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FAMILY LAW ADMINISTRATION: THE UNIFIED FAMILY COURT

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The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

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FAMILY LAW ADMINISTRATION: THE UNIFIED FAMILY COURT

I
HISTORY OF PROJECT

In 1968 a Law Society Committee under the chairmanship of Stuart S. Purvis, Q.C. made a report to the Benchers of the Law Society recommending the establishment of a unified family court for Alberta. The Benchers then made a proposal to the then Attorney-General based on that report. The Attorney-General thereupon asked the Institute to undertake a study of the system of courts administering family law in Alberta with a view to making specific recommendations to the government.

The Law Society proposal included three major elements:

(1) the creation of a family law section of the Trial Division of the Supreme Court of Alberta,

(2) the creation of a department of court services which could provide assistance to the court from other professions in the field of behavioural sciences,

(3) the establishment of an advisory committee of citizens to assist, advise and co-ordinate the new court division and particularly to assist in achieving acceptance and support from the the community.

The recommendations contained in this Report would give effect to the first, with modifications. Our Report No. 26, Family Law Administration: Court Services, would give effect to the

the second, again with modifications. We have not reached the conclusion that the third is necessary.

It is, we think, significant that a group in Ontario was contemporaneously but independently formulating a proposal similar in its main outline though different in detail. The Ontario group was the Family Law Project of the Ontario Law Reform Commission, the proposals of which, with modifications, became the foundation of the Ontario Law Reform Commission's Report on Family Law, Part V, Family Courts which in turn and with further modifications became the foundation of Ontario legislation creating a unified family court as a pilot project (S.O. 1977, c. 85). In the meantime, problems similar to those perceived by the Law Society Committee have been perceived in many parts of the country, and the unified family court in one form or another has been chosen as the court structure within which solutions for those problems may best be sought.

We accepted the request of the Attorney-General and launched upon a study of the problem. In 1972 we issued a Working Paper on the subject in which we made tentative recommendations for a unified family court with social services attached to it. In the Working Paper we envisaged a court which would be either a section of the Trial Division of the Supreme Court, a separate division of the Supreme Court, or a separate superior court. We tentatively preferred a court composed of judges of equal jurisdiction, but discussed two other possibilities. One was a court composed of one group of judges appointed by the Governor General under section 96 of the British North America Act and another group appointed by the Lieutenant Governor in Council. The second possibility was the establishment of two separate courts, one appointed by the province and one appointed by the Governor General, but we thought that it would not be desirable unless no more satisfactory arrangement proved attainable.

The climate of opinion was not altogether favourable. The judges of the Trial Division, while expressing the opinion that the manner in which family law was then being dealt with had faults, thought that radical changes should not be made. The reaction of the bar generally appeared at best lukewarm. The Family Law subsection of the Alberta branch of the Canadian Bar Association, or at least the Calgary members, thought that the Working Paper had not shown the need for a unified family court, but then proposed "that the [existing] Family Court be enlarged in structure so as to encompass the litigation of all matrimonial problems." Under their proposal the court would follow summary procedures and there would be an appeal by way of trial de novo to the Trial Division, with a further appeal to the Appellate Division.

In the more recent canvass of judicial opinion which we will mention below, however, the great weight of the views we received was in favour of some form of court with jurisdiction in all of family law, though there were of course different views on the precise structure to be adopted. The views of the bar also appeared to have changed somewhat. In 1974 the Law Society and the Alberta branch of the Canadian Bar Association made a submission to the Board of Review, Provincial Courts. The submission, which was based upon consultation with the lawyers most involved in Family Law matters, said that the two bodies had found overwhelming support for the establishment at the level of the Supreme Court Trial Division of a Domestic Relations Court to deal with family law matters at first instance. The weight of comment from the bar in our canvass of professional opinion was the same way.

Late in 1975 we decided that we should take steps to obtain commentary and advice from a broad range of persons involved in the administration of Family Law. We accordingly invited the chief justices and chief judges, the Attorney

General and the Law Society of Alberta to make nominations to a committee "to examine the structure of courts administering Family Law and to make proposals for providing the most effective administration of justice in the Family Law field." The nominations were made, and the resulting Committee on Administration of Family Law was struck as follows:

The Honourable W. A. McGillivray	-	Chief Justice of Alberta
Mr. Justice J.H. Laycraft	-	Trial Division Supreme Court of Alberta
Judge John Bracco	-	District Court of Alberta
Judge Douglas Fitch	-	Family Court of Alberta
Margaret Donnelly (with Joanne Veit as alternative)	-	Department of Attorney General
V. W. Smith	-	Law Society of Alberta
Walter Coombs	-	Chairman of the Institute's Committee on Social Services
S.S. Purvis, Q.C.	-	Nominated by the Institute

W. R. Pepler of the Institute's legal staff sat as a member of the Committee and the Institute's Director acted as chairman, but their function was largely to see that the Committee received all relevant materials and all necessary assistance in the conduct of its business. James L. Lewis, Counsel for the Board of Review, Provincial Courts, sat with the Committee as liaison with the Board. He made valuable contributions to the discussions but bore no responsibility for the Committee's recommendations.

The Committee met seven times from March to September,

1976. It concluded that numerous and varied problems affecting families are not being satisfactorily dealt with under the present divided court structure and that the time has come when important changes and solutions can be implemented only if a family court is created with original exclusive jurisdiction over the entire field of matters affecting the family. Its internal deliberations resulted in a memorandum of recommendations dated July 27th, 1976 which is attached as Appendix B to this Report. The memorandum was not formally issued by the Committee but embodied its considered view that the best arrangement would be a unified family court based upon the present Family Court and composed of provincially appointed judges, with provision for the transfer to the Trial Division of the Supreme Court of lawsuits involving complex property or corporate matters. That view, however, was based on the premise that the constitutional problems in the way of such a proposal could be worked out by federal-provincial co-operation. As the constitutional problem began to appear more formidable, opinion in the Committee then became divided between those who were of the view that any necessary constitutional changes or arrangements should be made, and those who were of the view that the constitutional difficulties preclude the establishment of a provincially appointed court. The latter view became that of the majority of the Committee.

The Committee's minutes were circulated to members of the Bench. Some members of the Trial Division formed a view somewhat different from that expressed by the Committee in its memorandum, Appendix B. They thought that the unified family court should be established as a Family Law Division of the Trial Division of the Supreme Court and that the judges of the Trial Division and of the District Court should sit in it to do the work now done by those courts. They thought that the present judges of the provincial Family Court should

sit as judges of the Family Division with powers limited by warrants which would be issued to them by the federal government. They thought that the court should have a presiding judge who would be responsible for the administration of the court, including the administration of the support services now possessed by the Family Court. We refer again to this proposal at p. 62.

At that point, the Committee thought that a memorandum should be circulated to all members of the judiciary so that they would have an adequate opportunity to express their views, and the Institute in January of 1977 accordingly circulated a memorandum (Appendix C) to the members of the Appellate and Trial Divisions, the District Court and the Family Court. The Institute thought it desirable that the memorandum be circulated to the bar as well, and it was accordingly sent to every firm and solo practitioner in private practice. The comment received has not shown a strong current of opinion in favour of one solution or another. Almost none of it suggested that there is no need for a unified family court.

We have not attempted to consult the public generally as to the desirability of a unified family court nor as to its place in the court system, as questions of court structure are necessarily technical. We did however arrange for a survey of the views of those members of the public who have been involved in family law litigation, and have borne in mind their views about the processes which they went through.

In 1973 the Board of Review, Provincial Courts, was established, consisting of the Honourable Mr. Justice W. J.C. Kirby, Dr. Max Wyman, and J.E. Bower. Its terms of reference as contained in Order-in-Council 867/73 include the making of a review and report on a large number of specific and general questions relating to the Provincial Court and

to the Family and Juvenile Courts. After consultation, it appeared to the Board of Review and to the Institute that there was no conflict between the work of the Board of Review and the work of the Institute and that the continuation of the Institute's project was desirable. In the meantime the Board of Review has issued its Report No. 3, The Juvenile Justice System in Alberta, which made unnecessary any detailed consideration of the Juvenile Courts by the Institute. We will discuss at the appropriate place in this Report the relationship between the recommendations made in Report No. 3 and the Institute's recommendations.

This subject has been under debate for a long time. It has given rise to much difference of opinion. Largely because of that difference of opinion, it is not easy to identify the court structure which will be generally acceptable and which will best facilitate the solution of family law problems. We think, however, that the time for an initiative has come and that we should report now.

II
DEVELOPMENTS ELSEWHERE IN CANADA SINCE THE INSTITUTE'S WORKING PAPER

1. Developments in the provinces

Since our Working Paper was issued in 1972, there have been important and numerous developments in other Canadian provinces. These are as follows:

(1) British Columbia

Upon the recommendation of the Royal Commission on Family and Children's Law British Columbia enacted the Unified Family Court Act, S.B.C. 1974, c.99 which established a

pilot project in the Surrey, Richmond and Delta areas around Vancouver. The Act did not unify the court structures, as both the Supreme Court and the Provincial Court (Family Division) were left in being. The administration and facilities of the courts were, however, brought under one roof, and substantial support services attached. It was intended that the judges of the Provincial Court (Family Division) would make reports to the Supreme Court on custody and maintenance matters, and that they would do most of the work in those areas. The Royal Commission's Fourth Report, The Family, The Courts and the Community, shows that the two-tiered court structure was adopted because it was thought to be the best structure which could be established in view of the constitutional and practical constraints. The Report suggested at page 38 that every effort should be made to set up by a system of dual appointments a single-tiered court based upon the Provincial Court (Family Division).

(b) Manitoba

Acting upon a recommendation of the Manitoba Law Reform Commission, Manitoba amended its Queen's Bench Act by S.M. 1976, c. 73 to provide for a pilot project in the County Court District of St. Boniface. It created a division of the Court of Queen's Bench with jurisdiction to deal with family law matters, including the maintenance and custody jurisdictions of the Provincial Court, but not juvenile matters. It appears to contemplate that judges and local judges will sit in rotation in the division as they do elsewhere.

(c) Newfoundland

Newfoundland has enacted the Unified Family Court Act, S. Nfld. 1977, c. 88 which, when proclaimed, will establish a division of the Supreme Court with jurisdiction in family law.

(d) Prince Edward Island

By S.P.E.I. 1975, c. 27, Prince Edward Island created a Family Division of the Supreme Court and conferred upon it jurisdiction in family law matters including juvenile delinquency.

(e) Ontario

In 1974 the Ontario Law Reform Commission issued its Report on Family Law, Part V, Family Courts. It recommended a two-tiered Family Court in which federally appointed judges would exercise jurisdiction over all family matters, especially those now heard by federally appointed judges, and in which provincially appointed judges would exercise jurisdiction over the matters heard at the present time by provincially appointed judges and over such other matters as they can be authorized to deal with. In 1977 the Ontario legislature enacted the Unified Family Court Act, S.O. 1977, c. 85. The Act established a unified family court as a pilot project in Hamilton-Wentworth Judicial District. The court is essentially a separate court composed of judges holding County Court appointments. We will describe it later in this Report at greater length.

(f) Quebec

In 1975 the Civil Code Revision office issued the Report on Family Court prepared by its Committee on the Family Court. The report recommended the establishment of a unified family court, but, because of the constitutional problems, did not make a definitive recommendation as to the appointment of its judges and its relation to the rest of the court system.

(g) Saskatchewan

(1) In 1974 Mr. Justice Emmett Hall made a report recommending a unified family court sited in the Provincial Court. He recommended, however, that divorce and nullity be dealt with by the District Court, and did not deal with jurisdiction over matrimonial property.

(2) In December, 1977, legislation was introduced to establish a unified family court as a pilot project at Saskatoon. It resembles the Ontario Unified Family Court.

2. Law Reform Commission of Canada

In addition to these developments in the Provinces, the Law Reform Commission of Canada in its Report on Family Law, 1976, recommended the establishment of a unified family court as a superior court presided over by federally appointed judges.

3. Federal-Provincial Co-operation

Perhaps the most significant development of all is the willingness of the federal government to encourage the formation of unified family courts in the provinces. That encouragement has been manifested in a number of ways. One is in the funding by it of provincial unified family court pilot projects. Others are the expressed willingness of the Minister of Justice to consult the provinces in connection with the appointment of judges to such courts, the appointment of three Ontario provincial judges to the county court to sit in the unified family court, and an amendment to the Judges Act which counts time spent on the provincial court bench towards the ten years' standing at the bar required for judicial appointment. The same amendment authorized the minister to make fifteen appointments to unified family courts without the necessity of additional legislation. The provinces

in their turn have been active in advocating these projects and in carrying them forward.

III
SCOPE OF REPORT

1. Legislation and administrative arrangements

The establishment of a unified family court will require both legislation and administrative changes. We have in recent years made a practice of including draft legislation in our reports for two purposes: firstly to facilitate the drafting process upon the acceptance of our report; and secondly to expose our proposals to the kind of analysis which the drafting process requires. We propose, however, to issue this Report without draft legislation. Our reason is that the drafting cannot be effectively done until firm decisions have been made about the court system. These include a final decision upon the current proposal for the creation of one superior court instead of the present District Court and Trial Division of the Supreme Court. They include decisions upon the recommendations of Report No. 3 of the Board of Review, Provincial Courts, and decisions upon the recommendations made in this Report. Once these decisions have been made we would be quite willing to have the proposal referred back to us for consideration of the necessary legislation and administrative arrangements.

