MAINTENANCE FOR CHILDREN OF DIVORCE— NO ORDER MADE IN DECREE NISI— CAN MAINTENANCE BE AWARDED UNDER PROVINCIAL LEGISLATION?:

McCUTCHEON v. *McCUTCHEON* (1977) 2 Alta. L.R. (2d) 121

The decision of the Appellate Division of the Alberta Supreme Court in *McCutcheon* v. *McCutcheon*[1] declares *subsilentio* section 27(7) of the Domestic Relations Act[2] *ultra-vires*. It is an unfortunate decision because it denies the children of a dissolved marriage recourse to the Family Court for maintenance even though the divorce court has made no such order for them. It is all the more regrettable because it was made in an uncontested case without notice to the Attorney Generals of Alberta and Canada as required by the Judicature Acts.[2a] Decisions of the Courts of Appeal of Nova Scotia and British Columbia on precisely the same point in *Toole* v. *Toole*[3] and *Hughes* v. *Hughes*[4] respectively, were not brought to the attention of the Appellate Division. The Appellate Division did not draw the important distinction between matrimonial support and child support. The jurisdiction of a Family Court to require the father of the children to pay for their support is not destroyed because of the divorce of the parents because it does not depend on the husband and wife relationship, *Scott* v. *Scott*.[5] The submission of this comment is that the Supreme Court, under the Divorce Act, has undoubted jurisdiction to deal with custody and maintenance of children of divorced parents. Until, however, it exercised that jurisdiction in any particular case, the Domestic Relations Act continues in full effect as to children and confers on the Family Court judge the power and duty to deal with maintenance. It is further submitted that the authority of the McCutcheon decision is questionable and the Appellate Division should not consider itself bound by it.

The facts of *McCutcheon,* briefly stated, are as follows: Bertha Ethel McCutcheon obtained a decree nisi of divorce from Harry Edward McCutcheon on February 26, 1968[6] pursuant to the provisions of the Divorce and Matrimonial Causes Act. At the time there was reserved to her the right to apply for maintenance for the infant children of the marriage. The divorce was made absolute on December 9, 1968. Bertha McCutcheon never applied for maintenance for the children. She, however, received social assistance payments for the support of herself and the children from the Province of Alberta. She has refused to make any application for maintenence for herself or for the children. The Family Court Act[7] provides in section 7:

> 7. (1) Where a wife is receiving economic assistance
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> (a) from the Province, or
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> (b) from a municipality in the Province,

1. (1977) 2 Alta. L.R. (2d) 121.
2. R.S.A. 1970, c. 113.
2a. R.S.A. 1970, c. 193, s. 31 and S.A. 1976, c. 58, s. 6.
3. (1976) 14 N.S.R. (2d) 537.
4. [1977] 1 W.W.R. 579.
5. (1972) 10 R.F.L. 8 at 22.
6. The transcript of the proceedings before the District Court say 12th February, 1960. *See* p. 12 of the transcript. No. DCR 5948 (Calgary, dated 21st January, 1975).
7. R.S.A. 1970, c. 133.

> in respect of herself *or a dependent child*, any application that she can make to the Family Court in respect of a maintenance order may be made on behalf of her *or the child* by a welfare worker of the Province or the municipality, as the case may be.
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> (2) On an application authorized under subsection (1), all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by the wife.

Pursuant to this section the Department of Health and Social Development[8] of Alberta in the name and on behalf of Bertha McCutcheon, applied to the Family Court for an order that her ex-husband Harry McCutcheon, the father of their three children who were in the custody of Bertha and for whom she was receiving social assistance, be required to make maintenence payments for their support under the provisions of section 27(7) of the Domestic Relations Act.[9] The matter came before Litsky, Family Court J. on June 4, 1974, who ordered the respondent, Harry McCutcheon, to pay to the clerk of the Family Court, Calgary, the sum of $120.00 per month (being the sum of $40.00 per month for the maintenence of each of the three infant children of the marriage), commencing the 1st day of July, 1974, and monthly thereafter. Respondent Harry McCutcheon appealed this order to the District Court judge who held that the Family Court judge had no jurisdiction to make the order on the grounds that the only court that had jurisdiction was the Supreme Court of Alberta who had reserved the question of maintenence in the decree nisi of divorce granted as aforesaid. Both parties were represented by counsel.

