Family Law and Social Welfare: Toward a New Equality

Mary Jane Mossman
Osgoode Hall Law School of York University, mjmossman@osgoode.yorku.ca

Morag MacLean

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FAMILY LAW AND SOCIAL WELFARE: TOWARD A NEW EQUALITY

Mary Jane Mossman* and Morag MacLean†

The rising divorce rate in Canada has had a differential economic impact upon men and women, and the author speculates ready divorce has been a major contributing factor in the "feminization of poverty". Principles in family law which have emerged for determining eligibility for support upon divorce or separation are not consistent with the principles of social assistance legislation. Future reforms must address the different economic positions of former husbands and wives following marital breakdown if the principles of equality and independence espoused as ideal are to apply to everyone.

INTRODUCTION

The spread of a society organized around self-reliance, the market, and wage labor marked a great advance, perhaps especially for women, but we should also mark its costs and limits. By the time our nation reached the early twentieth century the attempt to shore up independence through economic means had become largely defensive, and in our own time economic individualism largely betrays the promise it once held out. Neither the attempt to extend the traditionally male ideal of individual independence to women nor the attempt to extend the traditionally female ideal of nurturance to men can be based on an economic system that fosters a one-sided ideal of economic independence and correspondingly hollow collectivity. True independence, for both sexes, is based on an acceptance of our dependence on others and is realized through our ability to nurture and give to others without conflict within ourselves.¹

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* Associate Professor, Osgoode Hall Law School
† LL.B. 1985, Osgoode Hall Law School

This paper is an exploration of some underlying themes in family law and income maintenance. More particularly, the paper attempts to identify the principles which have emerged in family law for determining entitlement to support upon divorce or marriage breakdown, and to contrast these with the principles generally used to determine entitlement to income maintenance. It seems that family law principles have increasingly characterized support entitlement as a means of creating equality and independence for former spouses. By contrast, primary dependence on a spouse, former spouse, or "spousal equivalent" seems to be the prevailing notion in the income maintenance context.

The lack of congruence between these underlying principles in family law and social assistance legislation is significant for two reasons. First, it results in two distinct systems of "family law". In family units where there is sufficient property and other wealth on marriage breakdown to permit each spouse to have some financial security independently, there will be no recourse to state support through social assistance. However, in less affluent families, a division of property may result in each spouse having an inadequate portion to provide financial security; of course, in very poor families, there may be no property to divide at all. For these reasons, the principles of equality and independence now espoused in the family law context may have practical effect, if at all, only for more well-to-do families; although they may be applied in the context of less affluent families, their application has no practical impact.

The criticism that family law principles which address the division of property and wealth on marriage breakdown have no application to those with little or no property or wealth might be explained as merely one more example of the pervasive economic basis of the legal system. However, the second phenomenon which needs to be explored regarding these principles is their differential impact on men and women. That there is a differential impact suggests the need for a different type of analysis. The ideology of equality and independence evident in the principles of support is essentially that of classic liberalism, and it is applied in the family law context as if husbands and wives

3. See infra, at 34.
4. This is, of course, a traditional Marxist analysis. See, for example, F. Engels, The Origin of the Family, Private Property and the State (New York: International Publishers, 1972).
5. See, for example, J. S. Mill, The Subjection of Women (1869) (London: Oxford University Press, 1912).
were similarly situated in marriage, and as if equality and independence after
marriage breakdown presented the same difficulties and the same opportuni-
ties for both spouses. In fact, there seems to be mounting evidence that
the increasing ease of obtaining a divorce is an important factor contributing
to the “feminization of poverty”. Further, the income maintenance net
extended by the state offers only token support for former wives in need, by
comparison with others who require social assistance for different reasons.

This paper explores a major social phenomenon of our society: an increas-
ing divorce rate and a new trend towards serial monogamy. In doing so, this
paper questions the appropriateness of existing legal principles in family law
and income maintenance as responses to the economic consequences of such
phenomenon. In addition, this paper focuses upon the apparently different
economic positions of former husbands and former wives following marriage
breakdown, and suggests that any future reform must take into account these
differences to effectively ensure equality for both sexes.

I. AN INTRODUCTION TO THE FEMINIZATION OF POVERTY:
MARRIAGE AND MARRIAGE BREAKDOWN

There is now abundant statistical evidence of the escalating divorce rate in
Canada. In 1982, there were 70,436 divorces granted in Canada (23,644 in
Ontario) for a rate of 285.9 per 100,000 population (271.3 per 100,000

6. The phrase “similarly situated” has been adopted for purposes of equal protection
analysis in cases concerning the Fourteenth Amendment. See, for example, Rostker v.
Goldberg 453 U.S. 57 (1981) where the U.S. Supreme Court held that men and women
were not similarly situated with respect to registration for purposes of being drafted
for service in the military.

7. This idea is well-documented in M. Fineman, “Implementing Equality: Ideology,

8. The phrase “feminization of poverty” has been used by a number of writers; one
example is Pearce, “New Knots or New Nets: Towards a Model of Advocacy to meet
the Needs of Single Parent Heads of Household”, prepared for Poor Clients Without
Lawyers: What Can Be Done?, Univ. of Wisconsin Law School, October 1984. For data
on the phenomenon of the feminization of poverty, see infra, at 5.

9. See infra, at 37.

10. Statistics Canada, Divorce: Law and the Family in Canada (Ministry of Supply and
Services Canada: 1983) at 59. The divorce rate was 124.2 per 100,000 population in
1968. It “subsequently soared to 148.4 in 1972, 200.6 in 1974, 235.8 in 1976, and 243.4
in 1978”: see M. Boyd, “The Social Demography of Divorce in Canada” in K.
Ishwaran, ed., Marriage and Divorce in Canada (Toronto: Methuen, 1983) at 248 and
Table 11.1 at 258. See also Statistics Canada, Health Division, Vital Statistics and
Disease Vol. II: Marriage and Divorce (1982) at Table I.
population in Ontario). This rate of divorce was up by 4.1% from 1981, and by 9.1% from 1980.

The escalating divorce rate is not by itself proof of the differential impact of divorce on husbands and wives. However, the statistics demonstrate a pattern of divorce leading to this conclusion. The pattern, for example, seems to suggest a peak in the number of divorced persons between age thirty and thirty-nine. The figures for Ontario are as follows:

<table>
<thead>
<tr>
<th>Age</th>
<th>Divorced Persons, 1981</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-19</td>
<td>70</td>
</tr>
<tr>
<td>20-24</td>
<td>3,460</td>
</tr>
<tr>
<td>25-29</td>
<td>15,395</td>
</tr>
<tr>
<td>30-34</td>
<td>25,255</td>
</tr>
<tr>
<td>35-39</td>
<td>23,895</td>
</tr>
<tr>
<td>40-44</td>
<td>21,270</td>
</tr>
<tr>
<td>45-49</td>
<td>19,835</td>
</tr>
<tr>
<td>50-54</td>
<td>18,685</td>
</tr>
<tr>
<td>55-59</td>
<td>15,670</td>
</tr>
<tr>
<td>60-64</td>
<td>10,290</td>
</tr>
<tr>
<td>65-69</td>
<td>7,000</td>
</tr>
<tr>
<td>70-74</td>
<td>4,075</td>
</tr>
<tr>
<td>75 and over</td>
<td>2,945</td>
</tr>
</tbody>
</table>

As the figures clearly demonstrate, the largest numbers of divorced persons in 1981 were between age thirty and thirty-nine with a significant number also between age forty and forty-nine.

Although these figures show only the number of divorced persons in particular age groups in 1981, and not the actual ages of husbands and wives at divorce, the above figures are generally consistent with those illustrating the duration of marriage. The latter figures suggest that the largest number of

11. See Vital Statistics and Disease, id. at Table 10. It is interesting that the rate in Quebec was 286.6 per 100,000 population, more than the national rate.

12. Id. at Table 10. The Ontario figures for 1982 represent a 9.1% increase over 1981, and the 1981 figure was actually a decrease of 3.4% over 1980.

