30 Nfld. & P.E.I.R. 42,

Cook v. Cook

Newfoundland Supreme Court, Trial Division

Goodridge, J.

Judgment: December 16, 1980

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Dorothy Lorraine Cook, Petitioner v. Armand Francis Cook, Respondent

Armand Francis Cook, Petitioner by Counter-Petition v. Dorothy Lorraine Cook, Respondent by Counter-Petition

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Judgment: December 16, 1980
Docket: Doc. 1001, 01268

Counsel: **David** C. **Day**, Q.C., for the Petitioner.

Raymond J. Halley, Q.C., for the Respondent.

Goodridge, J.:

1 The question put to the Court in this matter is whether it has jurisdiction to consider an application for maintenance where no application was made for maintenance in the first instance and no order made in respect thereof.

2 It really involves an interpretation of Section 11(1)(a)(i) of the Divorce Act as hereafter set out.

3 Except as stated in the first paragraph above a recitation of the facts is not really essential for the interpretation of the Act. However, a brief resume is probably appropriate.

4 The parties were married on December 11, 1961 and separated in 1970. On October 12, 1973 the petitioner filed a petition for divorce based on three years separation and sought custody of the child of the marriage and maintenance by way of corollary relief.

5 The respondent counter-petitioned for a divorce on the basis of three years separation and sought custody of the child of the marriage by way of corollary relief.

6 There was an issue as to whether or not the petition had been filed before three years of separation had expired. As a result of negotiations between the parties the petition was withdrawn and a decree nisi granted on the basis of the counter-petition.

7 Custody of the child of the marriage was granted to the petitioner and the respondent was ordered to pay $40.00 a week for the support of the child.

8 The decree nisi is dated January 22, 1974 and the decree absolute April 30, 1974. During the years since then there have been several skirmishes between the parties relating to matrimonial assets. At the time of the decree absolute there was no legislation in this province dealing with the ownership of matrimonial property.

9 The petition having been withdrawn and no reply filed to the counter-petition, the question of maintenance for the petitioner was not before the court when the matter was heard. I see no basis upon which I can make a distinction between a set of pleadings in which no maintenance is claimed and one in which a claim for maintenance is made and withdrawn.

10 I must determine therefore whether the Court has jurisdiction to hear a claim for maintenance presented after the decree absolute for the first time. In other words, has the Court jurisdiction to consider a claim for maintenance not contained in the appropriate pleading as filed initially or as properly amended?

11 A wife can seek maintenance under the Maintenance Act and in suing for divorce can claim maintenance under the Divorce Act. A wife who has no legal interest in a matrimonial property can apply, relying on equitable principles, for a declaration that she has an interest in such property.

12 The petitioner pursued the last mentioned course in respect of the matrimonial home. In her quest she was unsuccessful both at trial and on appeal.

13 In retrospect the decision to disclaim maintenance initially by withdrawing the petition appears to have been an unwise decision and it is no doubt that situation which has prompted the present approach to the Court. In fairness to him I should point out that present counsel for the petitioner did not then represent her. In saying that, I do not in any sense intend to be critical of her former counsel.

14 The language of Sections 10 and 11 of the Divorce Act will be familiar to readers of this order. I am setting them forth however for convenience of reference:

> 10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just
>
> (a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;
>
> (b) for the maintenance of and the custody, care and upbringing of the children of the

marriage pending the hearing and determination of the petition; or

(c) for relieving either spouse of any subsisting obligation to cohabit with the other.

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either

(i) the wife, and

(ii) the children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either

(i) the husband, and

(ii) the children of the marriage; and

(c) an order providing for the custory, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

15 One notices almost immediately the different language used at the beginning of each section.

16 Section 10 opens with the words:

Where a petition for divorce has been presented . . .

17 Section 11 might have opened with parallel words such as:

Where a decree nisi of divorce has been granted . . .

18 Instead it opens with the words:

Upon granting a decree nisi of divorce . . .

19 Probably no conclusions may be drawn from these observations. I would not think that a reasonable interpretation of a statute would be excluded merely because another choice of words would have better supported that interpretation.

20 Nevertheless, the words chosen do suggest an immediacy to the granting of maintenance and have created a problem for judges and counsel as to whether the question of corollary relief may only be dealt with at the time the decree nisi is granted or may be dealt with at any time thereafter.

21 Initially in a number of cases to which I will refer, it was considered that Section 11 by its language bestowed jurisdiction upon the Court to deal with matters of corollary relief immediately upon the granting of a decree nisi of divorce but not afterwards. In view of the language of the legislation, it is difficult to draw the conclusion that these cases were wrong.