An appeal was then taken to the Appellate Division signed by D. F. McLeod Q.C., who purported to act as solicitor for appellant Bertha McCutcheon but who in fact was representing the Department of Social Services and Community Health. Before the appeal came on for hearing, Bertha McCutcheon had written to the Registrar of the Appellate Division objecting to the appeal being taken in her name. At the Appeal, the respondent Harry McCutcheon was not represented. The Appellate Division directed itself only to the following question:[9a]

> It is only necessary for us to deal with the question as to whether the Family Court judge had jurisdiction to make the order or whether the jurisdiction still remained in the Supreme Court.

McDermid J.A. said that this question had been decided by the Appellate Division in *Goldstein* v. *Goldstein*,[10] in which the Chief Justice of Alberta, giving the decision of the court had said:

> In the light of *Lapointe* v. *Klint*, 20 R.F.L. 307, [1975] 2 S.C.R. 539, 47 D.L.R. (3d) 474, 2 N.R. 545, it is my view that the rights of the parties to the divorce, as they may be from time to time relating to both custody of the children and maintenance of a spouse, are subject to adjudication as an incident of a divorce even though no claim for maintenance or custody is made at the time of divorce, but comes to be made late.

The Appellate Division held that in view of the above statement the application for maintenence made in the name of Bertha McCutcheon should have been made to the Supreme Court of Alberta and not the Family Court as she had only the right to sue in Supreme Court.[11] The appeal was dismissed.

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8. Now called the Department of Social Services & Community Health.
9. R.S.A. 1970, c. 113.
9a. *Supra*, n. 1 at 122.
10. [1976] 4 W.W.R. 646.
11. But the Province has rights to move only the Family Court under the Maintenance and Recovery Act and the Family Court Act.

It is relevant to note here that in the District Court the notice of appeal did not raise the question of jurisdiction of the Family Court. It was raised by the District Court on its own motion.[12]

The application of Bertha McCutcheon was for the support for her children only and not for herself. It was made under section 27(7) of the Domestic Relations Act, which is as follows:[12a]

> 27. (7) Where a *divorced woman* has in her care or custody legitimate children of herself *and her divorced husband* and there is *no order of the court* for maintenance of the children, she may apply to a *magistrate* for an order for maintenence *restricted to the maintenence of the children* and the application may be dealt with in every respect as an application under sub-section (2) by a deserted wife. (emphasis supplied)

The District Court judge and the Appellate Division held that once a woman is divorced, the Divorce Act of Canada pre-empts any jurisdiction which a Family Court magistrate might otherwise have. The "divorced wife" therefore cannot have recourse to the Family Court even if her application is restricted to the maintenance of her children from her "divorced husband". She must, the District Court judge and the Appellate Division held, have recourse only to section 11 of the Divorce Act.

To put it differently, the court had before it a case in which a provincial statute and a federal statute were applicable and the question was which one of them was to govern the situation. While answering this question, the District Court and the Appellate Division did not notice section 6(3) of the Judicature Act,[13] which is as follows:

> 6. (3) Section 31 (of the Judicature Act, R.S.A. 1970, c. 193) is amended by adding after subsection (1) the following section:
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> (1.1) When in an action or other proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made thereon unless notice has been given to the Attorney-General for Alberta and the Attorney-General for Canada.

This provision was not brought to the attention of the courts with the result that the Attorney-Generals of Alberta and Canada were not notified (and therefore not represented). The omission is all the more glaring because the application had been originally made and taken in appeal to the Appellate Division by a government department. This omission, it is submitted, goes to the efficacy of the judgment.

By holding that "the rights of the parties to the divorce, as they may be from time to time, relating to both custody of the children and maintenence of children and maintenance of a spouse, are subject to adjudication as an incident of divorce, even though no claim for maintenance or custody is made at the time of the divorce, but comes to be made later" the court in effect nullifies section 27(7). This was also done without notice to the Attorney-General for Alberta as required by section 31 of the Judicature Act,[14] which says:

> 31. (1) When in an action or other proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought in question the enactment shall not be held to be invalid unless notice has been given to the Attorney-General for Canada or the Attorney-General for Alberta, as the case may be.

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12. *See* pp. 12-14 of the transcript. *Supra*, n. 3.
12a. *Supra*, n. 9.
13. S.A. 1976, c. 58.
14. R.S.A. 1970, c. 193.

(2) The Attorney-General for Canada or the Attorney-General for Alberta is entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding.

In this regard, it is submitted that the authority of *Goldstein* v. *Goldstein*[15] is also questionable as the Attorney-General of Alberta was not notified in that case as required by s. 31 of the Judicature Act.