2. Court Services

A second question about the scope of this Report is this: should it deal with the social and legal services which should be attached to the unified family court? There is no doubt that those services are important to the proposed court and to its ability to serve the public. Indeed, some

think that they are the most important feature of the court. We have decided, however, to deal in this Report only with the structure of the court itself, and to deal with court services in a separate Report No. 26, Family Law Administration: Court Services. Our reason is that we think that our recommendations about the court services relate primarily to administrative matters and can be considered and given effect to in the context of the existing court system without waiting for the establishment of the unified family court. When the unified family court is established, we think that the court services should remain much the same though they should be reviewed to see whether some modification is necessary.

IV
WHY A UNIFIED FAMILY COURT?

1. "Family Law" as a legal category

Traditional jurisprudence does not include any category known as "Family Law". We believe, however, that it is a category which should be recognized and which is achieving recognition. We believe that problems arising from family relationships, that is the relationships of husband and wife and of parent and child, call for consideration separate from that of other legal problems.

Family law problems are often serious manifestations of the deterioration or breakdown of families. The neglect or the delinquency of children are signs of failure of family controls; custody disputes are signs of collapse of the family's protective function; adoption proceedings are designed to secure ratification of a new family relationship that will protect the child; and assaults and other disorderly behaviour within the immediate family are usually signs of serious deterioration of the marriage relationship. The

solution of these problems does not fit well within the fragmented and overlapping jurisdictions of the courts which must adjudicate upon them, and requires a unified rather than a fragmented court structure.

2. Definition of Family Law

"Family law" for the purposes of this paper is that body of law which relates in whole or in part to the basic social group composed of husband, wife and children. It is distinguished from other branches of law because the legal controversies involved in it arise out of the status and relationships of the individuals as members of the family unit, including children now regarded as illegitimate. Family law therefore includes the law relating to:

(1) the formation, annulment and dissolution of marriage;

(2) the rights and obligations of husband and wife between themselves;

(3) declarations as to status, including declarations of legitimacy;

(4) judicial separation, and restitution of conjugal rights;

(5) matrimonial support;

(6) the division or transfer of property upon breakdown of the marriage relationship;

(7) child guardianship, custody, access and support;

(8) criminal charges which arise from a family dispute, such as husband-wife assaults, threats, non-support, and liquor complaints; but not including charges of more serious crimes such as murder and manslaughter;

(9) neglected children, and wardship and adoption of children;

(10) affiliation proceedings;

(11) juvenile delinquency.

To the extent that the law confers rights and duties upon couples who live together without being married, and upon their children, family law would include the law relating to those rights and duties and to their ascertainment and enforcement.

We would make specific reference to juvenile delinquency. To the extent that the Juvenile Delinquents Act (Canada) applies to offences committed by young people it may be argued that it is criminal law and is accordingly more appropriately administered in the courts which deal with the crimes of adults. We think, however, that it should be dealt with by the unified family court. The Juvenile and Family Courts have long been associated in Alberta, and it seems appropriate that the court which deals with the problems of family breakdown under provincial law should also deal with them under federal law until the time comes when they should be transferred to the ordinary criminal courts. The Board of Review, Provincial Courts, says in its Report No. 3, The Juvenile Justice System in Alberta, at pages 49-50:

(3) RELATIONSHIP BETWEEN THE JUVENILE COURT, THE PROVINCIAL COURT AND THE FAMILY COURT.

The Juvenile Court exists by virtue of The Juvenile Court Act. Section 7(1) of the Act makes every *Magistrate* in the province an ex officio judge of the Juvenile Court. Section 5(b) of The Provincial Court Act provides that:

> *Every judge has all the powers and authority now vested by or under any Act of the Legislature in a Magistrate . . . .*

These provisions allow Provincial Court judges to preside in the Juvenile Court, and they do in fact do so when a Juvenile Court judge is not available. Also the Chief Judge of the Provincial Court is the Chief Judge of the Juvenile Court.

Some of the disadvantages arising from these arrangements are listed below:

(1) There is a distinct difference between the philosophy used in the Juvenile Court and that used in the Provincial Court.

(2) The support and administrative services attached to the Juvenile Court are different from the corresponding services in the Provincial Court.

(3) The judges of one Court are not usually familiar with the services provided in the other Court.

(4) From lack of experience, and specialized knowledge in the field, some Provincial Court judges may be unable to deal appropriately with juvenile delinquents.

(5) In some areas,when Provincial Court judges preside in their capacity as Juvenile Court judges, the juveniles awaiting trial often are thrown into the company of adults awaiting trial on charges of criminal offences. Under these circumstances, the confidentiality basic to the juvenile justice process cannot be maintained.

The Board recommends that the Juvenile Court should become a distinct entity apart from the Provincial Court, and that Provincial Court judges should not exercise jurisdiction in the Juvenile Court. To implement this change, it will be necessary to have Juvenile Court judges go on circuit. This in turn might require an increase in the complement of Juvenile Court judges.

The Family Court exists by virtue of The Family Court Act. Judges of the Juvenile Court also hold appointments as judges of the Family Court. There is strong support for the continuation of the present relationship between the Family and Juvenile Courts.

For all these reasons, we think that juvenile delinquency should be included in the jurisdiction of the unified family court.

3. Courts administering Family Law

(1) Division of Jurisdiction

Six courts of original jurisdiction administer family law in Alberta as defined in this paper: the Supreme Court of Alberta, the District Court of Alberta, the Surrogate Court of Alberta, the Family Court of Alberta, the Juvenile Court of the Province of Alberta, and the Provincial Court of Alberta.

The first reason for the division of jurisdiction is the division of legislative power between Parliament and the provincial legislatures. Section 90(26) of the British North America Act confers upon Parliament exclusive jurisdiction in matters relating to "Marriage and Divorce." Section 92(13) confers upon the Legislature of the province the exclusive power to make laws in relation to matters coming within the class of subjects "Property and Civil Rights in the Province." "Property and Civil Rights in the Province" includes matters of custody, access, alimony and maintenance, but some of these same matters are also ancillary to "Marriage and Divorce," where legislation by Parliament is paramount. The power to legislate in relation to a subject carries with it the power to confer jurisdiction upon a court to deal with it. Accordingly, the division of the power to legislate in respect of family law matters means that jurisdiction in all family law matters can be conferred upon one court only if Parliament and the Legislature agree.

The next reason for the division of jurisdiction is

the distinction which the constitution of Canada makes between different kinds of courts. Under section 96 of the British North America Act the Governor General must appoint the judges of the superior and district courts in Alberta, and the courts have held that that means that the province cannot appoint judges to courts which exercise jurisdiction broadly conforming to the jurisdiction of a superior court, which includes important parts of family law. The province, however, has found it expedient to have some family law matters adjudicated upon by provincially appointed judges, with the result that jurisdiction has necessarily been divided.

(2) Lists of courts and their jurisdictions

(1) Courts with judicial officers appointed by the province. Three courts with judicial officers appointed by the province participate in the administration of family law:

(a) The Provincial Court. This court has jurisdiction in many criminal matters under the Criminal Code of Canada. This jurisdiction includes elements which pertain to family law matters, such as section 197(2)(a), (non-support charges); section 245(1)(b), (assault within the family), and section 745 (fear of injury to person or property by a member of the family). Provincial judges also have jurisdiction in respect of complaints under section 100 of the Liquor Control Act (Alberta), protection orders under sec. 27 of the Domestic Relations Act (Alberta), and offences committed by juveniles over fourteen years of age who have been transferred by an order of the Juvenile Court. They are also judges of the Juvenile Court.

(b) The Juvenile Court. Each judge of the Supreme Court of the province, each judge of the district court of the province and each magistrate in the province is ex officio a judge of the Juvenile Court, "but is not required to act in such capacity unless willing to do so" (The Juvenile Court Act (Alberta) sec. 7). The powers of a Juvenile Court judge are conferred by the Juvenile Delinquents Act (Canada): "Every judge of a juvenile court in the exercise of his jurisdiction as such has all the powers of a magistrate."

The two major areas of jurisdiction of this court are juvenile offenders and neglected children. Under the Juvenile Delinquents Act, a juvenile delinquent is defined as:

> 2.(1) . . . any child who violates any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.

In Alberta, offenders are included if they are boys apparently or actually under the age of sixteen years or girls apparently or actually under the age of eighteen years.

The Juvenile Court has jurisdiction in temporary wardship cases and all matters relating to neglected children under Part 2 of the Child Welfare Act (Alberta). This jurisdiction is shared by the District Court. Permanent wardship matters are under the exclusive jurisdiction of the District Court.

(c) The Family Court of Alberta. This is a court of record, and has a broad jurisdiction. Under the Family Court Act, a provincially appointed judge of the family court has jurisdiction with respect to:

(i) maintenance orders (protection orders) for deserted wives and families under section 27 of the Domestic Relations Act;

(ii) maintenance orders under the Reciprocal Enforcement of Maintenance Orders Act;

(iii) certain charges against adults under the School Act, 1970;

(iv) certain charges against adult persons under the Child Welfare Act;

(v) charges triable on summary conviction under section 197(2)(a) of the Criminal Code (non-support charges);

(vi) common assault charges under section section 245(1)(b) of the Criminal Code, where a husband assaults a wife, a wife assaults a husband, or a parent assaults a child;

(vii) charges triable on summary conviction under any other act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a family court to deal with them;

(viii) enforcement of Supreme Court alimony or maintenance orders, but without the jurisdiction to vary the Supreme Court orders;

(ix) custody of children whose parents are living apart from one another;

(x) right of access to such children.

Upon his appointment, a Family Court judge is also appointed to the office of magistrate and acting in this capacity, hears matters under section 245(1)(b) of the Criminal Code and section 100 of the Liquor Control Act.

The Family Court may exercise its jurisdiction throughout Alberta. There are Family Courts established in the five major cities--Edmonton, Calgary, Red Deer, and Lethbridge and Medicine Hat combined--and smaller operations in Fort McMurray and Grande Prairie. Under the Family Court Act, the jurisdiction of the judges is not restricted to particular districts, and circuit court systems have been developed in five urban centres.

Although the Juvenile Court and Family Court are established as two courts, in practice, where there is a Family Court, the two courts tend to operate as one. In Alberta all judges with Family Court appointments are also appointed judges of the Juvenile Court. Where there are no Family Court judges, the Provincial Judges act in their capacity as Juvenile Court judges along with their other duties.

(2) The Surrogate Court. Judges are appointed to this court by provincial legislation (The Surrogate Court Act (Alberta)). However, the legislation provides that the judges of the District Court are the judges of the Surrogate Court, so that appointment to the Surrogate Court depends upon appointment by the Governor General. The Surrogate Court has jurisdiction over guardianship of the

person and property of a minor, and over custody, control and access. The jurisdiction is concurrent with that of the Trial Division. It is not altogether clear whether or not provincially appointed judges could exercise it.

(3) Courts with judicial officers appointed by Canada. There are two federally appointed courts which administer family law in Alberta: the District Court and the Supreme Court of Alberta. The judges of the District Court are also the judges of the Surrogate Court.

(a) The District Court. This court has exclusive original jurisdiction to hear permanent wardship (Child Welfare Act, Part 2), adoption (Child Welfare Act Part 3), and affiliation proceedings (Maintenance and Recovery Act, Part 2). The court also has concurrent jurisdiction with the Juvenile Court over neglected children and temporary wardship (Child Welfare Act, Part 2).

Judges of the District Court are local judges of the Trial Division of the Supreme Court, and in that capacity exercise the family law jurisdiction of that court.

(b) The Trial Division of the Supreme Court of Alberta. This is the highest court of general trial jurisdiction in the province. Under the Divorce Act, it is designated as the tribunal to exercise original jurisdiction in divorce including maintenance, custody and access in divorce proceedings. It also has parens patriae jurisdiction over infants under the Judicature Act (Alberta), as inheritor of the powers of the English Court of Chancery. It also has wide family law jurisdiction under the Domestic Relations Act: judicial separation; disposition of marital property; injunctions preventing disposition of personal property by a spouse; nullity of marriage; loss of consortium; restitution of conjugal rights; jactitation of marriage;

alimony and maintenance orders, interim or otherwise; variation of alimony and maintenance orders; and in addition, jurisdiction over guardianship and custody of children and access to them, either on independent application or on pronouncing judgment for judicial separation.

4. Problems arising from Existing Divisions of Jurisdiction

The Committee on Administration of Family Law found much the same problems as those described in our Working Paper. We are prepared to adopt the Committee's statement of the problems which is as follows:

> Family law deals with the problems of husbands and wives arising from the breakdown of marriages. It deals with problems of the protection and support of children arising from the breakdown or lack of family relationships, and the problems arising from unlawful conduct of children and juveniles. These are among the most numerous and the most serious and important problems with which society must deal, and it is imperative that society provide strong courts and efficient social services in order to deal with them.
>
> The Committee is concerned that the numerous and varied problems affecting families are not being satisfactorily dealt with under the present divided court structure. The fragmented jurisdiction makes improvement very difficult. The Committee is convinced that the time has come when important changes and solutions can be implemented only if a family court is created with original exclusive jurisdiction over the entire field of matters affecting the family.
>
> Some of the most important problems arising from the division of jurisdiction among courts are as follows:
>
> (1) Piecemeal solutions--Because jurisdiction is divided it very often happens that no one court can deal with the whole of the legal problems arising from the breakdown of a marriage or of a family, and piecemeal solutions must be applied.