22 By some later decisions of the Supreme Court of Canada which I will hereafter discuss, this interpretation while not in my view overruled was broadened to permit such questions to be dealt with after the granting of a decree nisi of divorce. In each of those cases the issue of maintenance had been raised in the petition and there had been some finding at the trial level relating thereto.

23 In a later case (Fiedler, infra) the Supreme Court of Alberta went further and held that once a divorce decree has been granted the question of maintenance is thereafter always open to be raised notwithstanding that it was not raised in the first instance.

24 That decision has not yet been either approved or disapproved by the Supreme Court of Canada but it has certainly received the approbation of the majority of the provincial appellate courts.

25 Before getting into the basic issue a brief reference might perhaps be made to the constitutional question. Where does the Parliament of Canada get jurisdiction to legislate in respect of maintenance and custody when neither of these matters are mentioned in the provisions of the British North America Act relating to the distribution of legislative powers?

26 The constitutional question was considered by the Supreme Court of Canada in *Jackson vs Jackson*, [1973] S.C.R. 205 and in *Zacks vs Zacks* , [1973] S.C.R. 891. It is not necessary to go into the reasoning that lay behind the decision of the Supreme Court of Canada in these cases. The finding was simply that the legislation relating to maintenance and custody was ancillary to the legislative competence of the Parliament of Canada in divorce under Section 91(26) of the British North America Act.

27 The jurisdiction of Parliament being thereby affirmed, the Supreme Court of Canada in the *Zacks* case, and in two others which I will mention, considered the question of what is meant by the word "Upon" as it appears in Section 11(1).

28 Before discussing the *Zacks* case, reference should be made to three earlier judgments

which held that a maintenance order may only be made at the time of trial and not afterwards.

29 The three cases are *Todd vs Todd*, [1971] 2 R.F.L. 303, *Daudrich vs Daudrich*, [1971] 1 W.W.R. 81 (affirmed on appeal reported in [1972] 5 R.F.L. 237) and *Radke vs Radke*, [1971] 20 D.L.R. (3d) 679.

30 In *Todd*, Tyrwhitt-Drake, L.J.S.C. (B.C.) said at page 305:

> I cannot see that this is inconsistent with s. 11(1)(a) of the Divorce Act, or that it enables a party seeking maintenance to postpone his or her motion therefor indefinitely. To permit a divorced spouse to hold the club of a maintenance motion over the head of the former husband or wife forever would be monstrous; such matters must be settled no later than the trial, with the provision that adjustments can be made from time to time upon cause shown: (s.11(2)).
>
> It is my opinion that any application for maintenance under the Divorce Act must be made no later than the time of the trial of the divorce petition to which it is ancillary. Who seeks it must speak then or else forever thereafter hold her (or his) peace.

31 In *Daudrich*, Tritschler, C.J.Q.B. (Man.) said at page 82:

> It is only '*Upon*' granting a decree nisi that the court may order maintenance under s.11(1) and it is only an order so made that may be varied or rescinded under s.11(2). Therefore, unless there is some provision regarding maintenance in the decree nisi there is nothing to be varied or rescinded under s.11(2). An original order for maintenance cannot be made under s.11(2).

32 These views were sustained in *Radke*. The issue later came before the Supreme Court of Canada who, as I suggest, appear to have broadened rather than overruled these strict interpretations.

33 In the *Zacks* case the trial judge had declared that the respondent in that case-was entitled to maintenance and the matter was thereupon referred to the District Registrar for the purpose of recommending an appropriate sum therefor.

34 When that matter reached the Supreme Court of Canada, Martland, J. in his judgment said at page 912 of the cited report:

> The meaning of the word, as used in s.11(1), must be determined in the light of the fact that legislation by Parliament in relation to alimony, maintenance and the custody of children would only be within its powers if associated with and as a part of legislation in relation to the subject-matter of Divorce. It is my opinion that when it was provided that the court could deal with those matters 'Upon granting a decree nisi of divorce' it was meant that it was only when a divorce was granted that the court acquired the necessary jurisdiction to deal with those subjects. The words did not mean that those subjects could

> only be dealt with at exactly the same time that the decree *nisi* for divorce was granted.

35 It must be noted that at this point he is only discussing the time factor for dealing with the subject of maintenance. He had said earlier at page 911:

> . . . the trial judge not only considered the matter of maintenance, but declared the appellant's entitlement to it.

36 His finding on page 914 appears in the following terms:

> Applying my interpretation of s.11(1), Gould J. acted within his jurisdiction in making the order which he did, and the Court is properly entitled, upon receipt of the recommendation of the Registrar, to fix the proper amount of the maintenance which Gould J. has already decided that the appellant and the infant child are entitled to receive.

