# LIABLE PARENTS: THE NEW STATE ROLE IN ORDERING MAINTENANCE

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## I INTRODUCTION

Legislation passed at the end of the 1980 session of the New Zealand Parliament has fundamentally altered the country's law of maintenance. While the Family Proceedings Act 1980 introduced brand new ground rules for the obtaining of maintenance, even more significant changes are to be found in the Social Security Amendment Act 1980 which establishes a scheme to replace the usual court-ordered maintenance with an administrative procedure carried out by the Social Security Commission[1] when a state benefit is being received. This new procedure will not only have the effect of vastly increasing the role of the executive in the financial adjustment of spouses on marriage breakdown, but it will also render redundant, at least for many people, those new provisions in the Family Proceedings Act 1980 which relate to spousal maintenance.

It is proposed in this article to trace something of the legislative history of "the liable parent contribution scheme", as it is known, and then to assess the legislation as it was finally passed and discuss its place within the wider framework of family law.

## II THE STORMY ROAD TO ENACTMENT

### 1 *The Origins of the Scheme*

The liable parent contribution scheme has two main origins. Something very similar had been recommended by the highly regarded though largely unimplemented *Finer Report,* presented to the British Parliament in July 1974.[2] That *Report* explored in some depth the needs of one-parent families, most of which were the result of a marriage breakdown. It found inadequacies in the relationship between the social security system, which in England offered such families continuing financial support by means of the supplementary benefit, and the private obligations imposed under the rules of family law, which in fact contributed in a very limited way to the subsistence of beneficiaries. By means of an administrative change, the so-called "diversion procedure" had come into force under which moneys paid pursuant to a maintenance obligation were diverted from the beneficiary to the Supplementary Benefits Commission, thus enabling the state to recoup something of the payments it had made to assist those in need as a result of marriage breakdown. According to

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1 The Social Security Commission is established by the Social Security Act 1964, s 6 (hereinafter referred to as the Act) to administer monetary benefits under the Act. Most of the Commission's powers are delegated to the Department of Social Welfare.

2 *Report of the Committee on One-Parent Families* (1974 Cmnd 5629), commonly known as the *Finer Report* after its Chairman, the Hon Sir Morris Finer. See especially Part 4, ss 10, 11 and 12.

the *Finer Report*: "Within the confines in which it operates, which are determined by the overlap of entitlements to maintenance and supplementary benefit, the diversion procedure represents a victory of realism over bureaucracy."[3]

The *Finer Report* realised the primary role of the state in providing financial support. It therefore decided upon a rationalisation of the system which, so long as the private obligation to maintain continued to be determined by the courts, failed to recognise the reality of the situation and led to unnecessary delays and contradictory approaches. The recommendation was that the Supplementary Benefits Commission should, after assessing the amount to be paid by a "liable relative", make an administrative order which would have the same effect as if it had been made by a court. Such an order would be legally binding and would require the liable parent to pay the due amount directly to the Commission. An underlying premise of the system was that "fair assessment and efficient collection are essentially administrative processes . . .".[4] So long as objections which involved "an investigation of matrimonial conduct or of paternity",[5] matters obviously considered to be within the proper jurisdiction of a judicial authority only, were tried by a court of law, the *Report* does not appear to have considered any break with the usual principle that "legal responsibility to pay cannot be fixed by administrative *diktat*".[6]

The second origin of the New Zealand scheme is to be found in the experience of the Social Security Commission and the legal profession. Where a separated mother with dependent children has lost the support of her husband or is being inadequately maintained by him, she is entitled to apply for a domestic purposes benefit.[7] Prior to the liable parent contribution scheme coming into operation, section 27B(2)(c) of the Social Security Act 1964 laid down as a condition of receiving such a benefit the obtaining of a maintenance order from the court or an agreement which met with the Commission's approval. For a long time the Commission's approval was hard to obtain and its approach was less generous to the husband than the courts'. Consequently, court-ordered maintenance was the norm.

The maintenance requirement in section 27B(2)(c) was subject to a waiver power vested in the Social Security Commission, but this was not normally exercised. The reason for this was the desire to recoup as much as possible of the money paid out by way of domestic purposes benefit. This could be done because under section 27F(4) of the Social Security Act 1964, the Social Security Commission was entitled to receive all moneys due under a maintenance obligation. The cost of the domestic purposes benefit rose enormously in the 1970s, far exceeding the rate of

3 Ibid at para 4.209.
4 Ibid at para 4.247.
5 Idem.
6 (1975) 898 UK Parliamentary Debates (HC) 61.
7 Social Security Act 1964, s 27B as inserted by the Social Security Amendment Act 1973. Prior to 1973, "domestic purposes benefits" were treated as a category of emergency benefit under s 61 of the Act. For the sake of simplicity beneficiaries will be treated as being female and liable parents as male. Only four percent of beneficiaries as at 31 March 1980 were male. It should be noted that applicants will normally also apply under s 61A for a "child supplement", in respect of each dependent child.