(2) Delay - Litigants are enabled to delay proceedings in one court by starting, or threatening to start, proceedings in another.

(3) Harassment - Litigants are enabled to harass other litigants by the multiplicity of proceedings which are available in different courts.

(4) Inappropriate procedures - Different procedures are available in different courts, and the most appropriate procedure is often not available for a particular problem.

Particular examples of these problems are as follows:

(1) A maintenance dispute may start in Family Court as a protection order, move to Supreme Court as part of a divorce, come back to Family Court when the Supreme Court order is registered for enforcement, and go back to Supreme Court for variation of the order, with resulting delay, cost, and frustration for the litigant.

(2) A temporary wardship proceeding is usually brought in Family Court, but if the facts suggest that the wardship should be made permanent, another proceeding must be commenced in a different court.

(3) There may be concurrent or consecutive proceedings for custody in the Supreme Court and wardship in the Family Court or in the District Court. The Supreme Court judge has no way of ordering wardship if he perceives that that is what should be done, and his order for custody can be rendered nugatory by an order in the wardship proceedings.

(4) Wardship and maintenance proceedings involving the children of married or unmarried parents must be brought separately in different courts.

Another important problem is that the social services cannot readily be related to a multiplicity of courts, with the result that they are not used as effectively as they might be. They are not as effectively available to litigants, bench and bar in the Supreme Court as they are in the present Family Court, and

> there is insufficient opportunity for judges and social service personnel to develop a proper understanding of each other's functions and needs. An example is the use of investigative services in custody matters on divorce.
>
> The Committee is satisfied that the problems are so serious, and that the resulting difficulties to the people who appear before the courts are so great, that solutions must be sought.

We believe, along with the Committee on Administration of Family Law and the legislative and law reform bodies we have mentioned earlier, that one court should have jurisdiction over the whole of family law. That will not automatically solve the problems we have mentioned, but it will provide a framework for their solution. All of the legal problems arising from the breakdown of a marriage or of a family could then be brought before one court, and that court would be able to exercise all the powers now conferred by the law on several courts. There would be no other court in which proceedings could be started for the purpose of delay, and one court would have control of all the proceedings. Procedures designed for particular classes of cases would be easier to adopt. The relationship of the social services to the court could be defined more clearly, and better opportunities could be made available to the judiciary and to the social services to understand each other's functions and needs. We do not, as the Committee and other legislative law reform bodies did not, see any way of achieving these results under a multiplicity of court jurisdictions such as that which now exists.

Recommendation #1

1. *That a unified family court be established in Alberta to exercise jurisdiction over the following:*

(1) *the formation, annulment and dissolution of marriage.*

(2) *the rights and obligations of husband and wife between themselves.*

(3) *declarations as to status, including declarations of legitimacy.*

(4) *judicial separation and restitution of conjugal rights.*

(5) *matrimonial support.*

(6) *the division or transfer of property upon the breakdown of the marriage relationship.*

(7) *child guardianship, custody, access and support.*

(8) *criminal charges which arise from a family dispute, such as husband-wife assaults and threats and non-support, but not including charges of more serious crimes such as murder and manslaughter.*

(9) *neglected children, wardship, guardianship and adoption.*

(10) *affiliation proceedings.*

(11) *juvenile delinquency.*

To this point, we think that there is general agreement in our Board, among the bench and bar, and among the legislative and law reform bodies who have dealt with the subject. We now turn to discussion of subjects upon which there is less agreement, namely, the choice of the court to exercise jurisdiction in family law, and the responsibility for the appointment of its judges.

V

CHOICE OF UNIFIED FAMILY COURT

1. Desirable Characteristics

We will first outline briefly the characteristics which would be desirable in a unified family court. They are as follows:

(1) The court should be composed of legally-trained judges of the greatest possible ability to deal with family law disputes.

(2) The court should have jurisdiction over all family law matters.

(3) The court should continue to be a court of law in the sense that judges will hear disputes, decide facts and dispose of disputes according to law.

(4) The court's procedures should be suited to the subject matter of litigation which may require relatively simple or relatively elaborate procedures.

(5) The court should have social services attached to it along the general lines suggested in our Report No. 26, Family Court Administration: Court Services, and the judges should be familiar with those services relevant to the judicial process.

(6) The court should be as accessible as is practicable to people in different parts of the province and to people of different levels of income and degrees of sophistication in legal matters.

2. Relevant Considerations

In order to achieve a court with the characteristics we have mentioned, it is necessary to bear in mind a number of considerations. The diversity of kinds of considerations, and their frequently complex relationships, make them difficult to cope with, but the effort must be made.

(a) External Considerations

(i) The constitution.

We have already mentioned two provisions of the constitution. One is that it divides legislative jurisdiction between Parliament and the Legislature. The second is that, as interpreted by the courts, it limits the jurisdiction which the Legislature can confer on a judge appointed by the province. Both provisions cause problems in the establishment of a unified family court.

We will deal first with the problem arising from the division of legislative power. Parliament, by the Divorce Act, has conferred jurisdiction in divorce upon the Trial Division of the Supreme Court of Alberta. Only Parliament could confer the necessary jurisdiction in divorce upon any other court. The time involved in obtaining legislation which would do so, and the uncertainty that it would be obtained, are considerations which weigh against the establishment of a unified family court which is not part of the "trial division or branch of the Supreme Court of the province." That is probably one reason for the rather complex structure of the Ontario Unified Family Court Act under which, though a county court judge will hear divorce matters in the Unified Family Court, his order will be an order of the Supreme Court made by him in his capacity as a local judge of the Supreme Court.

The second problem is more intractable because it arises from the constitutional instrument itself, the British North America Act, as interpreted by the courts. Unless the Governor General appoints the judges of a court the Legislature cannot confer upon it jurisdiction which broadly conforms to that of a superior court. We will later give our reasons for thinking that that problem is decisive against the establishment of the unified family court as a provincially appointed court based upon the existing Family Court.

We will mention briefly one other problem arising from the constitution. There is at least some doubt as to whether the "parens patriae" power can be conferred on a provincially appointed court. This is the inherent jurisdiction of a Supreme Court to make orders for the protection of children. It is a useful power, the lack of which in a particular case might make it difficult or impossible for a judge to deal with an emergency situation involving a child.

(ii) The need for inter-governmental co-operation

Under the present constitution the unified family court can be established only with the active co-operation of Parliament (which must provide for the salaries of the judges and confer or continue jurisdiction in matters under its legislative control); the federal executive (who advise the Governor General on judicial appointments); the Legislature (which must establish or continue the court and confer or continue jurisdiction in matters under its legislative control); and the provincial executive (who must provide for the administration of the court). The two executive branches must also in practice agree to the adoption of the necessary legislation. Therefore, any proposal made, if it is to be effective, must be one which both governments can accept.

We have already mentioned the co-operation of the federal government in connection with the unified family court projects in some provinces. In the case of the Ontario Unified Family Court pilot project, Parliament has created judgeships for the Unified Family Court and has modified the qualifications laid down by the Judges Act for their appointment, and the federal executive has agreed to the appointment of judges who were recommended by the province and who previously held provincial appointments. This co-operation is encouraging.

(b) Considerations relating to the court system

(i) Relationship to existing courts

Should the unified family court be an existing court or a branch of an existing court? Or should it be a separate court?

The Ontario Law Reform Commission made the case for a separate court as follows:

> We have expressed our view that a court capable of exercising integrated jurisdiction in all family law matters should be established. In our opinion the best and most effective way to do this is to create a Family Court which is separate from the existing traditional courts, and which is staffed by judges who collectively would be capable of exercising jurisdiction over matters within the competence of section 96 judges, and also over matters within the competence of provincially appointed judges, and we so recommend.
>
> The justification for creating a separate Family Court is clear. A Family Court is unlike any other court. Its work is of a highly specialized nature and this, of itself, justifies a court which devotes its time exclusively to family law matters. There is another compelling reason. The two-fold function of a Family Court, judicial and therapeutic, demands that it have attached to it specialized ancillary services, the nature and extent of which are required

> by no other court. The administrative requirements of a Family Court also differ from those required by other courts, chiefly because of the task of co-ordinating its two functions.
>
> A Family Court must be free to develop its own philosophy, its own procedures, and its own administrative techniques. We believe that this can best be fostered if the Family Court is a separate entity.

The Ontario Unified Family Court Act set up a separate Unified Family Court, and it appears that it will be administered as such, subject to some responsibility in Supreme and County Court matters to the heads of those courts.

The following passage well expresses the contrary view:

> I cannot, in this area, move away from my opposition to any judicial structure other than a unified one. I agree with Pound that "the method of archaic law is to set up a new court". I agree with the A.B.A. [The American Bar Association] that the ideal trial court ". . . should have jurisdiction in all cases and proceedings . . . performed by a single class of Judges . . ." Duplicate judicial structures create, on the one hand, the unnecessary and complicating problem of overlapping jurisdiction and, on the other, the distortion of social values implicit in the stratification of causes. Further, while the introduction of some departure from these principles can from time to time seem like an appropriate expedient, one cannot overlook the historical fact that the elimination of segregated judicial structures becomes extremely difficult because of the interests that vest.

The creation of a separate court would, in this view, be contrary to the spirit of the Judicature Acts and would contribute to a state of affairs similar to that which made those Acts necessary.

The views which we expressed in our Working Paper were as follows:

> The establishment of a Family Court as part of the Supreme Court would, we think, be a valuable step in adapting the traditional courts to the needs of the times. The development of somewhat specialized branches of courts of general jurisdiction has much to be said for it as opposed to the development of a multiplicity of courts and will tend to preserve the essential values of the traditional courts. We believe that there is much to be said also for the proposition that the development of Family Law should be carried on by the traditional courts but through a specialist division or section with modified procedures.

We start with a preference. It is to establish the unified family court as part of an existing court in order to avoid proliferation of court structures. However, we consider the establishment of the unified family court to be the overriding interest and would accept a separate court structure if that is necessary to achieve it. When we reach the concrete example of the Ontario Unified Family Court we will discuss the question further.

(ii) Standing of the court and its judges

The view which we expressed in the Working Paper was that the unified family court, if possible, should be part of the Supreme Court. A principal reason for that view was that we thought that that arrangement would enhance the standing of the court. We said the following:

> To make a court part of the Supreme Court and to confer exclusive Family Law jurisdiction upon it would be to show that Family Law is considered to be of sufficient importance to justify the attention of the highest court of original jurisdiction in the province. There is a very strong prejudice, which must be recognized, that a Family Court will inevitably resemble a social agency more than a court of law. The association of Family Law with one of the traditional courts would, we believe, help to do away with this

> prejudice. The regard in which the court administering Family Law is held will be a considerable element in its acceptance by the legal profession and the public and in its ability to attract judges of the highest capacity.

We still think that that is an important consideration, though, as will be seen, we have concluded that we should not, for the purposes of this Report, distinguish between the Supreme Court and the District Court.

In the meantime, the Committee on Administration of Family Law recommended that the unified family court be created as a separate court at the provincial court level and based on the existing Family Court. What we have said about the desirability of enhancing the standing of the unified family court is a consideration which would have to be weighed against the merits of that proposal if we had not concluded that constitutional considerations are decisively against it.

There is also the question of the standing of the judges within the court. One view is that all judges should be appointed by the same authority and have equal jurisdiction so as to avoid any suggestion that some family law work is not important enough to justify the attention of judges of the first rank, and that this is a consideration which weighs in favour of a one-tiered court. The contrary view is that a division of work is appropriate, with superior court judges dealing with status and property and ancillary matters, and other judges dealing with less complex factual and legal problems.

(iii) Nature of the court

We envisaged at the time of the Working Paper, and we still envisage, a court in which properly qualified judges

will hear evidence, decide facts, and give judgments and make orders in accordance with law. The Committee on Administration of Family Law and the Institute's Social Services Committee both made similar recommendations. We will in our Report No. 26, Family Law Administration: Court Services, describe a number of services which should be attached to the courts administering family law, and some people regard the proper organization and provision of such services as the most important contribution which the unified family court will make, but the availability of those services does not alter the nature of the adjudication when it is made. Although forceful arguments may be made for relaxed procedures, we do not see any justification for the blurring of the judicial role. This is not a consideration which dictates the place of the unified family court in the court system so much as a consideration which must be borne in mind in considering the structure and procedures of the court once the choice is made.

(iv) Effect on existing institutions

A reform which will cause less disruption of existing institutions, if it is equally effective, is to be preferred to one which will cause more disruption. That is one consideration which suggests the adaptation of an existing court rather than the creation of a new one, and it is one reason why the Committee on Administration of Family Law recommended that the unified family court be based on the existing Family Court. It must however be weighed with the other relevant considerations.