37 It is important to note that Martland, J. concluded his judgment with the following passage of which I have underlined a portion.

> Counsel for the Attorney General of Canada invited us, in interpreting the meaning of the word 'Upon' in s. 11(1), to hold that in every case, where a decree *nisi* of divorce has once been granted, the court may, at any time thereafter, make an order as to alimony, maintenance and the custody of children. It was submitted that the lapse of time after the granting of a decree *nisi*, or the intervening grant of a decree absolute, before such an order was sought would be only factors to be considered by the court to which the application was made. It is not necessary in this case, nor do I think it would be desirable, to endorse such a broad statement. In the present appeal, it is true that a decree absolute has been granted, but the right to maintenance had been declared at the time of the decree *nisi*, and the procedure to fix the amount had been launched before the decree absolute was made. *What the position would be if no claim for alimony, maintenance or custody was made until after a decree absolute had been granted, or if an application therefor had been refused when the decree nisi was granted, is not in issue in this case, and I express no view thereon*.

38 In the case of *Lapointe vs Klint*, [1975] 2 S.C.R. 539, the wife who was the respondent at the appeal hearing had been sued for divorce and she in her answer applied for maintenance. After two adjournments, the husband ultimately was granted a decree nisi but the wife's application for maintenance was not dealt with because she was in Tokyo at the time. She was represented by counsel. In the decree nisi it was provided that other rights were reserved and in the decree absolute it was provided that the Court reserved all other remedies.

39 The wife subsequently applied for maintenance.

40 The husband raised by way of a preliminary point of law which reached the Supreme Court of Canada the issue of whether his former wife might apply for maintenance.

41 Martland, J. again delivered the judgment of the Court and at page 544 said:

> This is not a case in which the matter of maintenance had not been raised at all at the time the decree *nisi* was granted, nor one in which an application for maintenance had been refused. The wife had filed an application for maintenance before the decree *nisi* was granted, but it had been struck out, not for lack of merit, but owing to her absence. The Court, at the time the decree *nisi* was granted, was unable to make an order because of her absence in Tokyo, but, because of representations by her counsel, that issue was reserved, as it was also in the decree absolute. The question then is as to whether, in these circumstances, the Court was, in law, prevented from dealing with the matter of maintenance once the marriage was finally dissolved.

42 He then concluded with the following passage on page 545 in which I have again underlined certain parts:

> In my opinion *the issue as to the granting of maintenance*, although incidental to and dependent upon the granting of a decree of divorce, *may be dealt with by the Court separately from the issue as to the granting of such decree. If the Court decides that a party to the divorce proceedings is entitled to maintenance, or is entitled to have that issue determined, its right to determine such entitlement does not preclude it from dissolving the marriage, but such dissolution does not prevent it from dealing with the corollary relief aspect thereafter*. It is because the marriage is being dissolved that the power and the necessity to determine the right of a party to the marriage to maintenance arises. The Court having derived jurisdiction to deal with that matter when the decree *nisi* is granted, in the absence of some express provision in the Act to the contrary, is not deprived of the power to deal with *the issue which has come before it* because the decree is made absolute, if that issue is still undetermined.

43 Finally came the latest word of the Supreme Court of Canada on the matter in the case of *Vadeboncoeur vs Landry*, [1977] 2 S.C.R. 179.

44 In that case an application for interim maintenance had been granted under Section 10 of the Divorce Act, but when the divorce decree nisi was granted no reference was made to maintenance.

45 The judgment of the Court was delivered by Beetz, J. who, at page 187, said:

> In the case at bar, the petition is not based on needs arising after the dissolution of the marriage bond, nor was the wife's petition considered and denied for lack of merit when the decree *nisi* was granted, nor, finally, was the matter of her needs and support not raised during the proceedings; it was in fact raised and determined in favour of respondent, on an interim basis, before the decree *nisi*. The petition for alimony is based on needs that existed at the time of the dissolution of the marriage. According to the trial judge's undisputed findings the lack of an appropriate order made in favour of respondent

> when the decree *nisi* was granted is only the result [TRANSLATION] 'of an omission on the part of his or respondent's counsel or of a misunderstanding between them'. Respondent's right to alimony in the circumstances would normally have been dealt with when the decree *nisi* was granted, and it was only by an oversight that this did not happen and the issue remained unsettled. Respondent submitted her petition two months after the decree absolute was granted--in my opinion, a reasonable lapse of time--after she learned of a fortuitous omission in the proceedings taken to dissolve her marriage. The purpose of her petition was to remedy this omission. In my view, the Superior Court had jurisdiction to grant the petition and this jurisdiction, connected as it is with the granting of the decree of divorce originates in s. 11 of the *Divorce Act*.