13. Statistics Canada, 1981 Census of Canada Vol. I: Population, Age, Sex and Marital Status (Ministry of Supply and Services Canada: 1982) at Table 5—Population by marital status and sex, showing five-year age groups. The figures also show the number of divorced persons who are "urban" and who are "rural"; there are no significant differences, except that the number of divorced persons in the age group 35-39 is slightly higher than for the age group 30-34 for "rural" persons. The statistics show a median age for divorced persons of 43.6 years (43.1 years for males and 42.7 years for females).
divorces in 1982 occurred between five and nine years of marriage, although the median duration was 10.1 years in Canada and 10.4 years in Ontario:14

Table 2

<table>
<thead>
<tr>
<th>Duration in years (1982)</th>
<th>Canada</th>
<th>Ontario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 1 year</td>
<td>195</td>
<td>44</td>
</tr>
<tr>
<td>1 year</td>
<td>1,403</td>
<td>352</td>
</tr>
<tr>
<td>2 years</td>
<td>2,586</td>
<td>645</td>
</tr>
<tr>
<td>3 years</td>
<td>3,493</td>
<td>991</td>
</tr>
<tr>
<td>4 years</td>
<td>4,425</td>
<td>1,397</td>
</tr>
<tr>
<td>1-4 years</td>
<td>11,907</td>
<td>3,385</td>
</tr>
<tr>
<td>5 years</td>
<td>4,766</td>
<td>1,579</td>
</tr>
<tr>
<td>6 years</td>
<td>4,811</td>
<td>1,651</td>
</tr>
<tr>
<td>7 years</td>
<td>4,598</td>
<td>1,618</td>
</tr>
<tr>
<td>8 years</td>
<td>4,327</td>
<td>1,613</td>
</tr>
<tr>
<td>9 years</td>
<td>4,071</td>
<td>1,411</td>
</tr>
<tr>
<td>5-9 years</td>
<td>22,573</td>
<td>7,882</td>
</tr>
<tr>
<td>10-14 years</td>
<td>14,569</td>
<td>5,055</td>
</tr>
<tr>
<td>15-19 years</td>
<td>8,215</td>
<td>2,795</td>
</tr>
<tr>
<td>20-24 years</td>
<td>5,685</td>
<td>2,003</td>
</tr>
<tr>
<td>25-29 years</td>
<td>3,633</td>
<td>1,256</td>
</tr>
<tr>
<td>30 and over</td>
<td>3,576</td>
<td>1,190</td>
</tr>
<tr>
<td>n/a</td>
<td>83</td>
<td>34</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>70,436</strong></td>
<td><strong>23,644</strong></td>
</tr>
</tbody>
</table>

Median duration 10.1 years 10.4 years

These statistics are also generally consistent with those regarding ages at marriage and at divorce:15

14. See Vital Statistics and Disease, supra, note 10 at Table 16—Divorces by Duration of Marriage and Median Duration of Marriage, Canada and Provinces, 1982.
15. See Vital Statistics and Disease, supra, note 10 at Table 1.
Overall, the statistics generally suggest that there are large numbers of spouses who divorce between ages thirty and thirty-nine after approximately five to fifteen years of marriage. The significance of this demographic data for assessing the potential difference of impact on former husbands and wives is related to a number of other factors. One of the most important is that in marriages with children, the data on average length of marriage and age of spouses at divorce suggests that in many cases there will be dependent children who require ongoing custodial care. The statistics further confirm that in the majority of cases it is former wives who receive custody of dependent children on divorce, apparently whether or not it is the wife who is the petitioner in a divorce action.\(^{16}\)

### Table 3

<table>
<thead>
<tr>
<th></th>
<th>Canada</th>
<th>Ontario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean age at marriage:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males</td>
<td>25.2</td>
<td>25</td>
</tr>
<tr>
<td>Females</td>
<td>22.6</td>
<td>22.4</td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males</td>
<td>25.1</td>
<td>24.8</td>
</tr>
<tr>
<td>Females</td>
<td>22.4</td>
<td>22.2</td>
</tr>
<tr>
<td>Mean age at divorce:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males</td>
<td>37.7</td>
<td>37.8</td>
</tr>
<tr>
<td>Females</td>
<td>35</td>
<td>35.1</td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males</td>
<td>37.7</td>
<td>37.7</td>
</tr>
<tr>
<td>Females</td>
<td>35</td>
<td>35</td>
</tr>
<tr>
<td>Average duration of marriage for divorced persons:</td>
<td>1982</td>
<td>1981</td>
</tr>
<tr>
<td></td>
<td>12.0 years</td>
<td>12.3 years</td>
</tr>
<tr>
<td></td>
<td>12.1 years</td>
<td>12.4 years</td>
</tr>
</tbody>
</table>

### Table 4

<table>
<thead>
<tr>
<th>Custody Awards, 1982</th>
<th>Dependent Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where husband petitioned:</td>
<td></td>
</tr>
<tr>
<td>To husband</td>
<td>6,653</td>
</tr>
<tr>
<td>To wife</td>
<td>10,050</td>
</tr>
<tr>
<td>To other person/agency</td>
<td>63</td>
</tr>
<tr>
<td>No custody award</td>
<td>2,058</td>
</tr>
<tr>
<td>TOTAL</td>
<td>18,824</td>
</tr>
<tr>
<td>Where wife petitioned:</td>
<td></td>
</tr>
<tr>
<td>To husband</td>
<td>3,542</td>
</tr>
<tr>
<td>To wife</td>
<td>40,414</td>
</tr>
<tr>
<td>To other person/agency</td>
<td>83</td>
</tr>
<tr>
<td>No custody award</td>
<td>2,478</td>
</tr>
<tr>
<td>TOTAL</td>
<td>46,517</td>
</tr>
</tbody>
</table>

\(^{16}\) Id. at Table 15.
Thus, approximately five times as many dependent children were placed in the custody of former wives as of former husbands in 1982.\footnote{17}

The 1981 census data also reveal that there were at that time 250,285 single-parent families out of a total of 2,778,970 families in Ontario; that is, approximately nine percent of all families were single-parent families. Single-parent families statistically are less well-off financially than two-parent families. For example, single-parent families are more likely to live in rented housing rather than owned accommodation.\footnote{18} The statistical data also seem to suggest a correlation between lower income and single-parent families in Ontario:\footnote{19}

\begin{table}
\begin{center}
\begin{tabular}{lcc}
\hline
 & Families & Husband-Wife Families \\
 & Total & Percentage of Total \\
\hline
Without Income & 7,090 & 6,400 \\
Under $5,000 & 97,410 & 51,885 & 53.26\% \\
$5,000-$7,999 & 81,235 & 44,860 & 55\% \\
$8,000-$9,999 & 99,400 & 82,050 & 83\% \\
$10,000-$11,999 & 99,095 & 82,035 & 83\% \\
$12,000-$14,999 & 141,165 & 116,475 & 82.51\% \\
$15,000-$16,999 & 101,675 & 87,160 & 86\% \\
$17,000-$19,999 & 169,920 & 150,555 & 88.6\% \\
\hline
\end{tabular}
\end{center}
\caption{1980 Family Employment Income}
\end{table}

According to this table, the proportion of husband-wife families within the total number of Ontario families increased as the level of family income

\footnote{17} In a Survey of Child Care Arrangements: Initial Results, 1981 (a supplement to the Economic Characteristic Statistics Labour Force Survey: Research Paper No. 31), it was reported that there were some significant differences in the child care arrangements adopted for preschool age children, depending on whether they lived in a family with a working couple or with a single mother. The data showed that thirteen percent of preschool age children of working couples, by comparison with thirty-five percent of such children of single mothers, were in day-care centres. The percentages of such children in nursery schools, or cared for at home, for both groups were similar. However, while only thirty-three percent of such children of single mothers were cared for in another private home, fifty-two percent of such children of working couples were cared for in this way. The average cost per week for the care of such children was $44.00.

\footnote{18} 1981 Census of Canada Vol. I, supra, note 13 at Table 4—Census families in private households by family type, family structure and labour force activity of husband and wife or lone parent, showing tenure of dwelling and number of children at home, for Canada and Provinces, 1981.