(v) Existing judges of the Family Court

If the unified family court is to be established as a provincially appointed court based on the existing Family

Court, the provincial authority which appointed the present judges of the Family Court might be expected to appoint all or most of them to the new court. The likelihood is less great that the Governor General would do the same if the judges of the new court are federally appointed. The appointment of three Ontario provincial court judges to its new Unified Family Court suggests that some existing Family Court judges might be appointed to a federally appointed unified family court, but some do not meet the qualifications in the Judges Act, and it cannot be assumed that all of the others would receive such appointments. Basic requirements of honor and decency require fair treatment of persons who have been persuaded to leave other occupations to which they could only with difficulty, if at all, return, and the independence of the judiciary and the need to facilitate the future recruitment of judges impose further requirements. Some present judges of the Family Court no doubt would be content to accept appointments to the Criminal or Small Claims side of the Provincial Court. We cannot here make recommendations about any remaining judges, other than to say that, on the one hand, satisfactory arrangements must be made with regard to any who do not become members of the new court, while, on the other, the choice of a court structure for the indefinite future should not be dictated by the difficulty of making appropriate arrangements for them.

A unified family court established as a branch of a superior court with a tier of provincially appointed judges would be an obvious place for the judges of the existing Family Court, but it is not clear to us that they would necessarily regard membership in the provincially appointed tier of a two-tiered superior court as the equivalent of membership in the single tier of the present Family Court.

(c) Considerations relating to the court itself

(i) Specialization or concentration of judicial work

There is a great difference of opinion as to whether or not it would be better for specialized judges to adjudicate upon family law matters. Some hold the view that it is better that family law judges be specially chosen with reference to special qualities thought to be of value in the family law field, and that they then work in family law and no other field. Some hold the view that trial judges should all deal with matters across a broad legal range. There are various intermediate opinions.

In our Working Paper we said at page 30:

> . . . we believe that on the whole better decisions will be given by specialist judges whose attention and judicial experience are directed entirely toward the judicial resolution of problems arising out of the family relationship.

And later on the same page:

> We believe that these problems of conflicting and fragmented jurisdictions, and the advantages of consistency in philosophy and approach, expertise in dealing with the family relationship, and practical use of social services, can best be dealt with by the creation of one court with exclusive jurisdiction in the field of Family Law as we have defined it. There would be no conflict of jurisdiction between different courts because there would be only one court. One court would have the best chance of developing and applying a consistent philosophy of treatment of Family Law matters. Judges whose time is spent entirely, or almost entirely, in Family Law would have the best chance of developing the greatest understanding of problems rising out of the family relationship. The attaching of supporting services

> to the court would enable the judges of the court to become familiar with their proper use and to see that they are properly directed. Procedures designed to cope quickly and inexpensively with the particular types of problems encountered in Family Law can best be developed in one court dealing exclusively with Family Law.

The Committee on Administration of Family Law was of the same view. They said that specialization would inevitably flow from their recommendations, though the specialization of an individual judge might be for a fixed period. They went on to say:

> The Committee is of the view that specialization will bring with it the advantage of continuity in particular cases, which is difficult to achieve if the judges are assigned to different sittings each week; and the advantage of experience in dealing with family law matters, which have aspects different from the administration of justice in general. Specialized judges have a much better opportunity to assess the benefits and limitations of the social services and to develop methods of using those services to the best advantage. While the Committee would not recommend the establishment of a unified family court for the sake of specialization, it is of the view that advantages of specialization in this unique field will outweigh the disadvantages.

In that passage the Committee referred to the advantage of continuity. If judges sit in family law matters by rotation, they do not see a matter through from start to finish. That may lead to a series of adjournments, each made without a complete knowledge of what has gone before, and it means that a judge does not see the consequences of his order, as a specialized judge will do if the problem is not solved by the time the first order comes back before him. A greater degree of continuity would be provided by a specialized court, though it would not be possible or desirable always to have the same judge sitting at the same place.

On the other hand there is a strongly held view that specialization is a bad thing. This view starts with the proposition that family law is no more difficult than the law in other fields and does not require a specialist. The facts are no more difficult. The law is no more difficult. If a certain kind of personality is wanted, that can be arranged through assignment of judges of a non-specialized court. There is no observable tendency towards specialization in other fields of law. The case for specialization is therefore, in this view, not a strong one, while there is a strong case against it. The great majority of issues will be ones of fact, and a specialized judge must suffer the debilitating process of sitting through countless disputes which are of a similar type and raise similar problems, and, to the extent that lawyers are involved, hearing the same counsel. There is a great danger that he will develop a philosophic bias which will adversely affect his performance. There is danger of boredom and loss of challenge. There will be grave difficulty in attracting the best judges to spend a lifetime in the area of disputes in the family.

There is force in the arguments on both sides of this vexed question. We do not propose here to state a conclusion with regard to it, and we leave further consideration of it until we come to the consideration of the alternative courses of action available.

(ii) Fragmented and overlapping jurisdictions

The principal problems to be solved by the establishment of a unified family court are those which are caused by the fragmentation and overlapping of jurisdiction among the courts. We have described these problems elsewhere in this Report and will not repeat the description here.

(iii) Court procedures

There is a great volume of litigation in family law matters. Most of those matters do not involve difficult legal questions, and in most the facts are not unduly complex, though the making of the right decision may be extremely difficult. Many involve people of low incomes and little legal sophistication. The court structure should therefore make it possible to provide simple and inexpensive procedures. It should also make it possible to provide some assistance to litigants in coping with the system. There are on the other hand some family law matters which do require formal procedures and interlocutory steps. That is particularly true when the property of a husband and wife is substantial and when complex questions of trust relationships or company matters are involved. The court structure should therefore make it possible to provide formal procedures as well.

(iv) Suitability of family law litigation to a superior court

The field of family law as we define it includes a number of things that are not usually thought to require the attention of a superior court. If such matters do not require the attention of a Supreme Court judge, their existence may tend to suggest that the court should be composed of both provincially appointed judges and federally appointed judges as the former would be available for such matters. The opposing argument is that any matter arising out of the breakdown of a family relationship is important enough to justify the attention of any court.

(v) Accessibility

(a) Geographical

The unified family court should be accessible to people in as many parts of the province as is reasonably practicable. It should be accessible in a different sense to people of all levels of income and degrees of legal sophistication.

We do not think that the establishment of a unified family court should be the occasion for a quantitative reduction in the existing services available in the province, or in the reduction of the potential for quantitative increase in those services. Therefore, the unified family court would have to provide the services now provided by the Family Court and the Provincial Court wherever those courts sit, or alternatively, the Provincial Court would have to be asked to provide those services where the unified family court does not sit. Further, the unified family court would have to provide the services now provided by Supreme and District Court judges wherever those courts sit, or, alternatively, those courts would have to be asked to provide those services where the unified family court does not sit.

(b) Financial and procedural

With regard to accessibility to people of low income and people of little legal sophistication, the Intake Service of the Family Courts provides basic information and assistance in getting into court on summary matters. The continued availability of that service does not depend on the choice of unified family court. The availability of publicly funded legal aid also depends upon other considerations and not upon the choice of the court which will adjudicate on family law matters.

(vi) Flexibility

The structure of the unified family court should be capable of growth and adaptation to meet the challenge of changing conditions and future problems. That is a consideration to be borne in mind during the discussion of the alternatives.

3. Discussion of Alternatives

A unified family court might take any one of several forms. We start by excluding one from extensive consideration.

We exclude the two-court system instituted in the British Columbia pilot project. In so doing we do not adversely criticize that project. It was a valuable experiment, and made great contributions towards unified administration and towards the intelligent development of social and legal services. However, the Provincial Court (Family Division) and the Supreme Court remain two separate courts and we do not think that the arrangement solves the problems arising from the fragmented and overlapping jurisdictions of the courts. Indeed, the Royal Commission on Family and Children's Law, upon whose recommendation the pilot project was set up, has said that the arrangement was made because it was the only way which then existed of getting around the constitutional problem and that "every effort should be made to avoid the duplication of jurisdiction that will plague any two-tiered system of family courts." (Fourth Report, The Family, the Courts and the Community, 1975, page 38).

We will discuss at some considerable length two proposals and give reasons for not recommending the adoption of either. The first is that the unified family court be

established as a separate provincially appointed court based upon the present Family Court, which was the initial preference of the Committee on Administration of Family Law but which we think is precluded by the constitutional considerations which we will describe. The second is that the unified family court be established as a separate superior court, which is the solution adopted for the pilot project in Ontario. We will then go on to discuss proposals for the establishment of the unified family court as part of a superior court. In the course of that discussion we will give reasons for a principal recommendation and an alternative recommendation and reasons why we have decided not to recommend either of two other variants of proposals for a unified family court as part of a superior court.

(a) A Unified Family Court based upon the present Family Court: the proposal of the Committee on Administration of Family Law

The Committee on Administration of Family Law was composed primarily of persons nominated by the chief justices and chief judges of the courts, by the Attorney-General and by the Law Society. It was not a function of the members of the Committee to represent constituencies but rather to bring to their terms of reference the wisdom and experience which they had accumulated in their respective positions.

The members of the Committee started by making a rigorous analysis of the existing situation. They then set about devising what they considered to be the best solution to the problems disclosed by their analysis. They started both processes without preconceived notions. A proposal so arrived at is obviously one the merits of which must receive the greatest attention.

The Committee's proposal appears in Appendix B. It may be summarized as follows:

(1) There should be a unified family court.

(2) The unified family court should be based upon the existing Family Court and its judges should be appointed by the province.

(3) The judges of the unified family court would inevitably be specialized, though possibly for a fixed period of time, and there should be a chief judge whose function would relate to the unified family court alone.

(4) Provision should be made for the transfer of actions and issues to the Supreme Court by leave of a Supreme Court judge, which would be expected to be given when complex property and corporate matters are involved, though the test would be whether or not the issues could more conveniently be tried in the Supreme Court.

The solution proposed by the Committee was one which the Institute had not previously considered in depth, though the Family Law subsection of the Alberta branch of the Canadian Bar Association, in reply to our Working Paper, had suggested the establishment of the unified family court as a provincially appointed court upon a somewhat different basis. Therefore we had not gone thoroughly into the constitutional problems implicit in the establishment of the unified family court as a provincially appointed court. When the Committee's deliberations disclosed the need for such a consideration of those problems we consulted Professor P.N. McDonald of the Faculty of Law, University of Alberta. We will include his

opinion in Background Paper No. 11 which will be issued about the same time as this Report.

We think that Professor McDonald's opinion demonstrates that the Legislature cannot confer upon a provincially appointed court jurisdiction in some of the important parts of family law which are under provincial legislative jurisdiction, including the division of matrimonial property, granting and enforcing charges on property, granting injunctions, and, possibly, adjudicating on nullity of marriage arising from defects in the solemnization of marriage. In addition, there is doubt in the areas of orders prohibiting a spouse from molesting the other spouse or the children, and granting the spouse exclusive possession of the matrimonial home, which doubt we think undesirable, though the proposed Ontario legislation (Ontario Bill 59, 1977, which may become law before this Report is issued) appears to accept the risk. Finally, there is also doubt about the power of the Legislature to legislate with regard to judicial separation, including doubt about its power to confer jurisdiction upon a court other than the Supreme Court.

That leaves open two possibilities. One is a system of dual appointments by federal and provincial authorities. The second is an amendment to the British North America Act.

We will deal firstly with a possible system of dual appointments. What the Committee on Administration of Family Law hoped would prove workable was a system under which the Legislature would establish the unified family court and appoint the judges, whereupon the Governor General would issue to them limited patents empowering them to exercise the jurisdiction in family law which can be exercised only by a judge of a superior court. The great difficulty which appeared on further examination is that if the Governor General appoints the judges of a superior court (which he would

ex hypothesi be doing), Parliament must provide for their salaries under section 100 of the British North America Act, and they will be removable only by an address of both Houses under section 99. The court would thus of necessity become a federally appointed court.

The second possibility is that of an amendment to the British North America Act which would exclude a unified family court from the operation of section 96 or which would in some other way allow the province to appoint the judges of the court. Parliament can amend the British North America Act, but it cannot do so "as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province." Professor McDonald has advised us that there is a respectable argument to be made that "Government of a province" includes its courts, and that Parliament accordingly cannot make an amendment which would affect the superior courts of the province. If that argument is correct the amendment would have to be made by the Parliament of the United Kingdom. Even if Parliament could make the amendment, however, it appears to us that the prospect of any amendment to the constitution at this time of constitutional debate and turmoil is too uncertain, and is likely to cause too much delay, to be a satisfactory foundation for a proposal for a unified family court. Therefore, without dealing with the merits of a proposal for the establishment of a provincially appointed unified family court, we are, for reasons based upon the constitution, unwilling to make such a proposal.

Faced with these constitutional difficulties, some members of the Committee on Administration of Family Law were strongly of the opinion that the Committee's proposal is the best proposal available and should be put forward, leaving it to those involved in the political process to take all steps necessary to give effect to it if it is accepted.

The prevailing view of the members of the Committee, however, was that the problems of the constitution itself, and of the circumstances in which the country finds itself, make that course of action too uncertain, and that the unified family court should accordingly be established as a superior court.