46 The Court again in that case rejected the opportunity to make a pronouncement on the proposition that the British North America Act empowers Parliament to prescribe that the obligation to provide assistance indefinitely survives the dissolution of a marriage and that in the Divorce Act this has been done. The learned judge felt that the circumstances of the case did not permit the expression of an opinion on such a general matter.

47 In retrospect, these three cases appear only to have broadened rather narrow interpretations of Section 11(1)(a)(i) of the Act. These three cases are perhaps not all that helpful for the purpose of determining the question that is before me. The *Zacks* case appears to me to have been a straightforward one; the *Lapointe* case was almost as straightforward; and the *Vadeboncoeur* case appears to have been resolved basically on the factual situation that therein pertained. However, the statement that the petition for alimony is based on needs existing at the time of dissolution affords a degree of support for the decision I am to make herein.

48 The next case of importance in this field which came shortly after the *Lapointe* decision was *Fiedler vs Fiedler*, [1975] 55 D.L.R. (3d) 397. This preceded *Vadeboncoeur*.

49 Having discussed the *Zacks* and *Lapointe* cases Sinclair, J.A. summed up the situation as follows at page 422:

> What conclusions are to be distilled from *Zacks* and *Lapointe* that may be helpful in considering the right of Mrs. Fiedler to claim for maintenance at this stage of the proceedings? I believe them to be these:
>
> 1. Section 11(1) does not mean that the subject of maintenance can only be dealt with at the same time as the decree *nisi* for divorce is granted.
>
> 2. A Court has power to make an order fixing maintenance after the decree absolute has been made.
>
> 3. The application of s.11(1) to a situation where no claim for maintenance is made until after the decree absolute has been granted was not in issue in either case, and no view was expressed thereon.

> 4. It was not necessary, nor did the Court think it desirable, to endorse the submissions of counsel for the Attorney-General of Canada that: (i) in every case where a decree *nisi* of divorce has been granted the Court may, at any time thereafter, make an order as to maintenance; and (ii) that the lapse of time after the granting of a decree *nisi*, or the intervening grant of a decree absolute, before such an order was sought would be only factors to be considered by the Court to which application was made.

From this analysis of *Zacks* and of *Lapointe*, it is my view that the Supreme Court of Canada has not yet decided whether an application by a spouse for maintenance can be entertained where the matter did not arise at any stage, or in any shape, during the divorce proceedings. In my opinion, it would be a logical extension of the reasoning in those decisions to hold that, where no claim for maintenance has been made until after the granting of the decree absolute, a Court does have the power, under s.11(1), to hear such an application in certain circumstances.

50 The *Fiedler* decision was followed the next year by *Goldstein vs Goldstein*, [1976] 67 D.L.R. (3d) 624, another decision of the Alberta Supreme Court.

51 Again Sinclair, J.A. discussed the matter and found, inter alia, as follows at page 632 and 633:

> I think it fair to say that in situations where no claim for maintenance has been made or dealt with before or during the trial of the divorce proceedings, the Supreme Court of Canada has yet to consider definitively the right of a spouse to seek maintenance for the first time after the decree *nisi* has been granted. So far as cases decided by this Division are concerned, the position appears to be as follows:
>
> (a) Where no claim for maintenance has been made until after the granting of the decree absolute, a Court does have the power, under s.11(1), to hear such an application. The application must be made within a reasonable time after the granting of the decree absolute, having regard to all the circumstances of the case (*Fiedler*).
>
> (b) Where, after consideration of the question of maintenance, the Judge who granted the decree refused to make an order for maintenance, the spouse cannot later make a claim for maintenance (*Radke*). In such a case the remedy of the spouse is to appeal.

52 The *Goldstein* and *Fiedler* decisions have been followed in most of the provinces of Canada. The case of *Archibald vs Archibald*, [1978] 8 R.F.L. (2d) 117 is a recent decision of the Nova Scotia Court of Appeal on the point in which the cases mentioned and others were referred to. Hart, J.A. in rendering the decision of the Court said at page 131:

> It would appear to me that the Supreme Court of Canada is now saying that s.11 of the Divorce Act establishes jurisdiction in the provincial Supreme Courts to deal with the

> matter of maintenance, and the expression 'Upon granting a decree nisi of divorce' does not limit the exercise of that jurisdiction to the time of the hearing. It may be exercised subsequently even after the decree absolute has been granted, but no limit has been placed on the period of time following the divorce in which maintenance must be sought. This aspect of the matter remains open, and in the absence of authority to the contrary Jones J. was prepared to accept the respondent's claim within a matter of months of the time of the decree. I cannot see where the trial judge erred in his interpretation of the law as it now stands, and I agree with him since he allowed all necessary amendments to the application that the proceeding can properly be treated as an original application for maintenance rather than an application to vary the existing decree. There is therefore no need to establish any change in circumstances from the time of the trial to the time of the application for maintenance since it really is an initial determination of the right to maintenance rather than a variation of a previous finding by the court.