inflation. In 1970 $2,300,000 was expended on the benefit and an estimated $300,000 was recovered from maintenance. By 1980 $169,448,524 was paid out to more than ten times as many beneficiaries (37,040 as against 3092 in 1970) and $12,301,647 was recovered from maintenance. While unmarried mothers of whom many might not be able to succeed in paternity and maintenance proceedings are included in these figures, nearly three-quarters of the recipients were people involved in marriage breakdown. The rate of recovery from maintenance therefore was only in the vicinity of ten percent.[8]

The delays involved in obtaining maintenance orders, often between six and twelve months, led the Social Security Commission to adopt two novel approaches. First, pilot schemes were tried whereby persons seeking a domestic purposes benefit were sent immediately for marriage counselling. It was hoped that, in the absence of a resumption of the marriage, the parties would agree on maintenance in line with the Commission's usual criteria.[9] The general success rate obtained through counselling at such an early stage in the breakdown of a marriage has been considerably higher than the usual conciliation upon referral by a court during separation proceedings.[10] The second approach of the Social Security Commission was to invoke a hitherto largely unused power in section 27F(3) of the Social Security Act 1964 enabling an officer of the Department of Social Welfare to institute proceedings for maintenance "as if he were [the] beneficiary". The object of using this power was clearly to hasten the process of obtaining a court order. The reaction of the legal profession was however swift and vehement. Not surprisingly legal representatives objected strongly to having their solicitor/client relationship suddenly disrupted by proceedings relating to one aspect of the client's affairs being instituted by an independent person with no instructions from the client.[11]

It was against this background that the Social Security Commission and the New Zealand Law Society explored the possibilities of a more coherent system for dealing with the private support obligations owed to persons already receiving greater financial assistance from the state. The result was the Social Security Amendment Bill (No 2) 1979, incorporating something very similar to the *Finer Report's* "administrative orders" and requiring so-called "liable parents" to make monetary contributions to the Social Security Commission.

8 The figures referred to in this paragraph are drawn from the annual reports of the Department of Social Welfare. See further Atkin, "The Effect of Social Security on the Payment of Maintenance—Some English Comparisons" [1980] NZLJ 298.

9 See *Council Brief* No 37, February 1978 at 6-7.

10 Figures supplied by the National Marriage Guidance Council of New Zealand are as follows:

| | percentage unsuccessful | percentage agreements | percentage reconciled |
|---|---|---|---|
| 1978 | 31 | 47 | 20 |
| 1979 | 34 | 35 | 30 |
| 1980 | 47 | 30 | 23 |

The 1980 figures include an increasing number of Department of Social Welfare referrals where agreement and reconciliation were not in issue, rendering the "unsuccessful" percentage misleading. Cases referred by the courts under the Domestic Proceedings Act 1968, s 15 show a forty percent success rate (modified pleadings thirty percent, reconciliations ten percent).

11 See eg *Council Brief* No 54, August 1979 at 1 and 3.

## 2 *The Original Bill*

The original Social Security Amendment Bill (No 2), introduced into Parliament late in 1979, must represent a classic example of the left hand in government not knowing what the right hand was doing. Shortly before, under the auspices of the Department of Justice, the Family Courts Bill 1979 and the Family Proceedings Bill (No 2) 1979 had also been introduced. The latter was a swept-up version of the Family Proceedings Bill 1978 which had been substantially modified after hearings by the Statutes Revision Committee and was therefore the culmination of a number of years' work. Responsibility for the social security legislation rested however with the Department of Social Welfare, a branch of the executive holding a clearly different brief from that of the Department of Justice. The primary aim of the Department of Social Welfare was to simplify and expedite the system by which money could be raised to offset the costs of the domestic purposes benefit. The aim of the Department of Justice on the other hand might be summarised as a desire to secure the principles of conventional family law, modified where appropriate to take account of latest thinking.

The result of two different government departments being involved in preparing legislation covering very similar ground was a Bill which contained glaring inconsistencies with the other legislation currently before Parliament. There were four principal ways in which the link-up between the Bill and the rest of the family law package was not recognised. Firstly, despite the forthcoming establishment of Family Courts to handle litigation involving the parties to marriage breakdown, objections by liable parents against the amounts they were required to pay were going to be handled by the District Court. Yet such objections seem to fall most logically within the jurisdiction of Family Courts where the same rules would be interpreted in the context of maintenance and paternity applications. Secondly, the procedure for assessing the amounts to be paid took very little account of the liable parent's own circumstances and his ability to pay the amount ordered. In particular, there was little or no recognition of the burden such a person may have shouldered by establishing a new family, a factor very clearly reflected in the line adopted by the courts in determining maintenance claims.[12] Thirdly, the Bill was defective in formulating the basis for objection. The proposed section 27P made express reference to clause 67 of the Family Proceedings Bill (No 2) 1979, which related to the relevance of misconduct to the question of maintenance liability, but only as a basis for challenging the amount of an assessment against a liable parent, and not whether any amount should be paid in the first place. Further, where part of the assessment was attributable to a person whom the liable parent was not liable in law to maintain, the element of the assessed amount was to be eliminated. The provision presumably would have allowed cross-reference to the new criteria for maintenance set out in the family proceedings legislation, many of which would have operated to extinguish liability altogether, but it ignored the fact that many factors go merely to lowering the amount a court might order without removing the legal obligation

12 See eg *Newton* v *Newton* [1973] 1 NZLR 225; *Matangi* v *Matangi* [1974] 1 NZLR 55; *Letica* v *Letica* [1976] 1 NZLR 667. Obligations to a first family may nevertheless continue: *Lindsay* v *Lindsay* [1972] NZLR 184.

entirely.[13] It would have been possible therefore, when comparing the position of a person under the liable parent scheme with that of a respondent under the family proceedings legislation to reach quite different results on what is theoretically the same issue. Fourthly, both Bills contained procedures for the enforcement of the obligations laid down, most notably an ability to attach wages and salaries by administrative action. Strangely however, the Social Security Amendment Bill (No 2) 1979 omitted many protections for the debtor and his employer laid down in the family proceedings legislation.