\footnote{19} Id. at Table 9A: All census families and husband-wife census families in private households, by number and combination of employment income recipients, showing 1980 family income groups, for Canada and Provinces, 1981.
increased. Presumably, one can conclude that single-parent families were correspondingly overrepresented at the lower end of the income levels. This conclusion seems to be confirmed by data on income source. The data is based on a total of 2,284,840 economic families in Ontario of which 261,255 or 11.4% were identified as low income families; the data also identified family composition in relation to income level, as follows:20

<table>
<thead>
<tr>
<th>Table 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Husband-wife Families</td>
</tr>
<tr>
<td>Non-Husband-wife Families</td>
</tr>
<tr>
<td>Male Reference Person</td>
</tr>
<tr>
<td>With children under 16</td>
</tr>
<tr>
<td>With no children under 16</td>
</tr>
<tr>
<td>Female Reference Person</td>
</tr>
<tr>
<td>With children under 16</td>
</tr>
<tr>
<td>With no children under 16</td>
</tr>
</tbody>
</table>

As Table 6 makes clear, a single parent family has a greater potential for low income than a husband-wife family, and the risk of low income is substantially higher for single parent families with female reference persons than with male reference persons.

There is also data which shows the number of single-parent families by age group and sex of the parent for Ontario:21

20. *Census of Canada, id.* at Table 10A—Economic families in private households by selected characteristics and 1980 income status for Canada and Provinces, 1981.
21. *Census of Canada, id.* at Table 15—Sole parent census families in private households by age of parent, showing sex and marital status, for Canada and Provinces, 1981.
Table 7

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Under</th>
<th>Age</th>
<th>55 and over</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>age 35</td>
<td>35-54</td>
<td>and over</td>
</tr>
<tr>
<td>Sole parents</td>
<td>250,215</td>
<td>71,260</td>
<td>116,890</td>
<td>62,060</td>
</tr>
<tr>
<td>Male parents</td>
<td>42,640</td>
<td>5,890</td>
<td>23,745</td>
<td>13,005</td>
</tr>
<tr>
<td>Total</td>
<td>19,340</td>
<td>4,070</td>
<td>12,135</td>
<td>3,135</td>
</tr>
<tr>
<td>Married &amp; Spouse</td>
<td>9,640</td>
<td>1,045</td>
<td>7,080</td>
<td>1,515</td>
</tr>
<tr>
<td>Divorced</td>
<td>207,575</td>
<td>65,370</td>
<td>93,145</td>
<td>49,060</td>
</tr>
<tr>
<td>Married &amp; Spouse</td>
<td>71,410</td>
<td>31,485</td>
<td>34,550</td>
<td>5,375</td>
</tr>
<tr>
<td>Divorced</td>
<td>50,355</td>
<td>16,345</td>
<td>30,495</td>
<td>3,515</td>
</tr>
</tbody>
</table>

As Table 7 shows, the highest number of single parents occurs in the age group 35-54. The data also confirm that women are single parents approximately five times as often as men, as earlier demonstrated.

The above statistics generally confirm that the escalating divorce rate has resulted, because of the age at which many people divorce, in a substantial number of one-parent families with custody of dependent children. They also indicate that women much more often than men receive custody of dependent children upon divorce. Since the statistics also seem to confirm that one-parent families are generally less well-off than two-parent families, it seems that women are more likely than men to be financially insecure as a result of divorce or marriage breakdown. Moreover, because the trend seems to indicate a continuing increase in the number of divorces each year, it seems likely that there will continue to be a disproportionate number of women, by comparison with men, who are financially disadvantaged as a result of divorce or marriage breakdown.

It is difficult to link this data directly to that concerning welfare payments. However, the “gender gap” is nonetheless evident in the data on sole support parents in Ontario:

Moreover, there is a pattern among welfare recipients which is quite similar to that presented by the data on families in regards to age groupings:

As Table 9 suggests, the largest age group receiving family benefits in Ontario was that of age 31-40, and this pattern seems to parallel that established by the statistics on divorce. As well, the welfare statistics confirm that single-parent families in 1982 represented 31.1% of the total number of beneficiaries receiving Family Benefits, General Welfare Assistance and Gains-D. It appears that there has been a change over the past two decades, however, in the size of family units, with smaller numbers of persons in a family unit more recently. For this reason, the proportion of single-parent family beneficiaries to total welfare beneficiaries obscures the significant increase in the numbers of single-parent families receiving welfare assistance. In fact:

[d]isabled persons and sole support parents have been the largest groups of social assistance recipients for two decades. They now represent almost 80% of the welfare caseload, compared to about 50% in 1961.

24. Social Planning Council of Metropolitan Toronto and the Ontario Social Development Council, And The Poor Get Poorer: A Study of Social Welfare Programs in Ontario, rev'd ed. (September 1983) at Figure 9—Reasons for Dependency on Social Assistance, 1982. Note that single parents comprise only 17.4% of GWA recipients, but 41.7% of those receiving FBA and Gains-D (Gains-D is a guaranteed income to persons who have a long-term disability that severely limits routine activities. See id. at 4).
25. Id. at 66.
26. Id.
All of this statistical data seems to lead to the conclusion that divorce may often result in poverty for former wives\textsuperscript{27} and less frequently for former husbands; this result seems especially to be linked to the frequency of custody awards to former wives as well as to other factors. Finally, it appears that a significant proportion of separated, deserted and divorced wives are increasingly the recipients of social welfare assistance, a further confirmation of the "feminization of poverty".

II. THE EVOLUTION OF BASIC PRINCIPLES: TOWARD EQUALITY AND INDEPENDENCE\textsuperscript{28}

A. The Family Law Context

If it is accepted that one of the consequences of the escalating divorce rate is the "feminization of poverty", it may be appropriate to try to alleviate such financial hardships for women through legal intervention. If so, it is essential to appreciate the historical development of the principles which are presently utilized in both the family law context and the social welfare context, particularly as they affect spouses upon divorce or marriage breakdown.

There are a number of differing views about the origin of the family and its historical development.\textsuperscript{29} According to Glendon:

\begin{quote}
the family in early centuries included a wide circle of people from different households related by blood ties and by a feeling that they belonged together in a different way from the way in which they belonged to a neighbourhood, a community or larger political entity.\textsuperscript{30}
\end{quote}

In the context of early English law, the family was part of the social structure of feudalism, a system of land ownership which ensured that the wealth and status derived from land remained intact within the family, passing from one generation to the next by way of the eldest son. Land was the basis for wealth and status in feudal society, and the social position of individuals was

\begin{footnotes}
27. Within the total pool of poor families, the proportion of female-headed poor families increased by 75% from 21.6% to 37.6% in the ten year period 1969-79. "And the poor get poorer...." The Saturday Star (24 September 1983) 1.


29. See Bridenthal, "The Family: The View From A Room of Her Own", in Rethinking the Family, supra, note 1 at 225; Zaretsky, "The Place of the Family in the Welfare State," supra, note 1 at 188; Collier, Rosaldo, Yanagisako, "Is There a Family?: New Anthropological Views", supra, note 1 at 25.