In *McCutcheon,* the Alberta Appellate Division purports to follow *Goldstein.* The British Columbia Court of Appeal had occasion to comment on *Goldstein* v. *Goldstein* in its judgment rendered on November 1, 1976 in *Hughes* v. *Hughes.*[16] (*McCutcheon* was decided by the Appellate Division on February 9, 1977.) *Hughes* held that the reasoning in cases such as *Zacks* v. *Zacks*[17] and *Lapointe* v. *Klint*[18] suggests that once a decree nisi is granted, jurisdiction exists for the granting of maintenance. In *Hughes* the British Columbia Court of Appeal[19] states that the Alberta Appellate Division in *Goldstein* misunderstood its own previous decision in *Skjonsby* v. *Skjonsby.*[20] Seaton J.A. said:

> The issue before the Alberta Appellate Division in *Goldstein* was whether maintenance could be granted under the Divorce Act several years after the decree absolute. It was decided that there was such jurisdiction. The comment regarding *Armich* and the observation that 'provincial legislation is no longer effective after a divorce' (p. 65) were not necessary to the decision and were said to be the result of *Skjonsby* v. *Skjonsby* [1975] 4 W.W.R. 319 (Alta. C.A.). But that decision of the same Division only decided that there was jurisdiction under the Divorce Act to vary an existing custody order. *The effect of the Divorce Act upon provincial legislation was not considered.* (emphasis supplied)

The British Columbia Court of Appeal came to the conclusion that a Divorce Act order supersedes a provincial order. Thus, a maintenance order made under the provincial legislation is superseded by an order made under the federal legislation, but the provincial legislation is not rendered inoperative by the federal legislation. Indeed in this case (*Hughes*) the Court of Appeal held that the Family Court order for maintenance remains in force even after a decree nisi of divorce *if no order respecting maintenance has been made under the Divorce Act.* This was for a case of matrimonial support limited to the maintenance for wife.

In an earlier but similar case in Nova Scotia, *Toole* v. *Toole,*[21] the Court of Appeal was called upon to decide whether, following divorce proceedings which gave custody of the adopted child of the parties to the mother but without making any order as to maintenance, the Family Court had jurisdiction to deal with an application by the appellant mother for an order for maintenance in respect of the child as a deserted child under the Wives' and Children's Maintenance Act.[22] The Court of Appeal answered the question in the affirmative. MacKeigan C.J.N.S. said:

> The Supreme Court, under the Divorce Act, has undoubted jurisdiction to deal with custody and maintenance of children of divorced parents. *Until, however, it exercised that jurisdiction in any particular case, the provincial Act continues in full effect as to*

15. *Supra,* n. 1.
16. *Supra,* n. 4.
17. [1973] S.C.R. 891.
18. [1975] 2 S.C.R. 539.
19. *Supra,* n. 4 at 583.
20. [1975] 4 W.W.R. 391 at 582.
21. *Supra,* n. 3.
22. R.S.N.S. 1967, c. 341.

children and confers on the appropriate magistrate or Family Court judge the power and duty to deal with maintenance. (emphasis supplied)

It is submitted that if the decisions in the *Toole* and *Hughes* cases had been brought to the attention of the Appellate Division, the decision in *McCutcheon* might have been different.

Another noticeable omission in the judgments in *McCutcheon* is the complete absence of a reference to the actual wording of section 27(7). Only the Family Court judge mentions section 27 but he does not refer to the actual words of s. 27(7). In the 19 pages of transcript of proceedings in *McCutheon* before the District Court judge, section 27 is not mentioned at all. Similarly, in the judgment of the Appellate Division, no mention is made of section 27. It is submitted that if section 27(7) had been put before the court in its proper perspective, the decision of the court would probably have been different. That perspective is as follows:

Section 27 of the Domestic Relations Act provides for applications to a Family Court judge in three situations.

1. By a *married woman who has been deserted by her husband* or whose husband neglects or refuses to provide *her or her and her children* with support. [s. 27(1) to (4)]
2. By a *married woman who has not been deserted by her husband* but who has their children in her care may apply for a maintenance order restricted to the maintenance of the children. [s. 27(5), (6)]
3. By a *divorced* woman who has in her care or custody *legitimate children* of *herself* and *her divorced* husband *and there is no order of the court for maintenance of the children,* she may apply for *maintenance of children only.*

(emphasis only.

