CASE COMMENTS AND NOTES

THE ENFORCEMENT OF MAINTENANCE PAYMENTS: A CONSTITUTIONAL QUESTION

Two recent judgments from courts in Alberta have given rise to an issue of whether or not an order for maintenance payments embodied in a decree of divorce can be enforced under the provisions of section 6 of the Family Court Act.[1] The solution to this issue is dependant upon the answers to two questions: first, whether section 15 of the Divorce Act (Canada) is *intra vires* the federal Parliament; and second, if so, what effect does it have on section 6 of the Family Court Act? Each of these questions will be considered in turn.

Section 15 of the Divorce Act provides as follows:

> An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court, or in such other manner as is provided for by any Rules of Court or regulations made under section 19.

There appears to be no case in which the constitutional validity of section 15 has been considered in isolation. There are, however, two cases, *Niccolls* v. *Niccolls and Buckley*[2] and *Gillespie* v. *Gillespie*,[3] which contain brief references to section 15 in a general consideration of the provisions of section 10 (interim corollary relief) and section 11 (corollary relief granted at hearing) of the Divorce Act. Neither contain any suggestion that section 15 was other than *intra vires* the federal Parliament.

These judicial comments may not be of great weight when taken only in isolation. However, they acquire much greater force when seen in the context of judicial attitudes generally towards the corollary relief provisions of the Divorce Act. This attitude is most clearly expressed in the case of *Skjonsby* v. *Skjonsby*,[4] a judgment of the Alberta Court of Appeal, where Prowse J.A. at p. 327 quoted and approved Laskin J.A. in *Papp* v. *Papp*:[5]

> Where there is admitted competence as there is here to legislation to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.

After the decisions of the Alberta Court of Appeal in *Goldstein* v. *Goldstein*[6] and of the Supreme Court of Canada in *Jackson* v. *Jackson*,[7] the validity of the corollary relief provisions of sections 10 and 11 of the Divorce Act cannot now be questioned. It is practically inconceivable, therefore, that section 15 could be held to be *ultra vires* while sections 10 and 11 are *intra vires*. The existence of every possible "rational,

1. R.S.A. 1970, c. 133.
2. (1969) 68 W.W.R. 307 (B.C.S.C.).
3. (1973) 36 D.L.R. (3d) 421 (N.B.C.A.).
4. [1975] 4 W.W.R. 319.
5. [1970] 1 O.R. 331 at 335.
6. [1976] 4 W.W.R. 646.
7. [1972] 6 W.W.R. 419.

functional connection" between an order and its enforcement must bring section 15 within the scope of the legislative competence of the federal Parliament.

Section 6 of the Family Court Act provides:

> (1) a person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family Court and when so filed, it is enforceable in the same manner as an order made by a magistrate under part 4 of the Domestic Relations Act.
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> (2) a person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order.
>
> (3) the judge of the Family Court may not vary the amount of any alimony or maintenance ordered to be paid by a judgment or order of the Supreme Court filed in the Family Court under this section.

In the event that section 15 is valid, a situation exists where the federal Parliament and the provincial Legislature have legislated with respect of the same subject matter, that is, the enforcement of corollary relief provisions granted in divorce proceedings. A consideration of cases dealing with comparable situations indicates that the courts have been consistent in holding that the outcome of such a conflict must be that the provincial legislation falls.

A clear example of this view is found in the judgment of McGillivray C.J.A. in *Goldstein* v. *Goldstein*[8] where he quoted and approved Gale C.J.O. in *Richards* v. *Richards*:[9]

> FIRSTLY—when the federal government entered the field of divorce and corollary relief by the passage of the Divorce Act (Canada), insofar as any provincial legislation in that field dealt with the same subject matter as the federal legislation, it ceased to be effective, although the provisions of the federal and provincial legislation are not exactly co-extensive, it is our opinion that any of the provincial legislation, which appears to extend beyond the boundaries of the federal legislation is not effective, because the federal legislation occupies the field.

Similarly, Laskin J.A. in *Tapon* v. *Tapon*:[10]

> I am not called upon in the present case for reasons that will follow to decide whether the Matrimonial Causes Act is in all respects superseded by the Divorce Act of Canada. However, it is my view that where children who are within the Divorce Act are equally within the terms of the Matrimonial Causes Act, the former Act alone must be taken to apply to any claim for corollary relief in respect of those children when such relief is sought in association with the petition for divorce brought under the federal enactment.

Again, Hughes C.J.N.B. in *Gillespie* v. *Gillespie*:[11]

> In my view, when Parliament enacted the corollary provisions respecting custody of the children of a marriage contained in sections 10(b), 11(1)(c), 11(2) and 15 it carved out of the general jurisdiction in custody matters theretofore administered solely by courts deriving their powers through provincial legislation, a segment of that jurisdiction limited to the children of a marriage sought to be divorced and empowered the courts exercising divorce jurisdiction to make all this applicable to any children of such marriage. Since, in the circumstances of the present case, provincial and federal legislation cover the same subject matter, the federal legislation must prevail and supersede that enacted by the Province.

Finally, there is the case of *McCutheon* v. *McCutcheon*,[12] where it was held that section 7 of the Family Court Act, which enables the Province or

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8. *Supra*, n. 6 at 653.
9. (1972) 26 D.L.R. (3d) 264.
10. (1970) 8 D.L.R. (3d) 727 at 728.
11. *Supra*, n. 3 at 430.
12. Unreported, Feb. 9, 1977, Calgary Appeal No. 9831.

a municipality to apply in the name of a wife for an order that the husband pay maintenance was now of no effect in cases where the husband and wife were divorced. The principal underlying the *McCutcheon* decision is that exclusive jurisdiction over the question of maintenance becomes vested in the divorce court in divorce proceedings and is not lost after a divorce has been granted. Inso far as provincial legislation purports to grant jurisdiction over questions of maintenance between divorced spouses to some other court, it is unenforceable.