Other criticisms could also be levelled at the original form of the Bill. In summary, these relate to the imposing of too many burdens upon the liable parent without corresponding legal and procedural safeguards. For instance, the obligation commenced immediately the liable parent received notice of the Commission's assessment, and continued to run in the event of an objection unless on a separate application a court ordered its suspension. During the hearing of objections, the onus of proof was to lie on the liable parent, the reverse of his position as a respondent in ordinary maintenance proceedings, and he was to be bound by his pleadings even though at the time of objecting the liable parent may in most cases be acting without legal advice.[14]

Because of the deficiencies in the Bill, and because of the conflicting departmental objections, there emerged in the select committee hearings what was described as "something of a titanic struggle, between the officials of the Department of Justice on the one hand and the officials of the Department of Social Welfare on the other."[15] Mr G W R Palmer MP had earlier expressed the view that the Bill "was not only unworkable and Draconian, but was perhaps completely misconceived" and that "there was every indication that the Department of Social Welfare had it in mind to create a bureaucratic monster completely out of the control of the courts."[16] Despite a degree of hyperbole in these comments, there can be no doubt, judging from the extent and nature of the changes made by the Statutes Revision Committee, that a considerable battle took place. It is surely of particular interest that this battle took place not between two strongly opposed pressure groups within the community but between two areas of the state. It is perhaps possible to see the Department of Social Welfare as representing the interests of the general taxpayer and the Department of Justice as representing those of the liable parents, and in this way for the debate to be seen as a healthy sign of the advocacy of genuinely conflicting points of view which might otherwise not be heard. It must be of some concern in this instance however that the sharply differing views of two important government departments reveal the lack of a coherent and publicised family law policy. If there had been such a policy, a good deal of parliamentary and official time might have been saved.

13 See Family Proceedings Act 1980, Part VI.
14 The comments in this paragraph refer to the Social Security Amendment Bill (No 2) 1979 (hereinafter referred to as the Bill), clause 7, ss 27K(2), 27S(6), 27R(5) and 27R(4).
15 1980 NZ Parliamentary Debates 2556.
16 Idem.

### 3 *The Changes Made by the Statutes Revision Committee*

The Statutes Revision Committee largely rewrote the original Bill. Roughly the equivalent of eight pages of the original thirteen page Bill were struck out and replaced by new provisions of approximately eighteen pages. This is powerful evidence to encourage those who believe that Parliament is indeed creative and effective as a law-making institution, not entirely dominated by officialdom and political parties. But it is at least a little disturbing to the public that a legislative proposal should be altered so drastically after the select committee hearings that it has in effect become a new and different proposal. Interested parties are largely deprived of the opportunity of commenting on the proposal which in the end is the one which is enacted. While informal consultation may still take place with appropriate groups in the community such as the Law Society, such consultation is behind closed doors and not open to reporting by the media in the way that select committee hearings usually are. The democratic process is therefore only partially working.[17]

The extensive changes to the Social Security Amendment Bill (No 2) 1979 did significantly alter the nature of the proposal and went some way to meeting the criticisms levelled at the Bill. In broad terms the changes were threefold. Firstly, the inescapable interrelationship of welfare law and family law was recognised. This was apparently despite considerable resistance to the notion by the Department of Social Welfare.[18] Secondly, the potentially unfair position of liable parents was noticeably alleviated, even though this may mean smaller gains in recoveries from maintenance. Thirdly, the scheme which originally purported to be an administrative equivalent of both spousal and child maintenance was limited to being merely one of child maintenance,[19] even though again, the amounts properly recovered may be much smaller.

The detail of the scheme which emerged will be discussed in the next section, but at this point several comments may be made which take account of the criticisms levelled at the original Bill. Firstly, the revised Bill retained the District Court as the court which heard objections to assessments but this was only because the liable parent contribution scheme was to come into effect on 1 April 1981, fully six months in advance of the formal establishment of the Family Courts. When the Family Courts Act 1980 comes into force on 1 October 1981, the jurisdiction to hear objections under the Social Security Amendment Act 1980 will be transferred to the new court.[20] Secondly, the liable parent's own personal situation is now more fully included as part of the assessment process. While the original Bill made some allowance for the liable parent's accommodation and travel costs and the care of a child of the beneficiary

17 Contrast the approach taken with the family proceedings legislation. The Family Proceedings Bill 1978 was altered to such an extent that the Bill was withdrawn and the Family Proceedings Bill (No 2) 1979 introduced, incorporating the alterations. A second round of submissions was then heard by the Statutes Revision Committee.

