality of the sexes, but in substance relegate women to an inferior economic position to that of men. The principle of formal equality has been applied in a somewhat schizophrenic manner. At the same time as women are viewed as being capable of and responsible for their own support, the work they perform is systematically undervalued. A wife's right to an

equal share of the property and income accrued during the marriage is dependent on her having earned an income equal to that of her husband. Her non-financial contributions afford her few legal rights.

The state has created legal inequality through its laws regarding divorce. Statutes on the division of property limit those assets which may be divided between spouses. Of even greater impact is the reliance on judicial discretion in the division of income assets of a marriage. We have seen that these decisions generally favour former husbands to the detriment of their former wives. By forcing judges to establish the principles on which these decisions are based and by accepting their outcomes, the state condones the unequal treatment of divorced women.

We have seen that women suffer economically from the consequences of divorce to a greater extent than do men. Divorced women are much more predominant in the low end of the income scale than divorced men and husband/wife families. The average incomes of divorced male-headed, single-parent families, divorced men not living with dependents, and husband/wife families are 80%, 50% and 107% higher respectively than their female counterparts. Comparison of the standardized incomes of divorced women with those of husband/wife families revealed that more than 60% of the families of divorced women were much worse off. In examining the causes of this lower economic status we saw that the lack of value placed on women's work--their paid

work and their domestic labour--had greatly contributed to their relative poverty. This lack of value is based on the assumption that these women are economically dependent on a male breadwinner.

In Chapter II we saw that this assumption of female dependency has been pervasive since the inception of divorce policy. Up until the late 19th Century married and divorced women were made dependent on men by laws which severely curtailed their ability to function in the economic sphere and which stripped them of control over their own economic assets. These laws underwent substantial reform, but the foundation of these laws--the presumption of female dependency--remained intact. As a result current laws, superficially egalitarian, still result in the unequal division of marital assets in favour of men. In our discussion of public and private law we noted that in affairs of the family the state adopts what it views as a posture of non-intervention. It views its arbitration of divorce disputes as merely reflecting the financial and other decisions made by spouses in marriage. In fact, we found that state divorce policy amounts to intervention which reinforces the status quo in family relations and consistently works against the economic interests of women. We also found that this intervention is based on the assumption that wives are dependent on their husbands.

This orientation in state divorce policy was documented in Chapter III. We found that on the three issues generally under dispute in divorce proceedings--custody, division of property and

spousal support--an assumption of female dependency and a bias toward traditional male/female roles influence court decisions to the detriment of women. The major focus of this chapter was an analysis of the use of the concept of dependency as a basis for judicial decision making. This was pursued through studying the effects of new relationships on spousal support awards. Here we established that in general, when either former spouse enters into a new relationship, the effect is to reduce or eliminate support payments to the former wife. When the former wife remarries or cohabits, she is seen as having a new source of income; her dependency has been transferred onto a new man. When a former husband remarries he is considered to have taken on a new dependent (or dependents, if children are involved). In either case, the former wife's access to support is reduced or eliminated.

The evidence presented in this thesis suggests strongly that the state, through its divorce laws and their application, supports the status quo in family relations, a status quo based on an ideology of dependency. This is shown to be the case despite reforms in divorce policy which have rectified the more blatant forms of discrimination and which purport to espouse the principle of equality of the sexes.

A case in point is the new Divorce Act, 1985. In this Act, the factors governing a court-ordered support payment have changed slightly. Unlike the Divorce Act, 1968, which expressly directed judges to consider spousal conduct [Divorce Act, 1968

Section 11(1)], the new Act expressly disallows its consideration in decisions regarding support orders. Other factors which are now to be considered are "...the length of time the spouses cohabited and the functions performed by each spouse during cohabitation..." [Divorce Act, 1985 Section 15(5)]. The new Act also specifies the objectives behind support orders and any variations to existing orders. According to the Act these orders should: recognize the economic advantages or disadvantages the marriage or its demise have created; fairly distribute any economic burden arising from custody that has not been met through child support orders; address economic difficulties created by the divorce itself; and reflect the principles of "clean break" and "rehabilitative" maintenance in settling the mutual responsibilities of former spouses.

These objectives may be new to the statute governing divorce, but they are hardly unfamiliar concepts in the case law governing divorce. The already well-founded currency of these objectives together with their apparently deliberate open-ended wording will mean that these objectives, however well-intentioned, will not alleviate the inequality discussed in this thesis. In addition, these changes add yet more weight to the government's already well-established pattern of increasing formal equality without similarly ameliorating the substantive inequalities between husbands and wives.

In order to effectively promote equality, Canadian divorce law must ensure women's access to their fair share of the

economic resources of the marriage. This would require that divorced women be guaranteed a right to a portion of all financial assets of the marriage commensurate with their contribution. These rights are not conferred by gently nudging judicial decisions regarding support in the direction of equality. The Ontario Provincial Government expressly recognized this fact (Attorney General, 1984:7), and in its legislation governing the division of property replaced judicial discretion with clear legislation which equally divides all property accrued during the marriage. It remains for the federal government to enact equally compelling legislation in divorce matters under its jurisdiction.

Ensuring women's access to their share of the income assets of the marriage would require two steps. First, the current basis for the division of income would have to change from a law regulating support obligations based on defined need to a law governing the equal division of the wage and salary benefits accrued during the life of the marriage. Secondly, criteria governing the division of the benefits associated with wages and salaries would need to be developed. For example, two important factors influencing the division of the income assets of the marriage would be the duration of the marriage and the real (and in some cases the potential) increase in income during that period. The division of the income assets of a marriage of relatively short duration would in most cases concern itself with a small sum of money. Another case might be a marriage of

relatively long duration where, as a result of the spouses' combined contributions, one spouse's income became appreciably higher at the time that the marriage broke down. In this case that increase in income would be factored into the income assets to be divided equally. Clearly such a policy would evoke much controversy. However, controversy has not impeded similar reform, such as the equal division of business and investment assets which was recently legislated in Ontario. Nor will it arouse the ire of those women who have suffered from the discriminatory policy now in place.

We saw that under the current policy, few women get any share of the income assets of the marriage. For those who do, the money they receive is paid under the auspices of spousal support. In most cases it is withdrawn or reduced if they are seen to have found another source of support, or if their former husbands are seen to have assumed responsibility for another woman. Current divorce policy has further entrenched the low economic status of divorced women. A policy recognizing divorced women's non-financial contributions to the marriage would alleviate their current impoverished status. Such a policy would move women toward a level of substantive equality in line with the formal equality currently espoused in Canadian divorce policy.

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