\end{footnotes}
therefore dependent on their position within the feudal family structure.\textsuperscript{31} According to Olsen:

\begin{quote}
[j]ust as the feudal state was not perceived to be clearly separate from civil society, the feudal family was not perceived to be separate from the rest of economic life; there was no dichotomy between the market and the family. The hierarchical family was an integral part of hierarchical society.\textsuperscript{32}
\end{quote}

Glendon and others have asserted, however, that the pattern of the family changed as the feudal system of societal organization was replaced by capitalism; as capital increased in importance and displaced land as a form of wealth, the family became defined more in terms of a husband-wife marriage bond with dependent children: the modern nuclear family.\textsuperscript{33} In the twentieth century, moreover, it has been suggested that the pattern of the family has changed again as the nature of wealth has once again altered. In the context of the modern welfare state, both wealth and status in society seem more dependent on the income and employment of an individual rather than on the position of the family in society. The "new property" (jobs and employment) seems to create its own status for the individual, with a corresponding reduction in the family's role in defining status for its members.\textsuperscript{34}

In Glendon's view, the transformation of wealth from land (in feudal society) to capital (in the eighteenth and nineteenth centuries) to income and employment (in the modern welfare state) contributed to the increasing independence of members of the modern nuclear family. Until the twentieth century, only the husband/father had any independence or individual recognition; neither the wife/mother nor dependent children were recognized as individual members of the family unit until the late nineteenth century. According to the common law principles enunciated in the feudal period, the husband and wife became one on marriage; and the one was the husband.\textsuperscript{35}

This principle of the unity of legal personality meant that on marriage a husband acquired the sole right to manage and control land owned by his wife, the right to all rents and profits from the land, and the right to grant or

\begin{footnotes}
\item[31] For a brief description of modern beliefs about the development of the market and the family, see F. E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 at 1513-1528.
\item[32] Id. at 1516.
\item[34] Glendon, \textit{supra}, note 30 at 138 ff.
\end{footnotes}
withhold consent to its disposition.36 Thus, for all practical purposes, the husband became the owner of all his wife's property on marriage, and the legal guardian of their children.

The common law principle of unity of legal personality survived, notwithstanding changes in family patterns, until the enactment of the *Married Women's Property Acts* in England at the end of the nineteenth century, and the impact of the common law principle could be avoided prior to statutory reform only by the adoption of a trust settlement enforceable in equity. This device had certain limitations, however. It was useful only where there was sufficient wealth to warrant the creation and ongoing management of such an arrangement. In addition, it did not actually make the wife the owner, but merely the beneficiary of a trust arrangement in which her husband or other male relative acted as trustee.37 The enactment of the *Married Women's Property Acts* represented the culmination of a concerted struggle to achieve individual property rights for women. Yet, although the 1882 Act in England:

is often held out as a milestone in the march of women to equality,... in reality it did little more than save wealthy women from the irksome restraints of holding property through trustees. In fact, men continued to control the property of women, even if only in the capacity of advisors rather than husbands or trustees, since women were precluded from acquiring the skills thought to be needed for the proper administration of their property, such skills being locked within the male professions.38

Thus, both the formal principles of the common law, and the economic reality even after the later nineteenth century statutory reforms, emphasized the pre-eminent position of the husband/father as legal "head of the household" within the family. The wife/mother's role of homemaking and child care generally prevented her in practice from acquiring income or property, notwithstanding the formal equality accorded in the statutory right to hold separate property. At the same time, however, the law also enforced an obligation on the husband/father to provide lifelong financial support for his wife, and for his children during their infancy.39 Even when judicial divorce became possible after 1857 in England, the husband's obligation to support his wife during marriage was extended so as to ensure continued support for an

39. The common law provides that a husband must provide for his wife the necessities of life. See McCaughan, *supra*, note 36 at 166.
innocent wife after divorce. Thus, the principle of a wife's entitlement to lifelong financial support seems to have developed as a corollary to her lack of entitlement to property, and to her inability to earn a living because of her sex-defined role as homemaker and child care provider within the family.

Since World War II, both in Canada and elsewhere, the major re-examination of the roles of men and women which has taken place has influenced family life, family law, and society at large. In the family law context, the most dramatic change has occurred in the context of divorce and marriage breakdown. The Divorce Act of 1968 in Canada created a new ground for divorce: marriage breakdown. Although a divorce may still be obtained on the basis of specified matrimonial offences, it is the marriage breakdown ground which has resulted in the phenomenal increase in the divorce rate after 1968. The accelerating rate of divorce, coupled with the need to redefine post-marriage relationships in light of changes in the expectations of men and women, has led to dramatic legal reforms in many provinces within the last decade.

Since 1978, for example, all of the common law provinces of Canada have enacted reform legislation with significant effects on entitlement to property and support for spouses. Under most of these new schemes, certain types of property may be equally divided between the spouses on marriage breakdown, regardless of which partner holds legal title, and often subject to certain


42. Supra, note 13, and Vital Statistics and Disease, supra, note 10 at Table 1. See also Bill C-47 respecting divorce law reform.

43. See Matrimonial Property Act, R.S.A. 1980, c. M-9
Family Relations Act, R.S.B.C. 1979, c. 121.
Marital Property Act, R.S.M. 1978, c. 124.
Matrimonial Property Act, R.S.N. 1979, c. 32.
Matrimonial Property Act, R.S.N.S. 1980, c. 9.
Family Law Reform Act, R.S.O. 1980, c. 152.

In Quebec, Bill 89 also marks the beginning of a reform process in family law for the civil law tradition in Canada. See generally, A. Bissett-Johnson and W. H. Holland, Matrimonial Property Law In Canada (Toronto: Carswell). See now Ontario's Bill 1 (1985).
discretionary principles. At the same time, however, the concept of marriage as creating a lifelong entitlement to support seems to have declined in importance, or disappeared. In its place, the new legislation frequently provides that each spouse has responsibility for his or her own financial support, although one spouse may become entitled to financial support from the other where there is proof of need and available resources. It is the need of the individual, however, rather than the status of spouse in the family which generally provides entitlement under most of the reform legislation. Thus it is said that the new principles concerning property and support create equality and independence for married partners on divorce; certain property of the family is divided, and then each spouse becomes once more an autonomous individual responsible for self-support.

These family law principles are illustrative of the liberal approach to legal problem-solving: legal intervention is restricted to removing legal barriers to full participation, and economic and other barriers are generally ignored. The recent family law reform legislation establishes a principle of equality of spousal entitlement to the division of matrimonial property and then declares each spouse independent and autonomous for purposes of legal rights and obligations, especially regarding ongoing financial support. Such an approach, however, essentially fails to achieve effective equality because male and female spouses are not similarly situated upon divorce or marriage breakdown, particularly in relation to access to financial security.

There are a number of explanations for this gender gap. In the first place, where there are few or no assets from the marriage, a division of property will provide "equality" but little security for either spouse. Moreover, it is likely that the former wife will be in a disadvantageous position, relative to her former husband, to achieve independent financial security. This will be especially true if the marriage was based on the husband-breadwinner/wife-housewife model, because such a wife will have some difficulty entering or re-entering the work-force, and even more difficulty in a time of high unemployment. In some circumstances, the former wife may be entitled to "rehabilitative" support while she undertakes retraining for employment, but there may

44. For example, see Ontario's Family Law Reform Act, id., ss. 4, 25, and 18.
45. J. Payne has asserted that the principles of family law in Canada generally espouse a "neutral rather than a normative" approach to marriage and the family; see Payne, "The Impact of Family Law on the Economic and Social Well-Being of Families in Canada with Particular Reference to the Financial Consequences of Marriage Breakdown and Divorce", A Report Prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Draft) at 51.
46. Supra, note 4 and note 5.
be some limits on the length of time for which such support may be provided.\textsuperscript{47} Of course, the older a spouse is at the time of divorce, the more hardship there may be if these principles are rigorously applied.\textsuperscript{48} Even if the former wife is already employed in the paid work-force at the time of the divorce or marriage breakdown, she may nonetheless face some financial insecurity because she is statistically likely to earn a salary which is only two-thirds of that which a male may earn.\textsuperscript{49}

Second, the statistical data clearly demonstrate that it is the former wife who is more likely than her former husband to become the custodial parent of dependent children, and to live as a single parent.\textsuperscript{50} The ideas of independence and equality have all too little meaning in this context, since such a former wife faces all the problems of entering or re-entering the work-force noted above, coupled with the need to provide for child care.\textsuperscript{51} The alternative is to provide child care personally and become a welfare recipient. Even where a divorce occurs after children have grown up, a wife who has worked for many years as homemaker and child care provider faces greater obstacles to becoming self-sufficient, having lived a lifetime of economic dependence with an expectation that her full-time homemaking would lead to economic security in old age. The obligation of self-support appears especially harsh for such women because their failure to participate in the paid labour force often results in a denial of access to pension entitlement. This situation further contributes to

\textsuperscript{47} In \textit{Messier v. Delage} (1984) 50 N.R. 16, the Supreme Court of Canada decided by a 4:3 majority to continue a former husband's obligation to pay support to his former wife approximately five years after the divorce and after she had completed some "rehabilitative" training but had not yet found work. However, it is evident even in the reasoning of the majority opinion that the Supreme Court recognized some limits to such support obligations although they were not actually implemented on the facts of \textit{Messier v. Delage}. See also Law Reform Commission of Canada, \textit{Maintenance on Divorce}, Working Paper No. 12 (Ottawa: Information Canada, 1975) at 30.