(b) The Unified Family Court as a separate superior court: the Ontario pilot project

Ontario has established what amounts to a separate superior court as a unified family court by S.O. 1977, c. 85. So far it has done so only as a pilot project for the judicial district of Hamilton-Wentworth.

The plan of the Act is an ingenious solution to the problems arising from the division of legislative authority and from section 96 of the British North America Act. It creates a Unified Family Court which is to be presided over by a judge who satisfies three conditions. First, he must be a County Court judge. Second, he must be a local judge of the Supreme Court. Third, he must be authorized by the Lieutenant Governor in Council to exercise the jurisdiction of a judge of a Provincial Court (Family Division). When he sits in the Unified Family Court he exercises his Supreme Court powers as a local judge of the Supreme Court, his County Court powers as a County Court judge, and his Provincial Court powers as a provincial court judge. His orders or judgments in the exercise of the Supreme Court jurisdiction are orders or judgments of the Supreme Court, and his orders or judgments under his County Court jurisdiction are County Court orders or judgments. The court itself is a Juvenile Court and the Act purports to give it the parens patriae power. The court also has powers relating to contempt and to costs. In summary, there is a principal appointment by the Governor General, and a secondary appointment by the Lieutenant Governor in Council,

and, except in Juvenile Court matters, the substantive orders are legally the orders of other courts.

The first three judges appointed to the Unified Family Court were previously judges of the Provincial Court (Family Division). They were appointed County Court judges and local judges of the Supreme Court at the request of the province, and all the usual consequences of those appointments followed. They sit exclusively in the Unified Family Court and accordingly are specialized within the family law field.

That raises squarely the question of whether the unified family court, if established as a superior court, should be a separate court or whether it should be associated with an existing superior court. Clearly Ontario has thought a separate court practicable and desirable, presumably for the reasons given by the Ontario Law Reform Commission which we have quoted at pages 29-30 of this Report. On the other hand, the other provinces which have so far experimented with the unified family court have not.

We start with the preference which we have already expressed for avoiding proliferation of separate court structures. We think also that there are some specific advantages to some form of association between the unified family court and another superior court. One is that family law, though it requires some special treatment, is and should remain part of the general law, and that the maintenance of a connection with the other branches of a superior court would help to keep it that way. We think also that there should not be unnecessary structural barriers against a movement of judges of the unified family court to and from the court or courts of general trial jurisdiction; even if it is thought that some degree of specialization is desirable, some facility for such movement appears desirable.

Finally, we think that service can better be provided outside the major population centres if judges of the superior courts of general trial jurisdiction are able to act as judges of the unified family court, and an association between the unified family court and a superior court will facilitate such an arrangement.

Accordingly, we do not think that, in the absence of strong evidence of the superiority of the Ontario solution, the unified family court should be established as a separate superior court.

(c) The unified family court as part of a superior court

(i) Plan of discussion

We have so far in this Report given reasons for recommending the establishment of a unified family court. We have given reasons against recommending that it be established as a provincially appointed court or as a separate superior court. These considerations, together with the further considerations which we will describe, have led us to the conclusion that the unified family court should be part of, or at least associated with, a superior court.

We pause here to say that for this purpose we use the phrase "superior court" to include the District Court, the Supreme Court, or a court established in substitution for the two. We will give our reasons. Although at the time of the writing of this Report the Speech from the Throne has suggested that a new superior court will be created, it is not for us to say whether that intention will be carried out. That being

so, we think that it would be futile for us to engage in an elaborate discussion of the advantages of attaching the unified family court to one or other of the existing courts, and that our recommendations should necessarily remain somewhat general so that decisions can be made about them when decisions about the other elements of the court system have been made, including decisions about the future structure of the District and Supreme Courts or their successor, and decisions about the recommendations of Report No. 3 of the Board of Review, Provincial Courts. By using the phrase "superior court," we provide for that course of action.

We have set out the characteristics which a unified family court should have, and some considerations which should be borne in mind when deciding upon its structure. We will now consider them in relation to the unified family court as part of a superior court. We will then go on to give our reasons for our principal proposal for a one-tiered family law division of a superior court and for our alternative proposal for a two-tiered family law division of a superior court, and we will then give reasons for not putting forward two other variants of the unified family court as a family law division of a superior court. Our principal proposal appears as Principal Recommendation #2 at page 58 of this Report, and our alternative proposal appears as Alternative Recommendation #2 at page 61.

In our discussion we will use the term "one-tiered court" to refer to a court in which all the judges are appointed by the same appointing authority and have equal jurisdiction. We will use the term "two-tiered court" to refer to a court in which some judges are appointed by the Governor General and some by the province and in which there are differences in the jurisdictions of the two groups. We will not use these terms to suggest that one court structure is better than

another, or that it is a test of the desirability of a court structure that it be one or the other. We will use them only for convenience.

We should at this point say that there is divergence of opinion in our Board as to which of the two alternative court structures which we will put forward would be the most beneficial. We are however unanimously of the view that the establishment of a unified family court is in the highest public interest, and that either the principal recommendation or the alternative recommendation should be adopted.

(ii) Considerations relevant to decision

(1) Specialization or concentration of judicial work

Most of our Board, for the reasons which we have given in our discussion of that subject, favour some degree of specialization or concentration of work of judges in family law. That is one major reason for our principal recommendation that the judges of the Family Law Division be specially appointed to that division. We think, however, that the area of specialization or concentration should be as broad as the field of family law, and one of our reservations about our alternative proposal is that it would confine the provincially appointed judges to a smaller area than the whole of family law; they would have more jurisdiction than the present Family Court, but the work may prove less attractive to the best potential judges if it is associated with an apparently junior position in a superior court.

Under either proposal the federally appointed judges (who under our principal recommendation would be all the judges) would specialize in, or concentrate upon, the whole field of

family law. We suggest however that there should not be complete specialization in a one-tiered court, or in the federally appointed tier of a two-tiered court. Judges of the Family Law Division should be ex officio members of the general trial division of the superior court and should spend some time in general trial work each year in order that they may not lose touch with the general law and in order that there be some variation in what they do. Trial judges of the superior court should also be ex officio members of the Family Law Division and sit in it occasionally. Such arrangements would be safeguards against the Family Law Division becoming too inward looking and would help to keep it in the mainstream of the judicial system. We doubt that it will prove practicable, though it would be possible, to make similar arrangments between the Provincial Court and the judges of the provincially appointed tier of a two-tiered court and accordingly expect that the latter would spend their full time in family law.

(2) Fragmented and overlapping jurisdictions

The establishment of a unified family court as a Family Law Division of a superior court would eliminate the problems arising from the fragmented and overlapping jurisdiction of the courts. The next question is whether or not a one-tiered court is necessary to ensure that no problems will arise from the fragmented and overlapping jurisdictions of the judges.

We can see the possibility of continuing problems if two tiers of judges make support and custody orders. Proceedings before the provincially appointed tier may be hampered, and even stopped, by the commencement and prosecution of divorce or other superior court proceedings before the federally appointed tier. Judges of the provincially appointed tier will enforce support orders which they cannot vary. There

may be other problems as well. The most efficient solution for this problem is a one-tiered court.

There are, however, steps that can be taken within the framework of a two-tiered court to alleviate these problems. A provincially appointed judge can continue to hear a matter until an order is actually made by a federally appointed judge, and he can be given power to make an interim order in the superior court proceeding, so that the inhibiting effect of the superior court proceeding should not be too great. Where a party wants to apply to vary an order made by a judge of the federally appointed tier, practices can be adopted which will give easy access to a federally appointed judge, and if the application is made because a collection proceeding is on foot, a federally appointed judge may be available to deal with both the collection proceeding and the application for variation. Provision can also be made for the provincially appointed judge to hear the application and make a report which is likely to be accepted by a federally appointed judge. The presence of a chief justice or associate chief justice of the Family Law Division would do much to ensure that procedural problems do not stand in the way of justice. While the alternative proposal does not completely solve the problems of fragmented and overlapping jurisdictions of judges, those problems would be alleviated and are therefore only one consideration to be weighed against the benefits of a two-tiered structure.

(3) Court procedures

There is a tendency for procedures in superior courts to be more elaborate than procedures in courts such as the Family Court and the Small Claims Court. Some family law matters can be dealt with best by simplified procedures, while others require more formal procedures. That might

suggest a two-tiered court in which the provincially appointed tier would deal with matters to which the simpler procedure would be appropriate and in which the federally appointed tier would deal with matters to which the more elaborate procedure would be appropriate. However, we do not think that there is anything in the nature of a superior court which makes it unable to follow a simplified procedure, and we think that a one-tiered superior court is therefore able to provide the necessary procedural flexibility.

(4) Suitability of family law litigation to a superior court

The argument that many family law matters are of a nature not usually dealt with by a superior court tends to suggest that a two-tiered court would be preferable to a one-tiered court. We tend, however, to the view that any legal problem arising from the breakdown of a family relationship is important enough to justify the attention of any court.

A related statement that we have encountered is that "section 96 judges" will not do the things that are now done by the Family Court. If the statement means that many judges appointed to courts of general trial division would consider inappropriate a deliberate and substantial change in the nature of the work of their courts by the assignment to them of protection order proceedings and proceedings for collection of support payments, it may prove correct, though it appears that the Manitoba pilot project will do that very thing. If, however, it means that qualified persons will not accept federal appointments if those appointments involve adjudicating in such proceedings, we do not see any foundation for it, as we think that a federal appointment to a court constituted in accordance with our recommendations will be perceived as worthwhile and challenging by a sufficient number of qualified

lawyers. It appears to us that such an appointment is likely to be more attractive than is an appointment to the present Family Court, and that court seems attractive to qualified judges.

(5) Accessibility

(a) Geographical

We will come back later in this Report to the problem of providing court services outside the metropolitan areas of the province. It is enough to say three things here. The first is that the court system must be able to give adequate service throughout the province to the extent that resources are committed to it. The second is that a two-tiered court structure would lend itself somewhat better to giving service elsewhere, as the stationing of judges of a superior court outside Edmonton, Calgary and Lethbridge is not characteristic of the present arrangement of the superior courts in Alberta. The third is that we do not think that there is anything inherent in the nature of a superior court which would preclude the making of any arrangements which appear appropriate.

(b) Financial and procedural

We have already discussed the question of the accessibility of the court to people of low income and people of little legal sophistication. That discussion tends to favour a two-tiered court because provincially appointed courts tend to operate more informally than the traditional superior courts. Again, however, there is nothing in the structure of the Family Law Division proposed by our principal recommendation which precludes the adoption of procedures suited to the subject matter of litigation before the court or which precludes the attachment of appropriate social and legal services to it.

(6) Acceptability to governments

If a one-tiered court is established, its judges would be appointed by the Governor General and paid from money appropriated by Parliament. If a two-tiered court is established, one tier would be appointed by the Governor General and paid from money appropriated by Parliament, and the other would be appointed by the province and paid from money appropriated by the provincial Legislature. These are circumstances which the federal and provincial governments will take into account. Although the federal government has encouraged the establishment of unified family courts and has made special judicial appointments to the Ontario pilot project, we are not able to assess its willingness to undertake on a permanent basis the responsibility of appointing and paying the judges needed for a unified family court exercising jurisdiction throughout the province. Nor are we able to assess the willingness of the province to give up the appointing power which it now has. We cannot therefore point to the likelihood of the greater acceptability to the two governments of either alternative as a reason for preferring one over another. We can only recommend that the two governments consult each other and attempt to negotiate an arrangement within the range of practicable alternatives outlined in this Report, with a view to coming to an agreement which will be in the interest of the people of the province and of the country. Failing such co-operation, we think that the provincial government should do what it can do unilaterally to achieve the objectives of the unified family court, but that we think that should be a last resort.

(7) Constitutional problems

We do not think that, given the co-operation of the two governments, there is a substantial constitutional problem with our principal proposal, a one-tiered Family Law Division of a superior court. The only possible problem that has been

suggested to us arises from A.G. Australia v. The Queen and the Boilermakers Society of Australia [1957] A.C. 288, where the Judicial Committee of the Privy Council held that under the Australian constitution judicial and non-judicial powers cannot be united in one body. We do not think that there is an analogy between the situation there and one in which the question is whether a superior court can exercise judicial powers characteristic of courts which are not superior courts.

There is more room for doubt about the constitutional validity of a two-tiered court. In 1972 Professor W.R. Lederman gave us an opinion which we will reproduce in Background Paper No. 11. It is to the effect that there may under the present constitution be a single family court that includes both federally and provincially appointed judges as long as the functions of the provincially appointed judges are confined to those functions which a province may validly confer on provincially appointed judges. He thought, however, that it would have to be a court composed of two sections or divisions, for the two different types of judges. His reason for this qualification upon his opinion was that there is a core of typical superior court jurisdiction that must be respected by a provincial legislature, that is, that there are certain types of laws that a province must assign for interpretation and application to a superior court. That being so, there must in his view be a superior court section of a provincial family court that is to cover the full range of family law issues, a section that would have federally appointed judges with exclusive original jurisdiction over the class of superior court issues in the family area. Professor McDonald in his opinion to us agreed with Professor Lederman's view that the province can establish a two-tiered court but not with the qualification that it must be composed of two sections or divisions. In his view, the Supreme Court of Canada in A.G. for B.C. v. McKenzie [1965] S.C.R. 490 established that

an adjudicator need not be appointed to a section 96 court to exercise section 96 functions; he need only be federally appointed. That being so, he thinks that it follows from the accepted validity of arrangements by which a single adjudicator, a provincially appointed magistrate, can exercise the section 96 powers conferred by the Criminal Code of Canada along with the powers of an inferior tribunal, that different members of the same court could do so without the necessity of sitting in different divisions.