53 In reviewing the cases I am somewhat struck by the repeated reference to *time*.

54 In the *Lapointe* case, Martland, J. said at page 543:

> It may be noted that the wife's application for maintenance was made very promptly after the decree absolute had been granted.

55 In the *Vadeboncoeur* case Beetz, J. said at page 187:

> Respondent submitted her petition two months after the decree absolute was granted - in my opinion, a reasonable lapse of time - after she learned of a fortuitous omission in the proceedings taken to dissolve her marriage.

56 In *Fiedler*, Sinclair, J.A. said at page 422:

> I believe that such an application must be made within a reasonable time after the granting of the decree absolute, having regard to all the circumstances of the case.

57 He reaffirmed this position in Goldstein in the passage quoted above from page 632.

58 Hart, J.A. in *Archibald* at page 131:

> It may be exercised subsequently even after the decree absolute has been granted, but no limit has been placed on a period of time following the divorce in which maintenance must be sought. This aspect of the matter remains open, and in absence of authority to the contrary Jones, J. was prepared to accept the respondent's claim within a matter of months of the time of the decree.

59 I have been unable to determine what effect time lags have upon the interpretation of a statute. Can it be said that a statute which means one thing today means something else tomorrow or to put it more accurately, can it be said that the interpretation of a statute depends

upon the exercise of discretion by a judge?

60 It seems to me that if the section gives the Court jurisdiction to consider at a later date an application for maintenance not presented at the time of the hearing of the petition for divorce decree nisi, it may be heard at a later date. There is no time limit contained in the Act. If it can be heard at all, it can be heard at any time as long as both of the parties live. Hart, J.A. in *Archibald* was correct when he said that no limit has been placed on the period of time in which maintenance must be sought.

61 I consider the situation to be this. Assuming that the Court has power to consider such an application after the decree absolute where the issue has not been raised at the hearing of the application for such a decree, then it has such jurisdiction for all of the time that both of the parties to the dissolved marriage shall be alive but discretion rests in the judge as to whether or not to exercise that jurisdiction.

62 It might be more accurate to say that discretion rests with the judge in the exercise of that jurisdiction to determine whether or not the maintenance sought should be granted and, if granted, how much and upon what terms. In the exercise of this discretion, the judge would presumably consider the time factor.

63 One may ask where the discretion comes from.

64 Section 11 contains at least two references to the exercise of discretion.

65 The first occurs in the passage which reads:

> . . . the Court may, if it thinks it fit and just to do so having regard to the conduct of the parties, . . . order maintenance.

66 It occurs secondly in the paragraphs of subsection 1 of Section 11 where it makes reference to:

> such . . . sum . . . as the Court thinks reasonable.

67 No compulsion rests upon the Court by these two passages. In contrast there is in the first a restriction that the discretion may only be exercised if the Court thinks it fit and just to do so having regard to the various factors therein mentioned. The use of the term "may" indicates that the Court is not limited to consideration of the factors therein mentioned, and may consider other factors such as delay on the part of the applicant in making the application for maintenance.

68 The question of time is really a question of fact and not a question of law and should not be considered in the interpretation of the statute but should only be considered by the Court in determining either whether or not or how to exercise its discretion.

69 I believe that the repeated references to time lags in some of the Canadian cases on the

matter stem from the dissenting decision of McDermid, J. in *Radke*. His views were based upon what he considered to be comparable legislation in England where the word "on" was used in place of the word "Upon" which appears in the Canadian act. The English decisions appear, indeed, to take a middle road and to hold that the term "on" does not confine consideration of the question of maintenance to the time of the divorce decree nisi but that it does confine it to a reasonable period thereafter. However, the English rules provide that an application for maintenance is made by a petition which must be filed at the time or within a month of the divorce hearing and thereafter by leave of a judge. What the judges appear to have said in the English cases referred to is that they will only give leave to issue a petition for maintenance after the one month limitation where the application for leave is made within a reasonable period.

70 This situation has no counterpart in the Canadian act and the English decisions can therefore play no role in its interpretation in this respect.

71 This aspect of the matter is discussed more thoroughly by Allen, J.A. in his decision in *Radke* beginning at page 690.