\textsuperscript{48} There have been some cases where the principles of equality and independence have been less rigorously applied where the wife is older and has lived her life as a housewife. For example, see \textit{Zupet v. Zupet} (1984) 40 R.F.L. (2d) 286; \textit{Leatherdale v. Leatherdale} (1982) 45 N.R. 40, 30 R.F.L. (2d) 225 (S.C.C.); \textit{Bregman v. Bregman} (1978) 210 O.R. (2d) 722; 7 R.F.L. (2d) 201 (Ont. H.C.); \textit{Silverstein v. Silverstein} (1978) 20 O.R. (2d) 185, 1 R.F.L. (2d) 239 (Ont. H.C.).

\textsuperscript{49} Ontario Ministry of Labour, Women's Bureau, "Women in the Labour Force 'Basic Facts' Update" (1982).

\textsuperscript{50} \textit{Supra}, note 16 and Table 5; \textit{supra}, note 13 and note 20 and Table 7.

the problem of poverty among elderly women in Canada who rely for financial security on the basic federal pension.\textsuperscript{52}

The principles of equality and independence which have evolved in the family law context do not match the reality of women's experiences on divorce and marriage breakdown. From another perspective, the "equality and independence" is essentially formal rather than effective, a declaration of what is legally possible without regard to what is economically feasible. In order for law to provide for effective equality for former spouses, it is necessary to take account of the actual economic circumstances and the fact that former husbands and former wives are not in fact similarly situated.\textsuperscript{53} The "neutral" principles of property division and spousal support in Canadian family law to date have espoused equality and independence for spouses on divorce or marriage breakdown, but have not achieved these objectives, especially for women.

B. The Social Welfare Context

Social welfare programs in Canada are quite recent in origin. Numerous government programs providing financial and other assistance were established in the last century:\textsuperscript{54} workers' compensation as early as the 1880s, unemployment insurance in 1940, the federal and Quebec pension plans in 1965, universal hospital insurance in the provinces between 1947 and 1961, and universal medical care insurance between 1962 and 1971. In addition, the federal \textit{Canada Assistance Plan} of 1966 provides for a federal contribution of fifty percent of provincial social welfare schemes. There are also federal old age pensions and numerous income tax deductions, credits, and subsidies.

The federal \textit{Working Paper on Social Security in Canada}\textsuperscript{55} in 1973 explained the existence of programs such as these as a reflection of shared community support for the values of independence, interdependence, and fairness in the

\textsuperscript{52} Social Planning Council of Metropolitan Toronto, "Poverty Among Ontario's Older Women" \textit{Social Infopac} (1982, No. 4) at 2 and Table 2. See also L. Cohen, \textit{Small Expectations: Society's Betrayal of Older Women} (Toronto: McClelland and Stewart, 1984) at 125 ff.

\textsuperscript{53} See Fineman, supra, note 7. There are also the practical problems of enforcing support orders, and the problem of determining the quantum of support where there are both first and second families. See Kitchen, supra, note 51.


\textsuperscript{55} Id.
distribution of resources. According to the *Working Paper*, Canadians accept the value of independence and expect to:

meet their own needs through their own efforts, and they expect others to do their best to do the same. This sturdiness of outlook is not a matter, it should be said, of sheer selfishness: rather it is a matter of believing that each should contribute, to the extent he is able, to his own and his family's well-being.\(^5\)

Similarly, according to the same document, the value of interdependence means "that man has a responsibility to his fellow men".\(^6\) Moreover, the *Working Paper* asserts that there is no contradiction between the values of independence and interdependence:

It is simply a matter of working, if you are able, to meet your family's daily needs, and of saving, to the extent you are able, to meet the contingencies of life.\(^7\)

It is evident that the explanation of the values of independence and interdependence obscures the role of the family, and the obligations of individual family members in relation to these values. The quotation concerning "independence" also seems to assume a male breadwinner working to support family dependents including a spouse; it does not seem to assume "equality and independence" during the marriage. The second quotation similarly assumes that support for family dependents is to be provided by accumulated savings in times of contingencies. Presumably, deserving persons are those who conform to this pattern and, if all else fails, they will be entitled to state support. Although social welfare schemes in the twentieth century have replaced the family (at least to some extent) as the means of providing economic security, it is apparent from the *Working Paper*'s definitions that the exact relation between individuals and the family in terms of responsibility for economic security remains unclear.

The confusion is partly due to the ambivalence about the provision of income security in the welfare state. Historically, there has been an effort to ensure an adequate standard of living for the deserving poor, but this group has usually been carefully distinguished from others who are the undeserving poor.\(^8\) In simplest terms, there was a perceived need to distinguish those who could not work (deserving) from those who would not (undeserving), and to ensure that the former were taken care of; the latter were to be maintained, if necessary, but at only a basic subsistence level. As the quotations from the *Working Paper* suggest, however, the classifications of deserving or undeserv-

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56. *Id.* at 4-5 (emphasis added).
57. *Id.* (emphasis added).
58. *Id.*
59. The terms were used by Pearce, *supra*, note 8.
ing poor were essentially conceptualized in terms of the “male head of a household”, and the deserving poor were those in a family unit with a “male breadwinner” head while the undeserving poor were those in a family unit with a “male pauper” head.\textsuperscript{60} It has been suggested, moreover, that these categories were used to create two different types of welfare benefits, one which was more of a “right”, often not means-tested, and often work-related; and the other which was a “charity”, usually means-tested, and available to those unable to work.\textsuperscript{61}

Using these two categories, it is evident that social welfare available as unemployment insurance or workers’ compensation, for example, would be classified as “male breadwinner” benefits while welfare assistance to the unemployable would be in the “male pauper” category. And since both categories are really directed, as the quotations from the \textit{Working Paper} seem to suggest, to the male head of the household, the position of a female single parent with dependent children is anomalous at best and at worst hard to classify. Of course, since she will often have no significant paid work-force participation, she will usually be found in the “male pauper” category: welfare assistance which is charitable and means-tested, and which will not be available if there is evidence that there is a male head of the household (the “spouse in the house” rule). What is significant is that the introduction of better social welfare programs in this century has had the effect of creating two classifications of welfare assistance: the deserving poor who receive work-related benefits such as unemployment insurance or workers’ compensation, and the undeserving poor who receive welfare because they do not work. What is also becoming evident is that the deserving poor are more often men while the undeserving poor are more often women,\textsuperscript{62} notwithstanding the male model originally adopted for each category. Ironically, the result may sometimes be an inequity between two women who appear to be similarly situated except for the source of their entitlement; for example, a widow who receives a pension under Ontario’s \textit{Workers’ Compensation Act} (originally payable to her husband) is entitled to a larger monthly sum than a widow who receives GWA or FBA Benefits (based on her financial need).\textsuperscript{63} While both women are widows, the former had a husband in the male breadwinner category while the latter did not.

This way of looking at social welfare assistance suggests that the position of

\begin{itemize}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.} See also E. Wilson, \textit{Women and the Welfare State} (London: Tavistock Publications, 1977).
\item \textsuperscript{63} \textit{Supra}, note 24 at 50-51 and Figure 8.
\end{itemize}
female single parents has not received high priority in policy-making. And there can be no doubt that the desire to create disincentives for male heads of households to desert their families or fail to work conscientiously might support the existence of below poverty-level benefits for such female single parents and their dependent children. However, the advent of a major societal change such as is evidenced by the extraordinary increase in the divorce rate and the actual circumstances of many women on divorce or marriage breakdown suggests that the antiquated conceptual basis underlying social welfare assistance programs in Canada must now be reformed.