Implicit in the concept of a "two-tiered court" is a distinction between the two "tiers" arising from the differences in the way the two tiers are appointed and paid and the differences in their respective areas of jurisdiction. Legislation establishing a two-tiered unified family court would necessarily reflect those differences; it would have to make separate provision for the establishment of each tier, for the jurisdiction of its judges, and, in the case of the provincially appointed tier, for their appointment and pay. Judges sitting in the two tiers would derive their jurisdiction from those different provisions. It seems to us that such a structure, if otherwise thought desirable, would provide any separate identity which is necessary, and we do not think that it would be necessary to go further and to require that proceedings be labelled in separate sections or divisions or that judges formally sit in separate sections or divisions.

(iii) The Institute's Principal Proposal: a one-tiered court

Our principal recommendation is that a family law division of a superior court be established. The superior court could be the Supreme Court, the District Court, or a court established to take the places of both, the choice to be made in the light of the decisions now being made or soon to be made about the structure of the courts in Alberta.

The judges of the Family Law Division would be appointed by the Governor General. They would all be clothed with all the jurisdiction of the Family Law Division in the field of family law as we have described it.

The judges of the Family Law Division would spend the greater part of their time in family law work. However, they would be ex officio judges of the division of the superior court having general trial jurisdiction and it would be understood that they would spend some time each year in general trial work, either by taking trial assignments or by being available in case of need to fill in for judges of the other division. Similarly, judges of the division having general trial jurisdiction would be ex officio judges of the Family Law Division, though it would be expected that they would do family law work only in case of need, most frequently, though not exclusively, when family law work arises on circuit.

We will discuss later the question of service outside the judicial centres, but will here say that where it is not practicable for judges of the Family Law Division to serve a locality, judges of the Provincial Court should be able to exercise the jurisdiction to grant orders of support, custody and temporary wardship, and to enforce orders of support.

This recommendation would not preclude the use of masters in the Family Law Division if considerations of efficiency suggest it. We do not think, however, that masters should be appointed specially to the Family Law Division if the Division is to have one tier of judges: masters of the Supreme Court or other superior court could be appointed with jurisdiction to deal with interlocutory matters. The view on which this recommendation is based is that judges should deal with all support and custody matters other than interim applications

in divorce or judicial separation. The jurisdiction of the masters should not be extended to the point at which they would really constitute a second tier of judges, a result which could be achieved by a succession of additions to their jurisdictions.

Our principal recommendation is based upon all the considerations which we have discussed in this Report. We will, however, summarize here our principal reasons for it:

1. We think that a substantial degree of judicial specialization or concentration of work in the court and a substantial degree of continuity in particular cases are desirable.

2. We think that the problems of fragmented and overlapping jurisdictions will not be solved as effectively by a court composed of two tiers of judges.

3. We think that a one-tiered court will avoid any distinction which would suggest that one class of family law litigation is of less importance than another, or should receive the attention of judges of lesser rank.

We will now record our principal recommendation.

Principal Recommendation #2

(1) That the unified family court be composed of judges of equal jurisdiction appointed by the Governor General.

(2) That it be a Family Law Division of the Supreme Court, the District Court, or any new court established to take the places

of the Trial Division and the District Court.

(3) *That judges be appointed to the Family Law Division and spend most of their time in its work.*

(4) *That judges of the Family Law Division be ex officio judges of the trial division of the superior court and spend some time in general trial work on a basis satisfactory to them and to the trial division.*

(5) *That judges of the trial division be ex officio members of the Family Law Division and spend some time in family law work on a basis suitable to them and to the Family Law Division.*

(iv) The Institute's alternative proposal: a two tiered court

We will now put forward our alternative proposal. We have three reasons for putting forward two proposals. One is the differences of opinion among members of the bench, the bar, the Committee on Administration of Justice, and our Board. The second is that the future structure of the courts in Alberta is not known to us and decisions upon that structure will affect the decisions to be made about the unified family court. The third is that the provincial and federal executive and legislative bodies may take into account in ways which we cannot assess the importance of the power to appoint judges and the responsibility of paying them. These considerations suggest that it is desirable for us by our recommendations to describe a field of choice.

Like our principal proposal, our alternative proposal contemplates the establishment of the unified family court as a Family Law Division of a superior court. The important differences between the two proposals are in the method of appointment of its judges and their jurisdiction and in resulting structural differences.

This proposal is for a two-tiered court. The Governor General would appoint the judges of one tier under section 96 of the British North America Act and all the usual consequences would flow from the appointment. The province would appoint and be responsible for the judges of the other tier. Judges of the federally appointed tier would do the work which can be done only by federally appointed judges. They would also have and exercise the jurisdiction exercised by the judges of the provincially appointed tier. It follows that the jurisdiction and the judicial work of the two tiers would overlap except in the areas requiring a federally appointed judge, principally divorce, nullity, judicial separation, support and custody ancillary to all three, division of matrimonial property, and the granting of injunctions.

We also propose here a relationship between the federally appointed tier of judges and the trial division of the superior court similar to that in our principal proposal, i.e., that the federally appointed judges of each division would be ex officio judges of the other and do some work in the other.

The reasons for our alternative recommendation may be summarized as follows:

1. We think that it, like our principal proposal, would provide a substantial degree of judicial specialization or concentration in the court and a substantial degree of continuity in particular cases.

2. We think that the summary and sometimes less formal proceedings which are desirable in many family law matters would more easily be achieved in a court which has a tier of provincially appointed judges of restricted jurisdiction than in a court consisting entirely of superior court judges.

3. While we do not all accept it, we recognize the force of the argument that some aspects of family law, such as summary support and custody matters, are less appropriate to a traditional superior court than to one having a tier of provincially appointed judges of restricted jurisdiction.

4. We think that practices and rules of court can be developed which will ensure that problems of conflicting and overlapping jurisdictions do not arise, or, at least, that those problems can be minimized so that they will not offset all the benefits to be gained.

5. We think that a two-tiered court will be better able to provide service outside the judicial centres, as provincially appointed judges are used to being stationed outside Edmonton and Calgary and travel more broadly throughout the province.

6. A two-tiered court would accomplish the objectives of the unified family court while making less change in existing institutions than would be made by any other constitutionally valid arrangement.

Alternative Recommendation #2

(1) That the unified family court be a Family Law Division of a superior court.

(2) That the Governor General appoint Federal Judges to the Family Law Division, who would have jurisdiction over all family law matters and who would spend most of their time in the Family Law Division.

(3) That the Lieutenant Governor in Council appoint Provincial Judges to the Family Law Division.

(4) That the Provincial Judges of the Family Law Division exercise all the family law jurisdiction which can be conferred on provincially appointed judges, and that in addition they be masters and referees of the Family Law Division.

(5) That the Federal Judges of the Family Law Division be ex officio members of the general trial division of the superior court and spend some time in the work of the general trial division on a basis satisfactory to them and to the judges of that division.

(6) That the judges of the trial division be ex officio judges of the Family Law Division and engage in some of the work of that division.

(v) A different two-tiered court

We should pause here to discuss a somewhat different proposal for a two-tiered court which we have already mentioned at page 5. Under that proposal, the judges of the federally appointed tier would be the judges of the Trial Division sitting by rotation in the Family Law Division, so that the Family Law Division would be composed of a provincially appointed tier of specialized judges and a federally appointed tier of judges of general trial jurisdiction. That is the essence of a proposal made to the Committee on Administration of Family Law by a group of members of the Trial Division of the Supreme Court, though their specific proposal envisaged the judges of the District Court as a third tier.

The proposal of the members of the Trial Division deserves consideration because of its source and because of its merits, and it has received some support on our Board. It would leave the Trial Division and its work essentially untouched except as to the formal creation for administrative purposes of the Family Law Division of the Supreme Court. The provincially appointed tier would in many ways resemble the present Family Court, so that it can be argued that this proposal would do even

less violence to existing institutions than would our alternative proposal. For the same reason it would avoid any proliferation of court structures and would advance rather than detract from the notion of one superior court of general trial jurisdiction. For those who do not think any specialization or concentration desirable, it avoids both and to them it is for that reason desirable.

After much debate and anxious consideration, however, we have finally concluded that we should not recommend that this proposal be adopted. Most of us think that some form of specialization or concentration on family law work is desirable and that a situation in which specialized judges deal with some family law matters and in which non-specialized judges deal with others is not. We also think that the two tiers which it envisages would be quite isolated from each other and that a consistent approach to family law problems would be much less likely to be achieved. The alternative proposal which we have made meets these two points.

(vi) A superior court with one non-specialized tier

Jurisdiction in all family law matters could be conferred upon an existing or new superior court of general jurisdiction, and the court services could be attached to it. That is the essence of the Manitoba pilot project. The legislation (S.M. 1976, c. 73) establishes the St. Boniface Family Law Division of the Court of Queen's Bench, and confers upon it jurisdiction in matters under provincial legislative jurisdiction. Because the Court of Queen's Bench already has the jurisdiction in divorce, the St. Boniface Family Law Division has jurisdiction in all matters which we have classified as family law with the exception of juvenile delinquency, which was intentionally omitted. No judges are to be appointed specially to the Family Law Division; its work

will be done by judges and local judges of the Court of Queen's Bench assigned to it as part of their usual judicial work.

That arrangement would do a great deal. In particular, it would solve the problems which arise from fragmented and overlapping jurisdictions. All of a couple's problems could be brought before one judge. Delay and harassment through the threat or the fact of multiplicity of proceedings would be avoided, or at least minimized, because one judge would be able to control the proceedings. Procedures could be designed to accommodate different kinds of cases. The arrangement would avoid fragmentation of the courts by leaving jurisdiction in family law matters with a court of general trial jurisdiction. The standing of the court would be suitable to the importance of the subject matter.

Nevertheless, in the absence of strong evidence of the superiority of the Manitoba solution, we do not recommend that it be chosen over either of the two proposals we have made.

Most of our Board think that some degree of specialization or concentration by at least some of the judges in family law matters is desirable and will tend to lead to a better understanding of family law problems and of the place of the social services in the solution of those problems. Most of our Board think also that some continuity in dealing with individual problems is desirable. We do not think that these objectives are as likely to be achieved within a superior court or their successor without some differentiation in structure.

If an arrangement of this kind were instituted throughout Alberta, its effect on the Trial Division or other superior court would have to be considered. The addition of the family law work done by provincially appointed judges would have a substantial effect on its workload and would require the

appointment to it of a number of additional judges. The effect would be rather less if a new superior court is substituted for the Trial Division and the District Court, as there would be more judges to share the additional burden, but it would still be substantial. The addition of summary jurisdiction support and custody matters to the day-to-day work of an existing superior court would, we think, be somewhat inconsistent with the usual functioning of a superior court of general trial jurisdiction, though we recognize that it would be possible. The addition of juvenile matters would effect a further change. These considerations also suggest to us that jurisdiction in all family law matters should not be conferred upon a superior court of general trial jurisdiction.

While we will deal separately with the problems of service outside the main centres of population, we think that these problems would be rather more intractable if all family law jurisdiction were to be conferred upon a superior court of general jurisdiction. It would require a major change in the arrangements of an existing superior court to provide service to additional points to the extent of the circuit system now operated by the Family Court, and we doubt that it is practical to suggest that such a change be made. We therefore think that the arrangement under discussion would, to an extent greater than the remaining alternatives, result in one court system for the judicial centres now served by the existing superior courts and another for the rest of the province, a situation which we think undesirable.

We leave the discussion of the relationship of juvenile and family courts until later, but we should say here that the arrangement under discussion would be inconsistent with the recommendations of Report No. 3 of the Board of Review, Provincial Courts.

For all these reasons we do not recommend that all family law matters be dealt with as part of its general judicial work by a superior court of general trial jurisdiction.

VI

SERVICE OUTSIDE THE METROPOLITAN AREAS

We have already discussed the requirement of accessibility to the unified family court and the need to ensure that those parts of the province which are outside the metropolitan areas are given adequate service by the courts which administer family law. This is a subject with which the existing Canadian pilot projects do not deal. We think that this is a subject which should be dealt with separately to be sure that it is not overlooked.

We start with the proposition that the establishment of a unified family court should not reduce the existing quantitative level of service given by the courts in family law outside the metropolitan centres, and the further proposition that the resulting court system should have at least as much capacity for improving the quantitative level of service as does the present court system. We are in this Report directing our efforts toward devising a court system which we think will make it possible for those involved in it to give more efficient service, but we do not think that without additional money and personnel, it will be able to give service more widely than do the existing courts. Maintenance of existing quantitative levels of service is the minimum below which the reformed system should not go, though improvement should of course be its objective.