72 I have other concerns about *Fiedler* and *Goldstein* apart from the fact that there was incorporated into the principle therein enunciated the proposition that such an application be made within a reasonable time.

73 I am unable to agree that the *Fiedler* decision is a "logical extension of the reasoning" in *Zacks* and *Lapointe*. These two cases very obviously considered situations where the question of maintenance had been raised by the pleadings and dealt with in one manner or another (but not rejected) at trial. In the *Vadeboncoeur* case the issue had been raised by the petition and dealt with before trial when an order for interim maintenance was made.

74 The Supreme Court of Canada very clearly rejected the proposal that they should make a decision in those cases on the issue of whether or not a claim for corollary relief not made until after the decree absolute could be considered or, in other words, was within the Court's jurisdiction.

75 The decisions reached in the Supreme Court of Canada cases are quite different from the decisions in *Fiedler* and *Goldstein* and in the subsequent cases which followed them. On the one hand you have an application for maintenance incorporated in a pleading and dealt with at trial; on the other hand you have an application for maintenance not incorporated in a pleading and not considered at the trial.

76 To arrive at the decision in *Fiedler* and *Goldstein*, the learned judge had to extract from the *Zacks* decision the presence of what I consider to be vital elements - the plea and the adjudication in respect thereof.

77 The decisions in *Fiedler* and *Goldstein* may be correct, but they are not logical extensions of *Zacks* and *Lapointe*; nor can they be supported by the English decisions, for the reasons which I suggested earlier.

78 Corollary relief is deemed to be within the legislative competence of the Parliament of Canada because it is ancillary to the power to legislate in respect of divorce expressly embodied in Section 91 of the British North America Act.

79 One might argue that because the maintenance legislation itself is ancillary to the divorce legislation then maintenance should be ancillary to the divorce.

80 The term "ancillary" is defined to mean "subordinate or subservient". I think perhaps it has a slightly different meaning when used in the constitutional sense. In the *Fisheries Act 1914 Reference*, [1931] D.L.R. 194, it was said that ancillary legislation is that which is *necessarily incidental to effective legislation*.

81 I mention the subject because I feel that there should be some ancillary relationship between the prayer for divorce and the prayer for maintenance. These are not two rights that exist, separate and independent of each other. If they did, the legislation relating to maintenance would not be ancillary to the legislation relating to divorce.

82 I see a distinction between an order for maintenance made concerning *spouses* which with its variations, if any, will survive the ultimate dissolution of the marriage and an order for maintenance made concerning *former spouses* after their marriage has been dissolved.

83 The former such order is clearly ancillary to the divorce decree. The latter is not. It is an order made between legal strangers. If the interpretation of *Fiedler* stands, Parliament has effectively created a potential liability on one party in favour of another which is, I suggest, an invasion of the Provincial legislative field.

84 If Section 11 is valid because it is ancillary to Section 5 (which creates the jurisdiction to grant relief in respect of a divorce petition), surely its validity only exists in respect of situations where the corollary relief is ancillary to the divorce relief.

85 Parliament legislates in the divorce field. That is within its competence. It legislates in the field of maintenance because that is ancillary to divorce.

86 When the decree absolute is granted the competence of Parliament comes to an end except in respect of the variation of orders made prior to the decree absolute.

87 After that, the parties are legal strangers to each other and Parliament is not competent to create legal rights and obligations between them.

88 If the act uses a geometric term, perhaps one may be forgiven for using a geometric allegory. The divorce and ancillary jurisdiction of Parliament is represented by a circle which has as its centre the divorce decree nisi. It is not a true circle because its radius on the one side is the length of time from the presentation of the petition to the decree nisi and on the other the length of time from the decree nisi to the decree absolute.

89 Within that circle lies the divorce jurisdiction of Parliament and all things that are ancillary thereto. Outside the circle, Parliament has no jurisdiction.

90 Outside the circle, things cease to be ancillary to those within. Parliament cannot legislate maintenance between couples who have not entered the circle or who, having entered it have left, divorced or not. The circle only opens its circumference to these divorced couples who have passed beyond it to permit them to have reviewed for variation an order for corollary relief made before they left it.

91 That perhaps is a fanciful flight. The word 'ancillary' may not be appropriate and may have been given too restricted an application by me. But that being so, what does one do with the word 'corollary'?

92 Even if we assume that the legislation for corollary relief is intra vires when it is considered in the light of its application to couples whose marriage has been dissolved or that, deriving its essential validity by virtue of being ancillary to divorce, the legislation retains its validity in non-ancillary situations, we must still consider the significance of the word "corollary".