18 Supra n 15 at 2557.

19 The Bill, clause 7, s 27I(2) contained a provision that the amount of an assessment was to be attributable to the extent of $17.50 to each dependent child and the balance to the beneficiary, ie usually a spouse. This provision was struck out by the Statutes Revision Committee.

20 Family Courts Act 1980, s 11(1)(g) and the Schedule.

in the custody of the liable parent, these are now allowed for on a much more generous scale. More significantly, however, the responsibilities to other adults and children who have become dependants of the liable parent, responsibilities which the original Bill ignored, are also deductible items, thus avoiding the possibility of a liable parent's second family being rendered destitute by the enforcement of an over-burdensome contribution to the Social Security Commission.[21] Thirdly, the grounds for objection have been transformed, so that, along with an objection based mainly on a mechanical miscalculation, any objection can be made on the basis of the application of the conventional rules of maintenance.[22] As the spousal maintenance element has now been excluded, this means that the rules relating to child maintenance and paternity, as laid down in the Family Proceedings Act 1980 (from 1 October 1981) will be pertinent.[23] Furthermore, the objection in any case may go to the existence of the obligation and the amount of the obligation, thus removing from the original Bill another awkwardness when compared with the conventional law.

Fourthly, the enforcement mechanism of the Family Proceedings Bill (No 2) 1979 was imported into the Social Security Amendment Bill (No 2) 1979. The Social Security Commission is empowered therefore without recourse to the courts, to issue "deduction notices" against a liable parent's employer where the liable parent consents or where he is in arrears for a period of at least fourteen days.[24] A deduction notice requires the employer to deduct the amount of the liable parent's contribution from his salary and pay it to the Social Security Commission.[25] While the original Bill envisaged a similar power,[26] it omitted several important safeguards. To take five examples, the employer had no defence of "reasonable excuse" for failure to pay the deductible amount, there was no provision to review the imposition of the deduction notice eg if it had been issued in error, the employer was not entitled to a fee for his efforts, there was no limitation on the amount deductible to ensure that the employee was left with sufficient to live on (the amount deductible might otherwise be considerably more where for instance the liable parent had large arrears to pay off as well as making his continuing contribution) and finally the employee had no job protection where he was threatened with dismissal because of the service of the deduction notice. All of these matters were covered under the family proceedings legislation and were incorporated in the Social Security Amendment Bill (No 2) 1979 by the Statutes Revision Committee.[27]

Finally the Statutes Revision Committee clearly recognised the precarious position of the liable parent. While there is strong antipathy in parts of the community towards husbands who fail to support their families and cast the burden on the taxpayer, there is surely also opposition

21 See Social Security Act 1964, Schedule 20 as added by the Schedule to the Social Security Amendment Act 1980 (hereinafter referred to as the 1980 Amendment Act).
22 Section 27P.
23 Family Proceedings Act 1980, ss 72-79 and 47-59.
24 Section 27Y.
25 Sections 27Z and 27ZA.
26 Clause 7, s 27T of the Bill.
27 Sections 27ZA(7), 27ZC, 27ZD, 27ZB(1), 27ZE respectively. Cf Family Proceedings Act 1980, ss 110-117.

to harsh and unfair treatment of those carrying such responsibilities. The Statutes Revision Committee therefore gave the liable parent twenty-eight days grace from the time when he received notice of the amount to be paid before the obligation commenced to run.[28] During this time the liable parent can reorganise his finances and, if he so desires, lodge an objection, in which case he may also apply to the court for suspension of the liability on an ex parte basis if hardship would otherwise be caused.[29] While some might favour an automatic suspension of liability where an appeal has been lodged, there is no doubt that the new provisions are much fairer. The same is true of the procedure for hearing objections where the Statutes Revision Committee went some way, though not all the way, to removing questionable provisions. So while the objector still carries a substantial burden of proof, the Commission has the onus to "adduce sufficient evidence to establish, in the absence of proof to the contrary, that the objector is liable in law to maintain each dependent child named in the notice of the required contribution".[30] It will be noted that the Commission's onus is merely an evidentiary one and can be rebutted not by contrary evidence but by contrary proof. From the liable parent's point of view therefore the advance made by the select committee may appear very small. The other matter relevant to the hearing of objections is that the select committee added a phrase to permit the leave of the court to be obtained to depart from the basis of one's objection.[31] Here again, given the possibility of an alternative formulation, that an objector could change grounds at any stage, the advance might be considered small from the standpoint of the liable parent.

### 4 *An Assessment of the Role of the Statutes Revision Committee*

The part played by the Statutes Revision Committee in shaping the final form of the legislation was vital. The Bill was not one to excite wide public attention nor were many submissions received on it. Despite its great importance to a potentially large number of people in the community, it received little coverage by the mass media and was dwarfed in many respects by the other major issues in the package of family law legislation, such as altering the grounds for divorce and providing for domestic violence. It is all the more remarkable therefore that the select committee took such a critical and vigorous approach to the Bill. Political motivations hardly aroused this activity. While to some extent National Party members might have had a greater interest to preserve the exchequer than members of the Opposition,[32] there was little electoral gain in fighting for or against the legislation. It is confidently suggested therefore that members were motivated by a genuine desire to test the need for the Bill and to improve the quality and fairness of the legislation finally passed.