It is also instructive to examine social welfare programs to determine whether the availability of familial support disentitles an applicant. It is interesting to note that the programs which are essentially those of the "male breadwinner" model tend to determine eligibility without regard to the availability of familial support, while those of the "male pauper" model grant benefits only where no familial support is present. The result is that those who qualify for "male breadwinner" benefits (predominantly males) may do so regardless of their family income, while those eligible for "male pauper" benefits (predominantly female) will qualify only if they affirmatively demonstrate the absence of other familial support. Thus, males are generally treated as individuals for social welfare purposes, while females are more often regarded as members of a family unit, and not as individuals. The dichotomy between individual entitlement and the potential for disentitlement because of familial relations in our social welfare programs has been called the "familialism-individualism flip-flop":

"To the degree that we make social security programmes available to individuals, we guarantee as a society some income security to individuals. Conversely, to the degree that we let eligibility to the social security programmes be determined by family status, we disentitle individuals from access to social support on the basis of their family status. This disentitlement is usually justified by reference to the support function of 'the family'—and with the pious wish that the state (or government) must not usurp the functions of the family. This encapsulates nicely the basic paradox which underlies any social security policy that is geared towards families rather than individuals: in the name of protecting 'the family' people are disentitled from public support on the basis of their family status."

This dichotomy between individual and family status has a significant impact on women. In many cases, the social welfare system seems to "presume" the availability of family support based simply on the married (or formerly married) status of women, thus denying eligibility to welfare benefits; at the same time, family law statutes seem to "presume" an obligation for self-

64. M. Eichler, Families in Canada Today (Toronto: Gage, 1983) at 110.
support, subject to proof to the contrary. What this means is a significant difference of philosophy between the two statutory schemes, with social welfare law focusing on the individual's family unit and family law increasingly focusing on the individual. It is true in most cases that a dependent wife (or former wife) will be regarded as entitled to welfare after she has been unsuccessful in a suit for support against her husband (or former husband). However, the fact that the welfare system starts with a presumption of familial support while the family law system starts with presumptions of equality and independence means that the woman will likely experience some delay, frustration and hardship before the systems "mesh", if they do at all:

As far as the support function of families is concerned, there is widespread consensus that families not only do support their own, but should do so. What is often overlooked is that there tends to be a direct opposition between the notion of the family as a support system and social security programmes: to the degree that the proper locus of support for an individual is seen to lie within that individual's family, the individual becomes disentitled from public support.65

If the increasing focus in family law on the individual represents Glendon's "attenuation of family ties",66 it is arguable that there should be a more general transfer of responsibility for the financial welfare of dependent family members from the family unit to society at large, and that this philosophical shift should be recognized in income maintenance legislation in particular. Yet, while such a transfer would effect the independence of individuals from the family unit, it would also result in financial dependence on social assistance programs of government. Clearly, the "independence" thereby achieved, especially for women, is more theoretical than real.

The lack of congruence between the principles of family law and income assistance is partly explained by the difference in their historical development. The evolution of family patterns and changes in the legal relationships of family members has occurred over a number of centuries, while the income assistance principles have been established almost entirely in this century. Further, the development of each set of principles has occurred separately, based on somewhat different policy objectives and without overall co-ordination. As well, the principles have been directed to the provision of economic security in two very different kinds of circumstances: family law principles have been designed for the division of the property of a marriage, and on the basis that at least some marriages will have substantial assets for distribution.

65. Id. See also Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services (1985) 51 O.R. (2d) 302; and Re Dowlut and Commissioner of Social Services (1985) 30 A.C.W.S. (2d) 299 (Ont. Div. Ct.).
66. Supra, note 31 at 191.
The creation of independence for purposes of support is at least theoretically sound in this context. Income assistance principles, on the other hand, are more clearly designed for those who are economically disadvantaged, including those whose families experience divorce or marriage breakdown. Yet, the relatively high rates of divorce and remarriage in Canada have resulted in many situations where family resources are inadequate to provide for the needs of all dependent "family" members. It is at this point that clear and coordinated policy directions are needed as to the principles to be used to accommodate the objectives of both family law and income assistance in order to reflect more equitably the real circumstances of many (former) wives.

C. Merging Principles

Co-ordinating policy directions is an extremely difficult task where contradictory objectives or ambivalence prevail. In the family breakdown context, there are, on the one hand, policies which assert equality and independence for former spouses as their objectives. Such policies suggest that income security is no longer viewed as the responsibility of family members, but rather as the individual responsibility of every adult. On the other hand, for other groups, the law maintains policies which demand contribution from certain individuals (primarily men) to others (primarily women) solely because of a previous "familial" relationship. Therefore, although family law policies hold out independence as a goal, there is still considerable psychological and other loyalty to the notion that "the family" should be economically responsible for its members. Furthermore, it seems that the extent to which the law adheres to the goal of independence is closely related to the demand on the "public purse".

The recent case law illustrates this point. In Webb v. Webb, the parties, who had been married some twenty years, entered into a separation agreement which expressly provided that the support was not variable, irrespective of any change in circumstances of the parties. Subsequently, the husband applied, pursuant to section 11(2) of the Divorce Act, to vary the decree nisi which had incorporated the terms of the agreement. Having decided that the court indeed had the power to vary the maintenance order, Blair J.A. went on to consider what change of circumstances the court would judge severe enough

67. See Family Law Reform Act, supra, note 43. Although the section speaks of the obligation of one spouse to support another, the presumption is self-support until need determines otherwise.

68. See Family Benefits Act, R.S.O. 1980, c. 151, Regulation 318 as am., s. 13(1) (b).

to warrant interference with the terms previously agreed to by the parties. He held that there were three such situations:

1. Where the failure to provide maintenance in the agreement is likely to result in a spouse becoming a public charge, the courts have frequently refused to be bound by the agreement: *Fabian v. Fabian*;\(^70\)

2. Where inadequate provision is made for children in an agreement the courts have included proper maintenance for children in the decree nisi holding that the parents may not bargain away rights of their children to support: *Dal Santo v. Dal Santo*;\(^71\)

3. Where the absence or inadequacy of a provision for maintenance in an agreement is unconscionable because of its terms or the circumstances surrounding its execution, courts have provided for appropriate maintenance in the decree nisi even though the validity of the contract could not be impugned because of fraud, undue influence or any other ground established in the law of contracts: *Deroon v. Deroon*.

In summing up, Mr. Justice Blair stated again that a court should interfere with maintenance terms in a separation agreement only when there has been a "substantial change in circumstances."\(^73\) In conclusion, he held that:

Even where no such change in circumstances is established, courts will refuse to be bound by an agreement, when exercising their jurisdiction under section 11(1) or (2), in a narrow range of cases where public policy is offended if it makes a spouse a public charge, deprives children or is unconscionable.\(^74\)

This "narrow range of cases" was acknowledged and accepted in the subsequent case of *Southgate v. Southgate*.\(^75\)

What is significant about this line of cases is the apparent threshold which is established; apparently, the spouse's income level will be permitted to decline, without interference by the courts, until the individual reaches the danger of becoming a "public charge", but no further. The justification for the non-interference seems to be the notion of the parties' ability to enter into their

\(^70\) (1983) 34 R.F.L. (2d) 313 (Ont. C.A.)


\(^74\) Id. For a case in which the court was willing to recognize unequal bargaining positions, see *Ross v. Ross and Howe; Ross v. Ross and Aysan* (1983) 39 R.F.L. (2d) 51 (Man. C.A.), which held that the wife was subject to intimidation by her husband despite independent advice.

own agreements, presumably because of their equality. The underlying assumption is that whatever the nature of the relationship between the parties during the marriage, they are equal and independent upon separation.