93 Sections 10 - 12 of the act dealing with maintenance are headed *Corollary Relief*. The use of the term "corollary" as an adjective is now rare but must, in the way it is used in the statute, be defined to mean "of the nature of a corollary". The relief sought must be of such nature.

94 Several definitions of "corollary" as a noun are contained in the Oxford Concise English Dictionary. That dictionary offers four meanings:

> 1. A proposition appended to another which has been demonstrated, and following immediately from it without new proof; hence gen. an immediate inference, deduction, consequence.
>
> 2. Something that follows in natural course; a practical consequence, result.
>
> 3. Something added to a speech or writing over and above what is usual or what was originally intended; an appendix; a finishing or crowning part, the conclusion. Obs.
>
> 4. Something additional or beyond the ordinary measure; a surplus; a supernumerary. Obs.

95 None of these are of much assistance. There are two dominant themes - *consequential* and *additional*. It is obvious that a corollary is something bound by some tie to a principal matter.

96 In this case the relief must be consequential or additional to the divorce relief. The legislation creates a nexus between the one and the other. This is perhaps better illustrated by the definition of 'corollary' in Webster's New Collegiate Dictionary:

> 1: an immediate inference from a proved proposition 2 a: something that naturally follows: RESULT b: something that incidentally or naturally accompanies or parallels

97 What impact then, has the word 'corollary', or for that matter the word 'ancillary' have on the issue? Does either word create a giant umbilical cord that connects the parties to the dissolution of their marriage for all of their lives, or recreate another umbilical cord between them that was severed as they left the allegorical circle.

98 I think not. I think that the Divorce Act creates one cause of action - relief by way of divorce -and, consequential or additional to it, a right to have considered at or pursuant to an order made at the trial those problems which necessarily arise when a married couple part - maintenance and custody.

99 When the corollary relief is sought for the first time *after* the granting of the divorce decree absolute and not *upon* the granting of the divorce decree nisi, the *nexus* has been broken and the Court is without jurisdiction.

100 In considering the question with reference to the term 'corollary relief', I note that that term appears in the Act only as a heading. The Interpretation Act bids us to ignore side notes but to consider recitals. I believe that headings may be regarded as recitals for the interpretation of what follows but may not be considered for the interpretation of legislation that appears under other headings.

101 In short I conclude that the Court has no jurisdiction under the Divorce Act to consider a prayer for corollary relief unless the prayer for such relief is contained in a pleading as originally filed or as amended in accordance with the pertinent rules. Whether a pleading may be amended after the matter has been concluded is another question, of course, which I do not propose to deal with here. I would presume that if it is, the time lag would be a vital element in determining whether or not to allow an amendment.

102 The preceding paragraph introduces a new aspect of the matter - procedure.

103 I would not wish to see the ends of justice defeated by a weakness in the procedural practise of a court. However, one must determine how such a prayer for relief, not embodied in a pleading, may subsequently be brought before court.

104 There is no provision for it in the Divorce Act. Under that act, provision is made for the presentation of a petition for divorce and for applications:

> (a) for a decree absolute by one party or the other;
>
> (b) to show cause why a decree absolute should not be made; and
>
> (c) for variation.

105 How then does one apply for corollary relief after the fact? By motion in the cause itself? By a new petition? By a writ?

106 If the act creates a separate cause of action for corollary relief, there are no procedural provisions for seeking the relief by motion or petition. I would think a writ would have to launch the quest.

107 I believe, however, that the prayer for corollary relief by its very description does not create a separate cause of action but a cause of action tightly linked to the prayer for divorce.

108 There is no procedural method to introduce such a claim after the fact. It must appear in a pleading. If it does not so appear, then that is the end of it unless leave to amend may be and is subsequently granted.

109 A spouse is entitled to be confronted with the issue of spousal maintenance at the time of the divorce. This may very well govern how he or she will act in relation to the pleadings. There are grey areas in the divorce field. Condonation and intolerable cohabitation are but two. A prayer for divorce which might be denied if defended might be granted if undefended. That can be so without collusion.

110 A spouse, faced with a claim for maintenance, might decide to defend a prayer for divorce. A spouse not so confronted might be content not to defend the claim. The outcome in each case could be different as could the resulting liability of the defending spouse.

111 The claiming spouse can make his or her claim at the beginning. Even though he or she may have no present need for maintenance, a nominal order may be made which may be varied to a valuable order if circumstances subsequently warrant.

112 If there is an injustice, it would be in raising the issue of spousal maintenance for the first time after the petition has been heard. The defending spouse makes or declines to make his or her plea on the basis of no maintenance claim and ought not to have to face one later.