Apart from submissions and advice from officials, two things may have helped the Committee to come to terms with the Bill. Firstly, most of

28 Section 27K(2).
29 Section 27O.
30 Section 27R(5).
31 Section 27R(4).
32 Opposition support for the measure was, in the end, grudging. It is not inconceivable that a change in government might well lead to substantial modifications of the scheme.

the members of the Committee were lawyers and therefore had some expertise in grappling with the technical and legal aspects of the Bill, as well as its human and social implications. Secondly, the submissions were heard over Parliament's long summer recess. The members of the Committee had more time to familiarise themselves with the Bill and alternative proposals as they were suggested by departmental officials. Had the legislation been introduced and forced through the House of Representatives in the usual rush at the end of the session, there is no guarantee that it would not have slipped through without proper examination.

The result however of the select committee's work was a statute much more in harmony with the rest of the law and much fairer to the parties concerned. The price paid for this was a greater degree of complexity, some of which it is proposed to explore in the section which follows.

## III The Scheme in Greater Detail

### 1 *The Identification Condition*

Under the previous law, the entitlement of a solo parent to a domestic purposes benefit was dependent upon the obtaining of a maintenance order or agreement. This condition has now been replaced by one which requires the non-custodial parent to be "identified in law".[33] In the vast majority of cases where the mother and father were married the legal identification of parenthood will have occurred at birth, by virtue of the presumption of parenthood in section 5 of the Status of Children Act 1969. In many other instances the identification will also have happened before any application for a benefit because of acts such as the registration of the child's birth with unmarried parents listed.[34]

The identification of any step-parent is also required in fulfilling the condition. This follows from the definitions in section 3 of the principal Act of "child", "father", and "mother" which expressly include the step-relationship. A foster parent however does not have to be identified, there being no further statutory extension from the usual reference of "father" and "mother" to natural and adoptive parents. This is a somewhat odd result, as a foster parent may be a "liable parent" under the definition in section 27I(1), namely:

> "Liable parent", in relation to the dependent child of a beneficiary, means every person (other than the beneficiary) who is liable in law to maintain the dependent child, whether or not that person is also liable in law to maintain the beneficiary.

It is clear that under the Family Proceedings Act 1980 foster parents as well as step-parents may have such a liability.[35] The identification con-

33 Social Security Act 1964, s 27B(2)(c) as inserted by the 1980 Amendment Act, s 5 and replacing the former paragraph which contained the maintenance requirement. The identification condition may be waived where a beneficiary already receiving a benefit takes a further child into her care.

34 See the list of such acts in s 27I(2), which is relevant only for the purpose of proving that a man is the father of a child for the purposes of ss 27J to 27ZI. Note that there is no corresponding provision for holding a woman to be the mother of a child, nor does the subsection relate directly to the identification condition in s 27B(2)(c).

35 Parents are liable to maintain their children under s 72 of the Family Proceedings Act 1980. Under s 60 "parent" includes the non-natural or non-adoptive parent of a "child of the marriage" which under s 2 includes a child "who was a member of the family of the husband and wife".

dition therefore does not necessarily coincide with the determination of liable parenthood. The oddity is compounded by the fact that a child may be a dependant of a foster parent beneficiary both under section 27A(3) for the purposes of establishing entitlement to a benefit and under section 27I(1) for the purposes of the liable parent contribution scheme.

Several additional points should be noted about the identification condition. Under the previous system the processing of most applications for a benefit was delayed because of the requirement that a maintenance order be obtained before an applicant became entitled to a benefit. In the interim the applicant was granted an emergency benefit at a rate $16 less than the domestic purposes benefit for the first twenty-six weeks.[36] Now, because the identification condition will usually have been fulfilled prior to the application for a benefit, the applicant will be entitled to the full benefit immediately. The identification condition does not require the parent to be identified in the sense of his whereabouts being revealed. The identification need only be "in law".

Where however the applicant is an unmarried mother who is unable to say who is the father of the child, or who is unsuccessful in bringing paternity proceedings, the identification condition cannot be fulfilled, since proper legal identification, rather than alleged identification, is necessary. As there is no power for the Commission to waive the condition as was the case with the maintenance requirement, the unmarried mother will simply not be eligible for a domestic purposes benefit. It may become Commission policy to place such a person on the less secure emergency benefit, with the lower rate applying for the first twenty-six weeks.

The remaining point is that the removal of the maintenance requirement does not deprive the beneficiary of the right to petition for spousal or child maintenance through the courts. By virtue of section 27J(5) of the Social Security Act 1964, maintenance is to be awarded without regard to the fact that the respondent is making a contribution under the liable parents' scheme and by virtue of section 62 of the Family Proceedings Act 1980, the fact that the applicant's reasonable needs are being met by the receipt of a domestic purposes benefit does not extinguish the private law liability to maintain. However, should a maintenance order be obtained it is automatically suspended during the time a benefit is received.[37] This relates to both spousal and child maintenance, even though liable parent contributions relate only to child support. A beneficiary therefore cannot receive payments twice over nor will a liable parent ever be faced with duplicate liabilities in force at the same time. For most beneficiaries there will be little point in suing for maintenance. The exception may be where the beneficiary can foresee fairly clearly when she is likely to cease receiving a benefit and will perhaps be commencing some form of employment. To have a maintenance order for herself and/or her children already in existence, even if that order may be the subject of subsequent variation proceedings to take account of her new earnings, could be a considerable advantage.