In other words, section 27 spells out matrimonial support or inter-spousal support and child support. Since the provincial legislation cannot deal with divorce or any relief based on divorce, section 27 regulates support as between husband and wife when their marriage is still subsisting, and hence the emphasis on the married woman and her husband. However, even divorce does not relieve people of the high obligations of parenthood to maintain, support and educate their children (*Hansford* v. *Hansford*).[23] Therefore the provincial legislation has provided that if children are in the care or custody of their divorced mother, she may apply on their behalf to the Family Court to obtain maintenance for them from their divorced father. It is submitted that the province provides for this remedy in the Family Court precisely to cover those situations where the Supreme Court grants a divorce to the spouses but does not make an order for maintenance for whatever reason. To this extent the provincial legislation is "supplementary" to the federal legislation.

Since children lack legal competence to bring an action, their custodial parent brings the action for maintenance on their behalf. Instead of saying that the children's guardian may bring an application before a Family Court judge, the legislation says that "the divorced woman who has in her care or custody their legitimate children . . .". The inclusion, therefore, of the "divorced woman" is only a procedural-enabling provision and has got nothing to do with the divorce provisions or divorce jurisdiction. The provision is included under the heading of "protection

23. [1973] 1 O.R. 116.

orders" which reflects the urgency of the situation. Because of the urgency, the remedy has been given at the Family Court level. Family Courts are designed to provide summary relief; the summary procedure being less expensive and more expeditious. Although there was no urgency in the instant case because the wife and children were on social assistance, it is a very unfortunate precedent because it does not simply affect such persons.

To say to a divorced woman who has in her care or custody the legitimate children of her dissolved marriage, but no order of maintenance from the Supreme Court, that she may go to the Supreme Court only, even for obtaining maintenance for those children, is to interpret section 27(7) perversely and in breach of section 11 of the Interpretation Act.[24] Indeed it amounts to nullification of s. 27(7). It also amounts to denial of justice to the children. To suggest that the children (through their divorced mother), can obtain a speedy and inexpensive remedy from the Supreme Court is unrealistic. One has only to look at the Legal Aid Tariffs for matrimonial causes to see that the remedy upstairs is not 'inexpensive'. It certainly is not as speedy as it is in the Family Court. *G.* v. *G*;[25] *see also Lanitis* v. *Lanitis*.[26] The action could be delayed in the Supreme Court for reasons beyond her control. To deny her the remedy in the Family Court would then amount to denial of justice.

It is submitted that because the provincial legislation, s. 27(7), is "supplementary" to the federal legislation (s. 11 of the Divorce Act), the two co-exist. If an order is made under s. 11 of the Divorce Act, this order will render an order under the provincial legislation inoperative but it will not render the provincial legislation itself inoperative. Provincial supplemental legislation is valid and operates concurrently with relevant federal legislation and the recent trend of the Supreme Court of Canada is to find in favour of concurrence where legislative jurisdiction of the Dominion and a province overlaps.[27] As was pointed out by Seaton J.A. in *Hughes*,[28] "the concept that provincial legislation might be operative while an order under it is invalidated by an order under a federal Act is not entirely new: *see Exparte Ellis* (1878) 17 N.B.R. 593 (C.A.), and *see Ross* v. *Registrar of Motor Vehicles* (1973) 42 D.L.R. (3d) 68 (S.C.C.) . . ."

It is submitted that once the divorce court grants a decree nisi of divorce it gets an ongoing jurisdiction to grant or deny maintenance for the spouse and/or children. *Zacks* v. *Zacks*;[30] *Lapointe* v. *Klint*.[31] If it exercises that jurisdiction by making or denying an order of maintenance, the maintenance jurisdiction under provincial legislation is extinguished. So long as, however, the divorce court does not make or deny an order of maintenance, its ongoing or continuing jurisdiction overlaps the jurisdiction of the Family Court for the support of children of divorced parents. The divorced woman who is the custodial parent may seek support for them either in the divorce court or in the Family Court.

In the light of the Canadian Bill of Rights and *Regina* v. *Drybones*,[32]

24. R.S.A. 1970, c. 189.

25. (1976) 22 R.F.L. 328.

26. [1970] 1 All E.R. 466.

27. *See* Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada* (1963) 9 McGill L.J. 185 especially 193 and 194.

28. *Supra*, n. 4 at 584.

30. *Supra*, n. 17.

31. [1975] 2 S.C.R. 539.