In cases where the parties have not entered into a separation agreement, equality is achieved through the division of marital property, and independence is achieved through some assessment of the quantum and duration of support payments necessary to make the spouse self-sufficient within a reasonable time. An interesting development in this regard is the dissenting opinion in *Messier v. Delage*, in which Lamer J. suggested that self-sufficiency would be achieved where the spouse was employable as opposed to employed: at the point where a spouse becomes employable, the former spouse is no longer responsible for support as the employable spouse is then in an equal position to any other individual who is unemployed. This dissenting opinion seems to have been subsequently ignored in all but one or two cases.

76. In *Farquar v. Farquar* (1983) 43 O.R. (2d) 423, 35 R.F.L. (2nd) 287, [1983] W.D.F.L. 1205, 1 D.L.R. (4th) 244 (C.A.), the Ontario Court of Appeal held that the discretion to vary maintenance contrary to the domestic contract should only be exercised in extraordinary circumstances because the parties have agreed to a final settlement of their own affairs. The rationale in this and subsequent cases is that the parties negotiate a contract and such a contract should be viewed as binding subject to the ordinary common law rules. In *Pelech v. Pelech* (1985) 45 R.F.L. (2d) 1, a recent decision of the British Columbia Court of Appeal, the court denied an application for variation brought by an indigent wife even though she would thereby continue as a charge on the welfare system; however, the wife's application in *Pelech* was filed more than 13 years after their marriage had been dissolved, and more than 12 years after her former husband had paid the last of the support payments required under the terms of the divorce order. Mr. Justice Lambert reviewed the cases, including *Webb v. Webb*, and concluded that the general principle is that separation agreements should not be varied, and that a variation in circumstances such as the present case would be the exception and not the rule; he also noted that neither the wife's "impoverished circumstances" nor the "long time that has passed since the maintenance agreement was carried out" were factors which should modify the principle. In view of the obiter comments in *Webb*, however, it seems possible that the length of time may have affected the application of the principle in this case.


78. *Messier*, supra, note 47.

79. See *Oakley v. Oakley* (1984) 40 R.F.L. (2d) 211 (B.C.S.C.). In *Messier v. Delage*, it should be noted that the former wife had completed a Master's degree in translating and was working part-time, although she had earned only $5,000 in the year prior to the trial. The majority held that, having regard to the wife's needs and the husband's means, the husband should continue to provide support. There had not been a sufficient change in circumstances to support a variation pursuant to s. 11(2); the wife was not yet self-supporting. See *supra*, note 47 at 353.
The reluctance of the courts to embrace this reasoning can perhaps be explained by the fact that, should it be accepted, even greater numbers of women would be eligible to claim income assistance.  

The foregoing cases clearly reflect the principles of only one system of family law. Nevertheless, it is precisely for this reason that they reflect the true emptiness of the principles they espouse. “Public policy” seems to require that independence and the “clean break” principle generally apply where a former spouse’s income is anywhere above the subsistence level, but where the state might be called upon to provide income, familial relations and obligations frequently resume primary importance. This conclusion is applied rigorously by the income assistance bureaucracy, and seems to have some support among the judiciary in family law cases. In this way, the family law principles and the income assistance principles merge and gain consistency. However, the consistency is not developed on theoretical or ideological grounds but rather on grounds of convenience. In other words, so long as women bear the costs of marriage breakdown, the principles of “equality and independence” have at least formal credibility. However, once the burden is to be shifted to the “public purse”, the costs of sustaining such principles become too demanding. The suggestion here is not that women are “independent” once they receive state support; obviously there is only a shifting of dependence from one individual to the collective. The point is to expose the fact that the bottom line is the demand for money from the public purse and not an ideological consideration; if the general public is required to pay, our society cannot afford equality for (former) wives.

III. TOWARD A NEW EQUALITY: DEFINING THE LEGAL UNIT

Thus far this paper has been concerned with demonstrating how the use of inconsistent principles in family law and social assistance legislation contributes to the “feminization of poverty”. In short, the economic costs of an escalating divorce rate have been and continue to be borne disproportionately by women. As a result, social policy and its underlying theoretical constructs

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80. The fact that most of these women will not have been employed previously precludes claims against the unemployment insurance scheme. For statistics regarding the number of women currently receiving income assistance, see supra, note 79.


83. This is so because of structural inequities, such as lower wages, occupational ghettos, lack of day-care facilities, etc. See supra, note 82.
must recognize that the almost inevitable consequence of marriage breakdown is economic crisis, at least for many women and dependent children. The question then, from a theoretical perspective, becomes what base unit best ensures economic security for the individual members of the now displaced unit?

Analysis of the current legislation reveals a choice between "the family" and/or "the individual". In selecting a particular unit for policy purposes, regard must be had to the goals sought to be achieved. As a beginning, we suggest three: economic security, equality and consistency. An attempt will be made here to examine the manner in which these units are currently used and to evaluate these units in terms of the suggested goals.

A. "The Family" as a Legal Unit

Earlier\(^8\) it was suggested that the manner in which the units are used is inconsistent within the law; in family law it is primarily the individual unit which is used and in social assistance legislation need is defined in terms of the family unit. In terms of consistency alone, there is nothing inherently better about using "the family" or using "the individual" as the basis of policy; it is the fact that both units are used that creates the inconsistency. Initially, it would appear that this is not a determining factor; either can be used as long as only one is. Perhaps, however, the obvious difficulty with using "the family" is the fact that family law principles are frequently used where the family no longer exists as a unit; assessing needs of that "family" becomes practically dysfunctional.

Moreover, a brief review of recent social science research leads to the conclusion that Canadian society is a "mixed bag" in terms of family structures or forms. Primarily because of the escalating divorce rate, the number of single-parent and reconstituted family forms has increased dramatically.\(^5\) In addition to these forms there are also: traditional families; cohabiting spouses which occur as initial families or as second families following divorce or separation, and which may or may not include children; and homosexual families. The variety of family forms becomes significant, taking into account the fact that choosing to use "the family" as the base unit will necessitate some definition of "the family". The need to find an inclusive definition for the variety of family forms in the modern context is, to say the least, challenging.

As family forms have changed, sociologists and anthropologists have also become increasingly involved with this problem of definition. At a practical

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8. See supra, note 83.

5. See statistics, supra, note 20.
level, it is increasingly common to characterize family units in terms of their function. As one group of authors note, anthropologists have a view of the family as a universal institution "which maps the 'function' of the 'nurturance' onto a collectivity of specific persons (presumably 'nuclear relations') associated with specific spaces ('the home') and specific affective bonds ('love')..." These writers suggest that such a definition may not be applicable to tribal and primitive societies, but that those who espouse such a definition:

were correct in insisting that the family in the modern sense—a unit bounded biologically as well as legally defined, associated with property, self-sufficiency, with effects and a space 'inside' the home—is something that emerges not in Stone Age caves but in complex state governed social forms.

Yet this means that the functional approach to the family leads only to a definition which "fits" those forms which have already been recognized and shaped by state policies. As a result, these writers suggest that to really understand "families", as opposed to "the family", it is necessary to analyze the family as an "ideological unit"; it is then possible to see that this unit makes a "moral statement" and that it has a "dialectical process which transforms it".

In this context, it is important to note that any legal definition of "the family" will have practical ramifications. It is clear that legal definitions of family both recognize and shape family forms; they are not value-free. What must be recognized is that any social or legal policy "implicitly or explicitly... discourages some reactions among citizens and encourages others..." This means that any legal policy which is designed to achieve equality between family forms in an ideal world must be neutral. However, Sussman argues "no single policy, legislative act, or program will be equally supportive of all types of family structures..." and therefore it would be necessary to adopt "families" rather than "the family" as the unit. It is suggested that such a proposition is exceedingly problematic, if not impossible, in the legislative context.