It is likely that it will be a considerable time before the Family Law Division, if established, will be able to provide as extensive a service to the judicial centres as the

Supreme and District Courts provide in matters under their jurisdiction. In the meantime, and possibly for the indefinite future, when they are on circuit the judges of the District and Supreme Courts should be asked to undertake family law work of the kinds which they now do, though only if the Family Law Division cannot provide the service. That is consistent with our previous recommendations about the relationship between the Family Law Division and the general trial division of the court of which it would form a part, but we will make a further recommendation about that relationship to deal specifically with the problem of service outside the metropolitan areas.

We think that in matters now under the jurisdiction of the Family Court, the Family Law Division should from the time of its establishment in an area provide as extensive a service to the judicial centres and other places as the Family Court now does. The achievement of that objective is likely to require that judges of the Family Law Division be stationed outside Edmonton and Calgary, as it seems unlikely that circuits can in all cases be as efficiently operated from those two cities as from other places. Such an arrangement will impose upon those charged with the administrative responsibility for the court the duty to ensure that the judges do not become isolated from their colleagues, but the importance of the objective justifies the additional burden.

We think, however, that it is likely to prove necessary that judges of the Provincial Court continue to have jurisdiction to grant and enforce summary orders of support, and custody and probably temporary wardship orders. Justice delayed, or justice far away, may be justice denied, and judges of the Provincial Court visit many places in the province which are visited infrequently or not at all by judges of the Family Court. It should be understood that judges of the Provincial Court would exercise jurisdiction in family law matters only

when judges of the Family Law Division are not available. In view of the fact that jurisdiction of Provincial Court judges in juvenile matters is specifically dealt with in Report No. 3 of the Board of Review, Provincial Courts, we do not make any recommendation with respect to it.

Recommendation #3

(1) That the necessity of maintaining and the objective of improving the amount of judicial service in family law matters outside the metropolitan areas be considered as a separate subject.

(2) That the judges of the Supreme and District Courts or of a successor court be asked to exercise on circuit where appropriate the jurisdiction which they now exercise in family law matters and (to the extent that Recommendation #2 does not already so provide) they be ex officio members of the Family Law Division.

(3) That the judges of the Family Law Division be stationed and their circuits arranged so as to provide in matters now under the jurisdiction of the Family Court an amount of judicial service at least equal to that now provided by the Family Court.

(4) That the judges of the Provincial Court have jurisdiction to grant and enforce summary orders of support and orders of custody and temporary wardship, and that they be asked to deal with such matters when judges of the Family Law Division are not available.

VII

AVOIDING PROBLEMS OF JURISDICTION

The purpose of our recommendations is to have all family law matters disposed of by one court, and it is to achieve that purpose that we have recommended the establishment of a Family Law Division of a superior court. The establishment of that Division, however, should not create a situation in which a great number of questions of jurisdiction will be

litigated or in which a litigant may find that a proceeding commenced in good faith is a nullity. If our recommendation for a Family Law Division of a superior court is accepted, the jurisdiction in family law can be conferred upon the superior court itself. Rules of court could then provide for the commencement of family law matters in the Family Law Division and for the transfer from one division to another of proceedings started in the wrong division.

The avoidance of jurisdictional problems should be dealt with after the outlines of the structure of the unified family court have been settled. We do not make any recommendation here but will merely record our concern so that it will not be overlooked.

VIII

ORGANIZATION OF THE UNIFIED FAMILY COURT

1. Appointment of judges

The appointment of the judges of the Family Law Division is crucial to the success of the court. The recommendation that it be a division of a superior court carries with it the implication that judges of the court who are federally appointed will have the legal qualifications required for that court by the Judges Act and we are content with those requirements. It carries with it also the implication that the federally appointed judges will be paid the same salaries as that paid to the judges of the trial division of the court and will have the same tenure, and we are content with that as well. If there are to be provincially appointed judges, their qualifications, salary and tenure should be the same as those of the judges of the Provincial Court.

We have said, perhaps platitudinously, that the court should be composed of judges of the greatest possible capacity

to deal with family law disputes. It is the function of the appointing authority to find such judges, and the appointing authority would no doubt strive to perform it, but we think that the subject is of sufficient importance to include a recommendation to that effect. Experience and interest in the field of family law would of course be desirable qualifications for judges of the Family Law Division.

Recommendation #4

(1) That the legal qualifications, salary and tenure of federally appointed judges of the Family Law Division be the same as those of the judges of the trial division of the court.

(2) That judges of the greatest possible capacity to deal with family law matters be appointed to the court, experience and interest in the family law field being desirable.

(3) That the legal qualifications, salary and tenure of provincially appointed judges of the Family Law Division be the same as those of the judges of the Provincial Court.

2. The Chief Justice

The Family Law Division should be administered separately from the general trial division of the court of which it forms part. It should therefore have its own head. Our recommendations, however, would maintain a substantial connection between the Family Law Division and the general trial division of the court and would provide for mutual assistance between the two divisions. The two divisions should therefore have a common head to ensure that they will work effectively and harmoniously in cooperation with each other. In order to provide one head for the Family Law Division and a common head for both we recommend that there be one chief

justice for the two divisions and an associate chief justice for one. The associate chief justice should sit with and administer one division. The chief justice should sit with and administer the other and should, in consultation with the associate chief justice, have the administrative responsibility for the making of arrangments affecting the two divisions, in general, and arrangements for the interchanges of judges, in particular. The appointment of assistant chief justices within the two divisions would not be precluded, but details of administration are beyond the scope of this Report.

Recommendation #5

(1) That there be a chief justice for the Family Law Division and the general trial division of the court and an associate chief justice for one of them.

(2) That the chief justice sit with and administer one division and that the associate chief justice sit with and administer the other.

(3) That the chief justice, in consultation with the associate chief justice, have administrative responsibility for the making of arrangements affecting the two divisions, in general, and arrangements for the interchange of judges, in particular.

3. Nature of Court

We have already said that the unified family court should be a court of law in which the judge hears the evidence, decides the facts, and gives judgment in accordance with law. The proposals we have made will, we think, lead to the establishment of such a court, but we will record a recommendation to that effect here.

Recommendation #6

That the unified family court be a court of law in which the judge hears the evidence, decides the facts, and gives judgment in accordance with law.

4. Procedure

We have already said that the Family Law Division should provide procedures to suit the different kinds of proceedings which will be carried on in it. Consideration should be given to rules of court, including consideration of the extent to which rules now applicable to the Supreme and District Courts will be appropriate, and consideration of the rules which should apply to the summary proceedings. We think that a counterpart of the present Rules of Court Advisory Committee should be set up for the unified family court, and that the Lieutenant Governor in Council should be empowered to promulgate rules of practice and procedure for the court. The establishment of the Committee should take place when the court has been established and well in advance of the commencement of its operation. Some rules, such as the divorce rules, would continue to be made under federal authority for constitutional reasons.

Recommendation #7

(1) That rules of court be provided for the Family Law Division.

(2) That a special Rules of Court Advisory Committee be established for the Family Law Division.

(3) That the Lieutenant Governor in Council be empowered to promulgate rules of practice and procedure for the Family Law Division to the extent that that is constitutionally possible.

5. Court Services

As we have said, we do not propose in this report to deal with the social and legal services which should be attached to the unified family court. That is the subject matter of our Report No. 26, Family Law Administration: Court Services, though, as that report suggests, it will be necessary to review the court services at the time of the establishment of the Family Law Division in order to see what modifications will be necessary to make them suitable to it. We will here simply record a recommendation that the services should be provided.

Recommendation #8

That court services be attached to the unified family court in accordance with our report No. 26, Family Law Administration: Court Services, subject to review upon the establishment of the unified family court to see what administrative modifications must be made in order to make them suitable for the unified family court.

6. Establishment of the unified family court

We do not propose to make detailed recommendations about the way in which the establishment of the unified family court should be carried through. Many things will depend upon the discussions between the federal and provincial governments which we hope will be undertaken. We do say, however, that we do not see the need for a separate pilot project in Alberta; we think that the pilot projects elsewhere in Canada should be watched and their results considered, but we think that they are enough. While it may well be that the unified family court, once decided upon, should be established in stages, we think that that sort of consideration should be dealt with after decisions in principle have settled the main outlines of the structure of the unified family court.

IX

REPORT NO. 3, BOARD OF REVIEW, PROVINCIAL COURTS

In their Report No. 3, the Juvenile Justice System in Alberta, the Board of Review, Provincial Courts, found a number of disadvantages in the present arrangement under which judges of the Provincial Court sometimes preside in Juvenile Court and the Chief Judge of the Provincial Court is the Chief Judge of the Juvenile Court. Their description of these disadvantages appears at pp. 49-50 of the Board's Report and is quoted at p. 15 of this Report. We turn now to consider whether our recommendations are consistent with those of the Board of Review, which are as follows:

1. Provincial Court judges should not exercise jurisdiction as Juvenile Court judges.

2. The Family and Juvenile Courts should be accorded statutory recognition as joint Courts.

3. The joint Courts should be separate and distinct from the Provincial Courts.

4. Provision should be made for the appointment of a Chief Judge of these joint Courts.

It appears to us that the essence of these recommendations is that there be an arrangement guaranteed by statute under which juvenile matters will be dealt with by a court which specializes in family matters and not by a court which specializes in criminal matters. We therefore think that our recommendations are consistent with the spirit of the recommendations made by the Board of Review, and that they do not depart from that spirit by taking the additional steps necessary to concentrate in one court the whole administration of family law and not only the part to which the attention of the Board of Review is directed by its terms of reference.

While our recommendations might leave the Family Law Division with an associate chief justice rather than a chief justice, we think that they make sufficient provision for a court which is a separate entity administered by its own head and that they therefore do not depart in this respect from the spirit of the Board's recommendations.

W. F. BOWKER
M. DONNELLY
R. P. FRASER
W. H. HURLBURT
E. JACOBS
J. P. S. McLAREN
W. E. WILSON

BY: _____
ACTING CHAIRMAN

_____
DIRECTOR

April 1978

Note: The Chairman of our Board, Judge W. A. Stevenson, thought it inappropriate for him, as a judge of the District Court, to take part in a report and recommendations on this subject.

APPENDIX A

SUMMARY OF RECOMMENDATIONS

Recommendation #1 (pp. 24-25)

1. *That a unified family court be established in Alberta to exercise jurisdiction over the following:*

   (1) the formation, annulment and dissolution of marriage.

   (2) the rights and obligations of husband and wife between themselves.

   (3) declarations as to status, including declarations of legitimacy.

   (4) judicial separation and restitution of conjugal rights.

   (5) matrimonial support.

   (6) the division or transfer of property upon the breakdown of the marriage relationship.

   (7) child guardianship, custody, access and support.

   (8) criminal charges which arise from a family dispute, such as husband-wife assaults and threats and non-support, but not including charges of more serious crimes such as murder and manslaughter.

   (9) neglected children, wardship, guardianship and adoption.

   (10) affiliation proceedings.

   (11) juvenile delinquency.

Principal Recommendation #2 (pp. 58-59)

   (1) That the unified family court be composed of judges of equal jurisdiction appointed by the Governor General.

   (2) That it be a Family Law Division of the Supreme Court, the District Court, or any

new court established to take the places of the Trial Division and the District Court.

(3) *That judges be appointed to the Family Law Division and spend most of their time in its work.*

(4) *That judges of the Family Law Division be ex officio judges of the trial division of the superior court and spend some time in general trial work on a basis satisfactory to them and to the trial division.*

(5) *That judges of the trial division be ex officio members of the Family Law Division and spend some time in family law work on a basis suitable to them and to the Family Law Division.*

Alternative Recommendation #2 (pp. 61-62)

(1) *That the unified family court be a Family Law Division of a superior court.*

(2) *That the Governor General appoint Federal Judges to the Family Law Division, who would have jurisdiction over all family law matters and who would spend most of their time in the Family Law Division.*

(3) *That the Lieutenant Governor in Council appoint Provincial Judges to the Family Law Division.*

(4) *That the Provincial Judges of the Family Law Division exercise all the family law jurisdiction which can be conferred on provincially appointed judges, and that in addition they be masters and referees of the Family Law Division.*

(5) *That the Federal Judges of the Family Law Division be ex officio members of the general trial division of the superior court and spend some time in the work of the general trial division on a basis satisfactory to them and to the judges of that division.*

(6) *That the judges of the trial division be ex officio judges of the Family Law Division and engage in some of the work of that division.*

Recommendation #3 (p. 68)

(1) *That the necessity of maintaining and the objective of improving the amount of judicial service in family law matters outside the metropolitan areas be considered as a separate subject.*

(2) *That the judges of the Supreme and District Courts or of a successor court be asked to exercise on circuit where appropriate the jurisdiction which they now exercise in family law matters and (to the extent that Recommendation #2 does not already so provide) they be ex officio members of the Family Law Division.*

(3) *That the judges of the Family Law Division be stationed and their circuits arranged so as to provide in matters now under the jurisdiction of the Family Court an amount of judicial service at least equal to that now provided by the Family Court.*

(4) *That the judges of the Provincial Court have jurisdiction to grant and enforce summary orders of support and orders of custody and temporary wardship, and that they be asked to deal with such matters when judges of the Family Law Division are not available.*

Recommendation #4 (p. 70)

(1) *That the legal qualifications, salary and tenure of federally appointed judges of the Family Law Division be the same as those of the judges of the trial division of the court.*

(2) *That judges of the greatest possible capacity to deal with family law matters be appointed to the court, experience and interest in the family law field being desirable.*

(3) *That the legal qualifications, salary and tenure of provincially appointed judges of the Family Law Division be the same as those of the judges of the Provincial Court.*

Recommendation #5 (p. 71)

(1) That there be a chief justice for the Family Law Division and the general trial division of the court and an associate chief justice for one of them.