32. [1970] S.C.R. 202.

children of divorcing and divorced parents are entitled to equality before the law and the protection of the law on the same terms as all other children; and federal legislation should be so construed and applied as not to abrogate, abridge or infringe this entitlement. *Bray* v. *Bray*.[33] The interpretation of s. 11 of the Divorce Act in *McCutcheon* precisely does that so far as the children's rights to parental support are concerned. The children of divorce, according to *McCutcheon,* cannot enforce their rights to parental support in the Family Courts. It may be argued that the 'rights' of the children of divorce have not been abridged or abrogated or infringed in any way because they can still enforce those rights in the Supreme Court. However, it is submitted that by depriving the children of divorce from taking recourse to Family Court, their right to parental support has been abridged. To suggest that the speedy summary procedure is available only to children whose parents are not divorced offends the notion of equality before the law.

There is a catena of cases on the overlapping jurisdiction of Family Courts and divorce courts for custody and maintenance of children. These cases hold that where there is an overlap between a petition for divorce pending in the High Court and proceedings in the provincial court under the provincial legislation, the jurisdiction of the provincial court will be ousted when the wife has obtained judgment in the Supreme Court. *Copeland* v. *Copeland*;[34] *Re Tuz and Tuz*;[35] *G.* v. *G.*;[36] *Rzeczycki* v. *Rzeczycki*.[37] It is submitted that just as mere commencement of divorce proceedings in the Supreme Court does not oust the jurisdiction of the Family Court to award custody of the maintenance for children, similarly the granting of a divorce decree without granting or denying custody and maintenance for children does not extinguish that jurisdiction of the Family Court. *Tomlinson* v. *Tomlinson*.[38]

By operation of the doctrine of *stare decisis,* the Appellate Division follows its own previous decisions. The doctrine is followed so strictly in Alberta that in *Chekaluk* v. *Sallenback*[39] the court said: "The Court of Appeal is not justified in refusing to follow one of its previous decisions even though that decision misinterpreted a prior decision of the Supreme Court of Canada". However, there has been an instance where the Alberta Appellate Division overruled itself. In *R.* v. *Hartfeil*,[40] Harvey C.J. said:[41]

> It seems to me clear that unless this court intends to establish a new principle of decision for itself it must follow its previous decisions unless, of course, it is shown that some decision or some provision of law has been overlooked in which case, as Lord Halsbury points out, it would not be correcting a mistake of law but one of fact.

There are several exceptions to the rule regarding the maxim *stare decisis*[42] and one of those exceptions concerns the situation where the prior judgment has been given *per incuriam. Re Ellwood Robinson and*

33. (1971) 2 R.F.L. 282.
34. (1974) 13 R.F.L. 164.
35. (1975) 67 D.L.R. (3d) 41 (Ont. C.A.).
36. (1976) 22 R.F.L. 328.
37. [1975] W.W.D. 178 (B.C.S.C.).
38. (1974) 4 R.F.L. 69.
39. [1948] 2 D.L.R. 452 (Alta. C.A.).
40. (1920) 55 D.L.R. 524.
41. *R.* v. *Hartfeil* is also a judgment of Harvey C.J. *See* W. F. Bowker, *The Honourable Horace Harvey, Chief Justice of Alberta,* (1954) 32 Can. B. Rev. 933, 1118, esp. pp. 1122-1128.
42. *See* MacGuigan, *Precedent and Policy in the Supreme Court,* (1967) 45 Can. B. Rev. 627, esp. pp. 650-656.

Ohio Development Co. Ltd.[43] A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction or if it is given in ignorance of the terms of a statute or of a rule having the force of a statute. *Young* v. *Bristol Aeroplane Co.*[44] It is, therefore, well settled that a court is not bound to follow its own decision where the prior decision was given without consideration of an applicable authority or statutory provision.

It is submitted that the decision in *McCutcheon* was rendered *per incuriam* as the Appellate Division's attention was not drawn to the provisions of the Judicature Acts and the decisions of two courts of co-ordinate jurisdiction, *viz.* Nova Scotia and British Columbia Courts of Appeal in *Toole* and *Hughes*. The Appellate Division, it is submitted, is not bound by its decision in *McCutcheon* and may be invited to overrule itself and correct the unfortunate situation created by *McCutcheon*.

—VIJAY BHARDWAJ*

43. (1975) 7 O.R. (2d) 556.

44. [1944] 2 All E.R. 293 at 300.

* Legal Research Officer, Institute of Law Research and Reform, the University of Alberta.

** The author is grateful to his colleague Gordon Bale and to his former colleague W. R. Pepler of the Faculty of Law, University of Calgary, for their assistance and to "a friend".