As stated earlier, existing family law seems to have adopted equality and

86. Collier, Rosaldo and Yanagisako, supra, note 29.
87. Supra, note 28.
88. Supra, note 30.
89. Supra, note 33.
90. Supra, note 36.
independence as its goals and thereby also assumes "the individual" as the base unit. However, although this is true with respect to the provisions regarding support between former spouses, division of property, and support of children of the marriage, it is also true that these and other provisions are placed very much within a context of "the family". In the current legislation the ideal family seems to be the nuclear family. Given the variety of family forms, as well as the cultural mix evident in current Canadian society, however, it is no longer tenable to legislate in favour of only one family type. Firstly, it must be recognized, for the reasons outlined above, that those families which do not meet the ideal are penalized. Secondly, the ideal is not composed of form alone. By this it is meant that the ideal vision of "the family" carries with it an "ideological stance concerning the proper division of labour within the family". This division is the traditional male-breadwinner/female-housewife model and clearly condones a sexist assignment of roles. This ideological stance not only prescribes particular personal role interactions but also prescribes particular economic responsibilities, and both are based upon a sexist bias.

Moreover, the "ideal" and the "ideological stance" pervade the social assistance legislation. Perhaps particularly because of the assumption of the family as the base unit, the economic responsibilities have a blatant sexist bias; the role of economic provider is presumed to be male. The damaging consequence of this is that the economic security of many women and children is dependent upon a claimant's ability to demonstrate affirmatively that she lacks a male provider. In its worst form, the policy requires that the female claimant have no sexual relations with a male while receiving social assistance. One of the assumptions underlying this policy is that women receive economic security from men as a reward for performing certain services; they

94. See supra, note 65, and accompanying text.
95. See G.W.A. Policy Manual, 21 July 1980, Ministry of Community and Social Services, GW-0303-08, at 2: "The following criteria can identify acceptable proof that an individual is not living as a single person: Familial, Sexual, Social, Economic, Other. The examples of each (provided below) do not cover all factors that might be used singly or collectively in assessing whether a person is 'not living in the circumstances of a single person' or 'living with another person as husband and wife'. They do, however, suggest a broad range of characteristics which will assist in the making of sound decisions in these cases....

If the administrator has what he feels is sufficient evidence that a common-law union exists, then he may refuse or cancel assistance, unless the common-law husband is eligible for assistance as the head of the family....

More particularly, [s]elf-admission of an ongoing sexual relationship is also acceptable." (Emphasis added). See also p. 4.
are the "supported class". Another assumption is that all members of the family unit benefit where there is one source of income; that there are unified interests. The latter view is of course applied universally as though the members of every family interact in the same manner. In addition, such a view ignores power imbalances which exist between family members. The policy does underscore, however, that the difficulty experienced by single-parent families headed by women is "not the lack of a male presence but the lack of a male income".

In sum, the ideal family form which pervades both systems of family law is not neutral, and in a social climate of diverse family forms, it is prejudicial. In addition, it threatens both the goal of equality and the goal of economic security. Inequality results as a consequence of the use of an ideal family form in a number of different ways. First, adherence to an ideal family form necessarily creates inequality between variant family forms. Second, the choice of the nuclear family as the ideal perpetuates inequality between the sexes. The combination of these inequities is particularly detrimental to the economic security of female individuals upon the dissolution of marriage. Moreover, because the nuclear family is the ideal, certain family forms, such as single-parent families, experience more severe economic insecurity. Third, since families are dynamic and any ideological unit has a "dialectical process which transforms it", any attempt to formulate policy on the family unit base is destined to be out of tune with the experience of at least some Canadian families. Finally, it must not be forgotten that, family law both reflects and helps create an ideology of the family—a structure of images and understandings of family life. This ideology serves to deny and disguise the ways that families illegitimately dominate people and fail to serve human wants...

B. An Alternative: "The Individual" as a Legal Unit

At first glance, the use of the individual as the base unit for legal policy seems to overcome many of the disadvantages which accompany the use of the family. If the individual is used, legal policy can accommodate the variety of family forms and the cultural differences. As a result, there is no need to define "the ideal family", and to define all policies in accordance with it.

98. See statistics in Cherlin, id.
99. See supra, note 90.
Family law deals with marriage breakdown and therefore with a particular family's dissolution. Just as a molecular structure which is disturbed by some chemical reaction breaks down into individual atoms which may or may not reorganize themselves into new structures, any family, regardless of the form of its original structure, is essentially composed of individuals and will break down into individuals, who may or may not reconstitute themselves in a new family form. Whereas chemistry uses the atom as its basic unit of analysis, family law could use the individual. By using the individual, it would be possible to approach interactions between people and family forms as processes rather than as static entities.

In terms of the suggested goal of equality, the use of “the individual” could eliminate inequities between family types. In addition, as there would be no prescribed family ideal, both men and women could interact without prescribed roles based on gender as defined by the ideal nuclear family. In terms of economic security, responsibilities would be distributed according to needs and capabilities. The social assistance legislation would incorporate the individual model and thus provide assistance to those individuals in need. All of this paints a rosy picture of the use of the benefits of using “the individual” as the unit. However, experience with its use demonstrates that there are some difficulties.

Along with the development of no-fault divorce has developed an assumption of a partnership and concurrently an assumption of equality. The result is that alimony is based on need, child support has become a shared responsibility, and marital property is divided equally. As previously mentioned, however, the difficulty with the legislation is that sexual equality is stated as an accomplished fact. As another writer has suggested, this may be because there is confusion as to the meaning of equality; does it mean equality of opportunity or of result? In our current legislation, family members are “judicially equal.” Yet, as has been suggested:

This view treats women's subordination as though it occurred by chance. That men happen to earn almost twice as much as women, and that this affects the social relations between the sexes is, according to this view, not the state's concern. Similarly, that children are economically dependent upon their parents and that parents sometimes use this dependence to dominate or exploit their

102. Weitzman and Dixon, supra, note 100 at 364.
103. Westerberg Prager, “Shifting Perspectives on Marital Property Law” in Rethinking the Family, supra, note 1 at 111.
104. Olsen, supra, note 102.
children, is likewise not the state's concern. Rather, the mistreatment of wives and children is simply a series of unfortunate individual occurrences.  

Moreover, a consequence of the atomization process is the non-recognition of interdependence, as the quotation at the beginning of this paper illustrates. And because interdependence is not recognized, the value of home labour is not fully recognized. This result interferes with the goal of equality between the sexes and has attendant economic consequences for the division of property. The individual unit also fails to take into account that people often make certain life choices, for example career choices, because of spousal and family considerations, choices that they wouldn't necessarily make if they were not members of a family unit. More often than not, it is women who make sacrifices in their career advancement opportunities, either because they take on the child care role or because the man's earning power is greater and it makes more economic sense. In this context, if Glendon's assertions are correct and the new (valuable) property is employment status and entitlements therefrom, an equal division of marital property does not in fact accomplish the goal of equality. Using the individual as the base unit does not solve all the problems.

**DIRECTIONS FOR FURTHER QUESTING**

In sum, the goal of equality is not necessarily better served by using "the individual" as opposed to "the family" as the unit. However, the potential for serving that end is perhaps greater. It is clear that using "the individual" as the base unit would create much greater economic security for individuals in terms of the social assistance legislation, particularly for the increasing numbers of single-parent families headed by women. This fact, in addition to the fact that the goal of consistency would be accomplished if the individual were to be used in the social assistance legislation as in family law, may be a persuasive reason for reforming social assistance legislation.

The point here is that a major societal phenomenon has created a need for policy-making which does not simply tinker with the existing principles, but which recognizes the feminization of poverty resulting from liberalized divorce laws, and which takes into account the variety of family forms. It may be that legal policy-making should abandon both the concept of "family" and of "the individual" in this context, and adopt an entirely different unit, such as that now used by Statistics Canada.  

105. *Id.* at 10-11.
106. See *supra*, note 30.
107. For example, the concept of the "household".
solution, is intended to explore the dimensions of the problem, the nature of the policy implications, and the need to recognize the inherent (sex) inequality of family members which actually exists and which is indeed fostered by the “neutral” principles of existing family law. As a former wife said in relation to a potential support order:

Whenever there is money involved, the relationship never really ends. As far as the father seeing the kids is concerned, I don’t mind at all. But I don’t want any money involved, because it becomes a matter of control. We all know that those who have money control108.