36 Section 61. After twenty-six weeks, the beneficiary goes on to the full rate of payment even if still receiving the emergency benefit. The lower rate of payment was introduced following recommendations of the Horn Committee—*Report of the Domestic Purposes Benefit Review Committee* (1977).

37 Section 27J(1). It appears that the order is suspended even if the maintenance exceeds the value of the benefit.

2 *The Calculation of the Contribution*

Once the identification condition is satisfied, the Social Security Commission has the responsibility to inform the liable parent that a benefit has been granted and that there is an obligation on the liable parent's shoulders to contribute financially towards the cost of the benefit.[38] The liable parent is required in turn to inform the Commission of his gross earnings for the previous financial year and "such other information . . . as the Commission may reasonably require for the purposes of calculating the contribution to be paid by the liable parent."[39] It is presumed that the latter relates to such things as the liable parent's current financial position, his dependants and the nature of his employment (for verification of earnings and possible future action by way of deduction notice). "Gross earnings" is defined in section 27I to mean in effect gross taxable income (ie normal deductions will have been made) and most earners are likely to take advantage of the provision in section 27M(2) whereby a certificate from the Commissioner of Inland Revenue of the liable parent's assessable income will be sufficient documentation. Under section 27M(3) a wage or salary earner's current wages or salary may be used if the liable parent so applies, but unless he has just commenced employment or has received a drop in salary, the liable parent is likely to be better off relying on his income for the previous year. Where the liable parent fails to supply the necessary information or his whereabouts are unknown, the Commission has power to deem his gross earnings to be his "likely gross earnings" for the current year, based on such information as the Commission has available to it.[40] The subsection concludes with the words "unless the contrary is proved" and given that this phrase is not restricted in time, it is presumed that if a liable parent who had not initially been traced subsequently turns up, he can challenge the "deemed" amount of gross earnings at any time.

The determination of gross earnings is of vital significance because it is the starting point for the calculation of the liable parent's contribution. This calculation is perhaps the focal point of the scheme and has to be made in accordance with the new Schedule 20 of the principal Act. Four different calculations are set out in the Schedule and it is the smallest of the four which, in any given case, is to be the amount of the liable parent's contribution. These will now be examined in turn.

(a) What might be labelled the "flat rate approach" requires the liable parent to pay $20 per week for each of the children for which he is liable and who are in the care of the beneficiary. In addition, if any child is under the age of five, an additional $20 per week is to be added to the total. This additional $20 (which is added once only and not for each child under five) is regarded under the scheme of the Act as a child care allowance, levied no doubt on the assumption that pre-school children need constant care and attention. One would be forgiven however for regarding it as an element of spousal maintenance creeping back into the system. No doubt a parallel could be drawn with the private law support obligation towards an unmarried mother, under section 53(2)(b) of the Domestic Proceedings Act 1968 (now replaced by sections 79-81

38 Section 27L. The liable parent's basic obligation is imposed by s 27K(1).
39 Section 27M(1).
40 Section 27M(5).

of the Family Proceedings Act 1980), which lasted for the first five years of the child's life. This provision was clearly linked with child care and the mother's needs arising from having to care for the child.

(b) The second relevant amount is the current weekly rate of benefit payable to the beneficiary. Very rarely will this figure be used, as few liable parents will be in a position to afford such a sum. If he can, and if there is co-operation, the beneficiary might be well advised to rely on maintenance and not seek state assistance at all.

(c) The third calculation is a "deductions approach" and is the most complex of the four. From a liable parent's "weekly income" which is derived from his annual gross earnings, are deducted seven things:—

(i) income tax

(ii) accommodation costs (to a maximum of $50 per week)

(iii) personal expenses of $60 (reduced to $30 if the liable parent is boarding)

(iv) travel costs (taking into account the reasonable availability of public transport)

(v) $20 for each dependent child (other than children being cared for by the beneficiary), such as a child of a second family, whether or not the liable parent fathered the child[41]

(vi) $60 for each adult dependant (this is most likely to be a new wife or person with whom the liable parent has entered into a de facto relationship, but it could also relate to other dependants such as aged relatives)

(vii) outgoings on the house occupied by the beneficiary (most likely to be the matrimonial home which the couple occupied before they separated).

(d) The final calculation is the "one-third approach", whereby the relevant figure is one-third of the liable parent's weekly after tax income. The "one-third approach" is similar to that used by the courts in England as a starting point for determining financial provision orders but this approach has not been accepted by the courts in New Zealand.[42]

Several points may be made in relation to the calculation of the liable parent's contribution. The Social Security Commission will have to employ all four methods of calculation in each case before it can decide which is the least, but the administration should be routine except when using the complex deductions approach formula. Care with this formula is essential however, as it is likely to vie with the flat rate approach as

41 "Dependent child" is defined in s 27I(1) as one "who is being cared for by the beneficiary" but this definition is only "in relation to a beneficiary". There is no definition of dependency in relation to a liable parent but it is submitted that mere proof of factual dependency is sufficient and that it is not necessary to prove that the liable parent is legally obliged to support the child. The extent to which a child and more particularly an adult must depend upon the parent is a question of fact and may give rise to difficulties in borderline cases.