113 The claiming spouse should make his or her claim at the outset and have the issue determined in some fashion at the hearing of the petition when the claim may be denied, granted, granted subject to assessment, granted in a nominal amount, or rights in respect thereof reserved.

114 That to my way of thinking is the common sense view. It is also, for the reasons above stated, what in my view is indicated by the legislation.

115 I find it difficult to get away from the basic situations that I have always considered to exist in respect of maintenance which I would summarize as follows:

1. If there is no prayer for maintenance in respect of a spouse, then none may be granted;

2. If a prayer for maintenance of a spouse is presented, it may be either ordered or refused;

3. If it is ordered and an amount can be determined on the evidence then available, then an order should be made accordingly;

4. If, as a result of a hearing, it is found that a situation exists where one spouse should be ordered to pay maintenance to the other but the other is found to have no present valuable need of the same, then a nominal amount such as a dollar a month should be awarded;

5. If maintenance is considered appropriate but evidence is not available to make an assessment of the same at the time, then maintenance should be ordered in an amount to be assessed.

116 Parts of this somewhat mundane approach have been frowned upon by some jurists. Nevertheless, I feel that it covers the field. The prayer for maintenance must be raised by the spouse seeking the same in his or her pleading and the Court must deal with the same in one of the matters specified above. If this is done, there is no problem.

117 The problem exists when a spouse disclaims his or her right to relief by refusing to claim the same when the matter is initially before the Court.

118 In conclusion I should make two brief observations.

119 The first relates again to the term "corollary relief". This embodies spousal and child maintenance, and child custody.

120 Child custody may be considered by the Court under its inherent jurisdiction. Child maintenance may be considered by the Provincial Court under provincial legislation.

121 The question of a claim for corollary relief after the fact is primarily one involving spousal maintenance for which there is in this province no legislative provision. Provincial legislation is confined in this respect to maintenance for deserted *wives*.

122 While the interpretation of the act relates to all forms of corollary relief, the fundamental issue will nearly always be spousal maintenance.

123 The second is related to the first for it raises the question of whether or not a court should impose the issue on the parties without regard to their wishes.

124 The English case of *Hyman vs Hyman*, [1929] A.C. 601 held that the legislation permitted a judge to order maintenance notwithstanding a prior agreement not to claim the same. That case held that a wife may not preclude herself from invoking the jurisdiction of the Court to claim maintenance. It would be contrary to the *public* interest.

125 If a spouse claims maintenance however, I would consider that he or she would have to do so under the existing legislation and rules. If he or she does not, then there is no issue before the Court in that respect to be considered.

126 If there is a duty on the Court (which I doubt) to insist that such a claim be made, surely the power of the Court would not extend beyond the framework of the same legislation and rules. This being so, court intercession would have to take place at an appropriate time -at or before trial.

127 It should be noted as an aside that the "public" referred to in Lord Hailsham's speech at page 614 of the reported decision of *Hyman* (supra) when transposed to the Canadian scene would become the "Provincial" public. The fear is that a spouse foregoing a claim to maintenance might if he or she were barred from making a claim under the act become a charge on the public purse - the Provincial public purse.

128 I suggest that while the Parliament of Canada has ancillary legislative competence to provide for the benefit of divorcing spouses, its competence does not extend to providing protection for the Provincial public purse.

129 It is my opinion and my finding that the Divorce Act does not create jurisdiction in the Court to consider a claim for maintenance made after the decree absolute. When such a claim is then made for the first time, it is neither ancillary nor corollary to the divorce decree nisi.

130 I have not dealt with the situation where a claim is made for the first time after the decree nisi and before the decree absolute as that is not the factual situation before me. At the very least it would seem to me this would involve initial amendment and consequential pleading or amendment of pleading, all of which would only be available, if at all, with leave upon due application.

131 Even that, however, seems to be contrary to the Act. I am of the view that the issue must be raised before trial, that the Court, granting the decree nisi, thereupon has the jurisdiction to deal with issues of relief which are then before it and may deal with them then or make provision for dealing with them thereafter.

132 If the word "Upon" creates a jurisdiction to deal with corollary relief, it surely must be limited to that relief put in issue. Having exercised its jurisdiction in respect of the issues before it, surely the Court is then functus except in respect of applications relating to decrees absolute, to the variation of orders already made with respect to corollary relief and to the consideration of matters within its jurisdiction reserved or otherwise prescribed at the trial.

133 My order is that the Court has in this case no jurisdiction to deal with a maintenance application made now for the first time after the decree absolute. The prayer for such relief is denied. The respondent may have his costs to be taxed.

END OF DOCUMENT