Section 15 enables an order to be enforced "in like manner" as a Supreme Court order. It thereby imports into the Divorce Act the entire mechanism for enforcing Supreme Court orders; execution, garnishment and ultimately contempt proceedings with the attendant remedies of fines or imprisonment. The provisions of Part XXIV of the Criminal Code define the sanctions available under the Family Court Act (see section 28, Domestic Relations Act[13]). They provide for fines and imprisonment. In no way do these provisions offer any greater powers than those available under section 15. Indeed, they provide rather less. They seek to prevent the applicant from using the full range of powers granted by section 15 and restrict her to those of the Criminal Code. The argument that the federal and provincial legislation does not cover entirely the same area, or is not in conflict, cannot, therefore, be maintained. Similarly, it cannot be argued that the clauses in section 15 enabling some alternative means of enforcement to be provided by rules of court or regulations made under section 19 of the Divorce Act, have any application to the issue here. The present section 6 of the Family Court Act is derived from earlier statutes of 1965 and 1966, not from regulations made pursuant to section 19 and clearly not from rules of court embodied in Rules 562 to 577A of the Alberta Rules of Court.

Accordingly, the principle formulated in *Goldstein, McCutcheon* and the other cases cited above must lead inevitably to the conclusion that the federal Parliament has, through the Divorce Act, "carved out" an exclusive jurisdiction over divorce, corollary relief and the enforcement of orders for corollary relief and any provincial legislation purporting to effect some part of that jurisdiction is of no effect.

A search for authorities in support of the continuing validity of section 15 reveals little material from which such support can be gleaned. One case to this effect is that of *Ritchie* v. *Ritchie*.[14] There, a number of arguments were advanced to attack the validity of provincial legislation comparable with section 6 of the Family Court Act. The main thrust of these was directed to the proposition that this legislation purported to give a provincially appointed judge a concurrent jurisdiction with a judge appointed under section 96 of the British North America Act of 1867. The court, however, drew the distinction between "adjudicating in an action or case" and determining the rights of litigants and compelling the observance of the judgment or decree of the court." As a provincially appointed judge's authority only extended to the enforcement of orders and not to the power to give judgment, such an appointment did not infringe upon the exclusive powers of a judge appointed under section 96 of the British North America Act. That distinction, however, does not of itself greatly promote the argument in facour of section 6 of the Family Court Act. The general power of a provincial judge to enforce Supreme

13. R.S.A. 1970, c. 113.
14. (1968) 3 D.L.R. (3d) 676.

Court orders or judgments is not in question here. The only point in issue is whether this power remains where such orders have been embodied in a decree of divorce. On this point, the court in *Ritchie* avoided a decision by holding that as the complaint under the provincial legislation had been laid before the Divorce Act came into force, the application of the Divorce Act could not be considered.

The case of *Peroff* v. *Peroff*[15] carries similar weight in this argument. There, provincial legislation comparable to section 6 was upheld. The argument against it, however, had been directed solely to the question of whether a provincial court judge could imprison a husband who defaulted in his payments of interim alimony. The possibility of a conflict between this legislation and the Divorce Act was not raised. *Regina* v. *Macdonald*[16] can also be cited in favour of upholding the validity of section 6. There, the constitutionality of provincial legislation creating the offence of interfering with the custody of, or access to, a child contrary to a divorce order was upheld. The argument that this legislation was in conflict with the Divorce Act was raised, but rejected on the ground that the Divorce Act "does not make provision for the enforcement of orders made by this court under the Act"[16a] and, accordingly, no conflict could arise. No reference is found in the judgment to section 15 of the Divorce Act. The suggestion that the Divorce Act does not make provision for the enforcement of orders would seem, therefore, to have been made *per incuriam.*

The last word on this argument, however, is in favour of upholding section 6. It is to be found in the decision of the Alberta Family and Juvenile Court in *Bowick* v. *Bowick*.[17] In that case, after argument on the precise issue raised here, Hewitt D.C.J. held that notwithstanding the Divorce Act, section 6 of the Family Court Act remained valid. The constitution of any country he declared, must be a flexible instrument if it is to withstand the changes which occur throughout the years. It must be interpreted accordingly. In some instances, the federal powers would prevail over those of the Province; in others, as in the case before him, the provincial powers must be upheld.

If it is accepted that the enforcement of corollary relief orders as provided by section 15 of the Divorce Act is *intra vires* the federal Parliament, as an integral element of the provisions enabling the granting of corollary relief orders, the validity of which provision is eatablished by the highest authorities, the situation arises where federal and provincial legislation exists dealing with the same subject matter. In such a case, the authorities are strongly in favour of the view that the provincial legislation must give way. The British Columbia cases dealing with comparable provincial legislation, which seem to indicate a contrary result, do not deal with this argument. They cannot stand against the overwhelming trend enunciated, time and again, in such cases as *Goldstein* and *Tapon* and which is seen to be implemented in *McCutcheon.* The *Bowick* decision stands out against this trend. For how long remains a matter of conjecture. It is, as the judge in *Bowick,* acknowledged, the higher courts to which we must look for an ultimate resolution of this issue.

—I. H. GLEDHILL*

15. [1972] 1 O.R. 171.
16. [1976] 5 W.W.R. 391.
16a. *Id.* at 393.
17. Unreported, August 29, 1977.

* Member of the Alberta Bar, Edmonton.