42 See eg *Borrington* v *Borrington* [1975] 2 NZLR 187.

being the most commonly used. Indeed where the liable parent has acquired responsibilities towards a new family the deductions approach is almost always going to be the relevant one, while the flat rate approach is more likely to give the smallest figure when there are few children involved and when the liable parent is living by himself.

Next, where there are two liable parents, the contribution of each is to be halved and where there are more liable parents, the respective contributions are to be reduced proportionately so that the total amount received by the Commission does not exceed the benefit payments.[43]

The obligation to pay the amount calculated commences to run twenty-eight days after the liable parent has received notice of the amount but is subject to the power mentioned previously for a court to suspend liability when an objection has been filed.[44] This obligation continues so long as the benefit is paid or until the liable parent dies.[45] There are however two mechanisms to meet a change in circumstances. First, under section 27ZG the Commission may wholly or partially relieve a liable parent of his obligation if payment "would entail serious hardship". What is "serious hardship" is not defined but it is submitted that it includes not merely financial destitution but also serious psychological and emotional harm to the liable parent or his dependants. The section is not limited by its terms to serious hardship to the liable parent and so it follows that serious hardship to a second family is relevant. Even if serious hardship is shown, the Commission is given a discretion whether or not to act but this is subject to an appeal to the Social Security Appeal Authority[46] and it is thought that by this appeal the danger of subjectivity in exercising the discretion will be largely removed. It is submitted that in practice where there is serious hardship, the power to relieve will in fact be used.

The second method of dealing with changes of circumstances follows from the obligation on the Commission to review every contribution from time to time and the ability of a liable parent to apply for a review.[47] The review is to be made applying the principles for original calculations and the amount *shall* be backdated to the date when the change took place. Thus a liable parent who received a salary increase without corresponding increases in expenditure may find himself facing substantial arrears by the operation of a retrospective calculation. This, it is submitted, is unfortunate, as liable parents are unlikely to have made allowances for possible increases in their contributions until such time as they know what the increase will be. Especially if there are delays in the Commission's administration, the liable parent faced with a large bill could be highly embarrassed.

Doubtless the automatic administrative review procedure will be of

43 1980 Amendment Act, Schedule 20 c'auses 3 and 4.
44 Sections 27K(2) and 27(2).
45 Section 27K(3) and (4).
46 The right of appeal to the Appeal Authority against most decisions of the Social Security Commission is not available for any decisions made under the liable parent contribution scheme except for the discretion to relieve: see s 12 J(1) as amended by the 1980 Amendment Act, s 4. The reason for the exclusion of the scheme is the existence of the right of objection through the ordinary courts. It might appear incongruous that the Appeal Authority is not used in all cases arising under the Act but there would be even greater incongruity if the maintenance and paternity laws were being interpreted both by the courts and the Appeal Authority.
47 Section 27ZH.

benefit to the Commission in ensuring without undue delay that the level of contributions keeps up with inflation. This is a difficulty under court-ordered maintenance, where variation proceedings can be costly and delayed. The review procedure is clearly necessary for those liable parents who undertake subsequent responsibilities, but for others, it is hoped that the review system will be operated in such a way that it does not create antagonism and consequent problems flowing from a lack of co-operation by liable parents.

### 3 *Objections and Enforcement*

The questions of objections and enforcement have already been discussed in the section dealing with the changes made to the legislation by the Statutes Revision Committee and it is not proposed to discuss them at great length here.

There are four possible steps in the objection procedure. Firstly, the liable parent must file with the Department of Social Welfare a notice of objection stating the grounds of his objection and where appropriate may apply to the court for suspension of liability.[48] There is no time limit within which an objection must be made.[49] Next, the Commission will reconsider the case and decide within fourteen days whether or not to allow the objection.[50] Only if the Commission decides against the liable parent will the case go to court, in which case the court has wide powers to decide the proper figure and direct the Commission accordingly.[51] The final possible step is on to the High Court and ultimately to the Court of Appeal.[52] Had the original Bill's proposal that the scheme embrace both child and spousal maintenance been pursued, it is probable that the level of objections would have been high. Now that the scope for legal argument has been reduced by the exclusion of spousal maintenance, it is predicted that the objections procedure will be less frequently used and that many well-founded objections based on a mathematical or mechanical miscalculation will be resolved before the matter reaches court.

The main means of enforcement will be the administrative system of deduction notices outlined earlier.[53] The Commission also has power to recover money due by ordinary civil action[54] but this power is likely to be used only where the liable parent is self-employed or the details of his employment are not known.

48 Section 27O.

49 The Bill required the Commission to specify a period within which an objection had to be made, being not less than fourteen days after the liable parent had received notice of the amount of his contributions: see clause 7, s 27N(2), struck out by the Statutes Revision Committee.

50 Section 27Q.

51 Sections 27R and 27S.

52 Section 27T.

53 Sections 27Y-27ZF.

54 Section 27X(1). A less useful power is contained in s 27X(2) to deduct amounts from any benefit to which the liable parent is or may become entitled under the Act. Section 27I limits "benefit" to a domestic purposes benefit "unless the context otherwise requires". It is submitted that the context of s 27X (2) does not require a different meaning and that payment of benefits such as the unemployment benefit or national superannuation will remain unaffected.

## IV Implications for Family Law

It was seen earlier that the principal debate during the passage of the legislation was the extent to which the principles of family law had to be incorporated in the new law. The victors in that debate were those favouring substantial incorporation. Despite this there are important consequences for family law, some good, some more ambiguous. The most important thing is that it is now possible to surmise with greater confidence the end of spousal maintenance. Most maintenance cases in recent years have been linked to the granting of a domestic purposes benefit. The operation of the liable parent contribution scheme immediately removes all those cases from the judicial arena for the period that a benefit is payable. In so far as such cases had become routine and were clogging the judicial system, their removal is surely a good thing. But more fundamentally, their removal is in line with the philosophy emerging from the Family Proceedings Act 1980 which sees spousal maintenance no longer as a life-long concomitant of marriage but as a transitional mechanism for assisting the parties to a broken marriage to readjust to their new lifestyle.[55] Of special note is section 64(2) of that Act which states:

> Where a marriage is dissolved, each party shall assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting the party's own needs, and on the expiry of that period of time neither party shall be liable to maintain the other. . . .

In the years ahead it is probable that the spousal maintenance provisions will be used less and less and may by the next decade have been legislated out of existence.

The new scheme also means the transfer of an aspect of the adversary nature of marriage breakdown from the spouses to one spouse and an arm of government. It is surely a good thing that wives (mainly) are no longer forced to litigate maintenance with their husbands merely to secure their state benefit. The emphasis in the establishment of the Family Courts and in the counselling provisions of the Family Proceedings Act 1980[56] on reducing the adversary environment between the spouses, is therefore consistent with the Social Security Amendment Act 1980. Two further points must however be made. The first is that the new scheme extracts one element of marriage breakdown from all the others. In most cases this will not matter but in others the important interrelationships between custody of children, occupation of the matrimonial home, sharing of matrimonial property and so forth might be undermined and leave the spouses and their advisers with less scope to work out a total package for dealing with their affairs. This leads to the other point, namely that there is no formal place in the new system for marriage counselling to take place. Under enlightened leadership within the Department of Social Welfare, applicants for benefits are still likely to be informally advised of the availability of such counselling and in the light of the improved success rates when counselling takes place at such an early stage it is to be

55 Cf similar judicial trends, most recently expounded in New Zealand by the Court of Appeal in *Bunce* v *Bunce* [1980] 2 NZLR 247; and in England by the line of cases dealing with the "clean break principle", especially *Minton* v *Minton* [1979] AC 593 (HL).

56 Eg Family Proceedings Act 1980, Part II.

hoped that most people will take advantage of this help. It is the writer's view however that, given the importance of the principle to family law, a reference to counselling should have been written into the legislation. What is envisaged is the suspension of the liable parent's liability during such time as the parties are undergoing approved marriage counselling. This would not unduly upset the new scheme but would provide a real incentive for parties to accept counselling.

The final comment is in relation to the state's role in financial support on marriage breakdown. Some in the community regret this role and regard family maintenance as still being first and foremost the responsibility of the husband. The state's role has become inevitable however and short of major social revolution, nothing will alter this. The liable parent contribution scheme, if anything, entrenches the state's position but paradoxically the new machinery may well also make it more likely that the husband's perceived responsibilities will be met. Increasingly the causes of marriage breakdown are being seen as social and economic rather than as personal moral failure. If this is so, it might be more proper to regard the liable parent as subsidising society at large rather than vice versa.

## V Final Evaluation

The main aim of the government in introducing the liable parent contribution scheme was to raise revenue. Whether substantially more is collected than under the old system remains to be seen. Payments by liable parents will be made earlier. Variation and enforcement of the amounts will be much easier. Furthermore, the legal aid fund will not be paying out on now unnecessary maintenance claims. On the other hand the scheme fails to help in the "hard" cases where the liable parent is difficult to locate or has left the country. There will be heavier administration costs and there will be earlier payment of the domestic purposes benefit at the full rate. With the removal of spousal maintenance, amounts levied against liable parents may not in fact be especially large. What is gained on the swings may be lost on the roundabouts.

In endeavouring to raise revenue, the government has been forced to recognise the place of public law in marriage breakdown. The consequence of this however is something which may give the constitutional lawyer misgivings, namely the substantial takeover by the bureaucracy of decisions which were previously handled by the courts. Many would see the Social Security Commission as being a judge in its own cause, the system being saved only by the power of final decision residing in the courts. In constitutional terms, the new set-up can probably be justified only if the decision as to the amount a liable parent should pay is accepted as being in reality an administrative and not a judicial task. That question could be hotly debated.

Whether the new scheme is successful may depend on the public relations efforts of the Social Security Commission and the degree of humanity with which it administers the scheme. It is just possible that liable parents will come to see it as a convenient and fair way of sorting out one aspect of their affairs. The fear remains that they will perceive it as "a bureaucratic monster".