(2) That the chief justice sit with and administer one division and that the associate chief justice sit with and administer the other.

(3) That the chief justice, in consultation with the associate chief justice, have administrative responsibility for the making of arrangements affecting the two divisions, in general, and arrangements for the interchange of judges, in particular.

Recommendation #6 (p. 72)

That the unified family court be a court of law in which the judge hears the evidence, decides the facts, and gives judgment in accordance with law.

Recommendation #7 (p. 72)

(1) That rules of court be provided for the Family Law Division.

(2) That a special Rules of Court Advisory Committee be established for the Family Law Division.

(3) That the Lieutenant Governor in Council be empowered to promulgate rules of practice and procedure for the Family Law Division to the extent that that is constitutionally possible.

Recommendation #8 (p. 73)

That court services be attached to the unified family court in accordance with our report No. 26, Family Law Administration: Court Services, subject to review upon the establishment of the unified family court to see what administrative modifications must be made in order to make them suitable for the unified family court.

APPENDIX B

80

COMMITTEE ON ADMINISTRATION OF FAMILY LAW

MEMORANDUM OF RECOMMENDATIONS

July 27, 1976.

I. INTRODUCTION

(1) Formation of Committee

The Committee assembled at the request of the Institute of Law Research and Reform. Its purpose is to examine the structure of courts administering family law and to make proposals for providing the most effective administration of justice in the family law field. Members were nominated by the Attorney General, the Chief Justices and Chief Judges of the Courts, the Law Society of Alberta, and the Institute.

(2) Members of Committee

The Honourable W.A. McGillivray	-	Chief Justice of Alberta
Mr. Justice J.H. Laycraft	-	Trial Division Supreme Court of Alberta
Judge John Bracco	-	District Court of Alberta
Judge Douglas Fitch	-	Family Court of Alberta
Margaret Donnelly (with Joanne Veit as alternate)	-	Department of Attorney General
V. W. Smith	-	Law Society of Alberta
Walter Coombs	-	Chairman of Institute's Committee on Social Services
S. S. Purvis, Q.C.	-	Nominated by Institute
W. R. Pepler	-	Institute of Law Research and Reform
W. H. Hurlburt, Q.C. (Chairman)	-	Institute of Law Research and Reform

James L. Lewis, Counsel for the Board of Review into Provincial Courts, sat with the Committee as liaison with the Board. He made valuable contributions to the discussions but bears no responsibility for the Committee's recommendations.

(3) Proceedings of Committee

The Committee met on March 26th and April 9th in the afternoon, on April 23rd, May 21st and June 11th, morning and afternoon, and on July 12th in the morning. As it proceeded minutes of its meetings were circulated to members of the Appellate Division, the Trial Division, the District Court and the Family Court and the developing proposals were the subject of valuable comment by members of those courts. In addition, Mr. Smith received or invited comment on the Committee's proposals from members of the bar in Calgary, Edmonton, Red Deer and Vegreville who are specially interested in the field.

2. PRINCIPAL RECOMMENDATIONS OF THE COMMITTEE

The Committee recommends:

(1) That one court, known as the Family Court of Alberta, have original exclusive jurisdiction in family law matters.

(2) That the court be based upon the existing Family Court and consist of provincially appointed judges.

3. LIMITATIONS OF PRESENT COURT STRUCTURES

Family law deals with the problems of husbands and wives arising from the breakdown of marriages. It deals with problems of the protection and support of children arising from the breakdown or lack of family relationships, and the problems arising from unlawful conduct of children and juveniles. These are among the most numerous and the most serious and important problems with which society must deal, and it is imperative that society provide strong courts and efficient social services in order to deal with them.

The Committee is concerned that the numerous and varied problems affecting families are not being satisfactorily dealt with under the present divided court structure. The fragmented jurisdiction makes improvement very difficult. The Committee is convinced that the time has come when important changes and solutions can be implemented only if a Family Court is created with original exclusive jurisdiction over the entire field of matters affecting the family.

Some of the most important problems arising from the division of jurisdiction among courts are as follows:

(1) Piecemeal solutions - Because jurisdiction is divided it very often happens that no one court can deal with the whole of the legal problems arising from the breakdown of a marriage or of a family, and piecemeal solutions must be applied.

(2) Delay - Litigants are enabled to delay proceedings in one court by starting, or threatening to start, proceedings in another.

(3) Harassment - Litigants are enabled to harass other litigants by the multiplicity of proceedings which are available in different courts.

(4) Inappropriate procedures - Different procedures are available in different courts, and the most appropriate procedure is often not available for a particular problem.

Particular examples of these problems are as follows:

(1) A maintenance dispute may start in Family Court as a protection order, move to Supreme Court as part of a divorce, come back to Family Court when the Supreme Court order is registered for enforcement, and go back to Supreme Court for variation of the order, with resulting delay, cost, and frustration for the litigant.

(2) A temporary wardship proceeding is usually brought in Family Court, but if the facts suggest that the wardship should be made permanent, another proceeding must be commenced in a different court.

(3) There may be concurrent or consecutive proceedings for custody in the Supreme Court and wardship in the Family Court or in the District Court. The Supreme Court judge has no way of ordering wardship if he perceives that that is what should be done, and his order for custody can be rendered nugatory by an order in the wardship proceedings.

(4) Wardship and maintenance proceedings involving the children of married or unmarried parents must be brought separately in different courts.

Another important problem is that the social services cannot readily be related to a multiplicity of courts, with the result that they are not used as effectively as they might be. They are not as effectively available to litigants, bench and bar in the Supreme Court as they are in the present Family Court, and there is insufficient opportunity for judges and social service personnel to

develop a proper understanding of each other's functions and needs. An example is the use of investigative services in custody matters on divorce.

The Committee is satisfied that the problems are so serious, and that the resulting difficulties to the people who appear before the courts are so great, that solutions must be sought. Its proposal, the creation of a single court to deal with family law matters, will of course create new problems; but these will in the Committee's opinion be lesser problems and can be surmounted. The Committee believes that its proposal will solve some of the most serious of the existing problems and provide the best judicial structure for the solution of the others.

4. DETAILED PROPOSALS

(1) One Court at Provincial Level

(i) Structure of Court

The proposed court should be created by statute in place of the present Family Court, and should be called "The Family Court of Alberta". It should continue to be, as the present Family Court now is, a separate court with its own identity.

The Committee has considered the alternative proposal that the unified Family Court be created as part of the Supreme Court or as a separate superior court, but its view is that it is better to create the court at the Provincial Court level and to base it upon the existing Family Court. The Committee's reasons are as follows:

(1) The great bulk of family law work can best be done by a court which is at home with simplified and summary procedures, and such a court can best be created from the present Family Court and maintained at the Provincial Court level; superior courts tend to follow more complex procedures which are less appropriate to most family law matters than to the other litigation in those courts.

(2) The court should also be at home with the use and effective application of the social services, and the Committee thinks that a court based upon the present Family Court is in the best position to become expert in their use.

(3) The Committee's proposal will create a unified Family Court while doing the least possible violence to existing institutions in order to achieve that end; the creation of a superior court and the working out of its relations with the rest of the judicial system would give rise to far greater practical difficulties than will the adaptation of an existing institution.

The Committee's view is that a judge of the Family Court should act judicially upon evidence properly before him. The social services available through the proposed Family Court should

be directed towards reconciling spouses if that is practicable, or of conciliating specific issues such as custody and maintenance, and to the extent that success is achieved matters will be kept out of the judicial process. Once, however, the parties have called for a judicial determination, there should be a proper adjudication on evidence taken only in open court and legal rights should be ascertained and enforced.

(ii) Constitutional Problem

The Committee's proposal requires the co-operation of the Legislature and Executive of the Province and of the Parliament of Canada and the Federal Executive. Only Parliament can confer jurisdiction in divorce. Only judges appointed by the Governor General can adjudicate upon some of the important matters to be dealt with in Family Court such as divorce, nullity, judicial separation and matters relating to property, and it is doubtful that provincially appointed judges can be empowered to grant injunctions or restraining orders. Only the Legislature of the province can establish the proposed Family Court. The Committee would prefer to see the federal part of the problem solved by two pieces of legislation. One would be an amendment to the Divorce Act which would assign jurisdiction in divorce to the proposed Family Court. The other would be an amendment to the Judges Act which would allow the Governor General to confer upon judges of the Family Court jurisdiction to deal with family law matters which are now reserved for superior court judges. The Committee recognizes, however, that that proposal involves further difficulties in that section 100 of the British North America Act requires that Parliament provide for the payment of judges and that section 99 deals with the security of tenure of judges and may not be appropriate here. The Committee is satisfied that the

problem can be solved by federal-provincial co-operation and they think that both governments should be urged to recognize that the public interest urgently requires that co-operation.

(2) Jurisdiction of the Court

(i) Problem of Definition

The Committee recognizes that the creation of a specialized court will inevitably give rise to questions about the boundaries of its jurisdiction. The Committee believes that those questions will be minimized by its proposal that the court be given jurisdiction over broadly defined areas of law.

(ii) What is Included

The proposed Family Court should have original exclusive jurisdiction over the following:

1. Divorce, nullity, judicial separation and restitution of conjugal rights.

2. Alimony and maintenance between spouses.

3. Guardianship of the person, maintenance and custody of children.

4. Affiliation proceedings.

5. Neglected children, including temporary and permanent wardships.

6. Adoptions.

7. Variation and enforcement of orders, including the power in the judges of the court to issue garnishment orders which would have effect on a continuing basis.

8. Criminal matters within the family, so long as the family element exceeds the criminal element. Clearly murder belongs in the criminal courts and common assault between husband and wife belong in the proposed Family Court, but the Committee is not sure just where the line should be drawn and thinks that the Board of Review into the Provincial Courts has a better knowledge from which to draw it.

9. Juvenile matters.

10. Injunctions and restraining orders in family matters.

11. Questions of property between husband and wife.

The judges of the proposed Family Court should also have jurisdiction in juvenile matters. The Committee is of the view, however, that, there should continue to be a separate Juvenile Court of which the Family Court judges should be members. The main purpose of that recommendation is to enable Provincial Judges to continue to exercise the jurisdiction of juvenile court judges, particularly in areas outside the metropolitan centres, so that where Family Court judges are not available there will be no reduction of service.

In connection with their family law jurisdiction, the judges of the proposed Family Court should have power to grant injunctions. These would include orders restraining one spouse from molesting another, orders leaving one spouse in the exclusive possession of the matrimonial home, and such other injunctions as might be required in the circumstances of the particular case.

(iii) Transfer to the Supreme Court

As it has said, the Committee believes that the proposed Family Court should have exclusive jurisdiction in matters of family law. However, there will be some matters which can be better dealt with by the Supreme Court. The Committee therefore proposes that an action, or some one or more of the issues therein, may by leave of a judge of the Supreme Court be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason such action or issues may be more conveniently tried in the Supreme Court. Because future needs are not foreseeable the Committee would not impose detailed restrictions upon the transfer power, but it has in mind such things as complex property or company matters. The Supreme Court should also have power to transfer the action or one or more of the issues back to the Family Court.

Property matters are peculiarly associated with Supreme and District Courts. The Committee is of the view, however, that it would be very unfortunate if the Family Court were to have jurisdiction over a divorce but not over the related property matters. It thinks that where the question relates to property which arises from the husband-wife relationship the matter is primarily one of family law; and that if the question is more closely related to property law it can be transferred to the Supreme Court.

A question then arises as to which court should have power to vary and enforce maintenance and custody orders made by the Supreme Court in matters transferred to it. In most cases it will be convenient for the Family Court to do so, but there may be exceptional cases. The Committee is of the view that the best provision is that once a judge of the Supreme Court has made an order for custody or maintenance the order should go back to the Family Court unless the Supreme Court judge otherwise orders, with power in the Family Court to enforce and vary it.

(iv) Service Outside Metropolitan Areas

So far as possible the services of the proposed Family Court should be available throughout the province. The Committee, however, recognizes that there are special problems in providing those services outside the larger population centres.

Judges of the Supreme and District Courts are available on circuit to deal with many family law matters while they are performing their general judicial duties throughout the province. The Committee is of the view that they should have power ex officio to sit in the Family Court. The purpose of that proposal is to allow them to deal with matters coming before them on circuit in order that the level of service available to people living outside the larger population centres will not decline.

The Committee has already recommended that the Juvenile Court remain in being. Provincial Judges of the Provincial Court should have the right ex officio to sit in Juvenile Court in order to maintain at least the existing level of service in that field throughout the province.

(3) Judiciary

(i) Specialized Judges

The next question is whether or not the judges of the proposed Family Court should be specialized. The Committee's view is that specialization will inevitably flow from the creation of a unified family court, though the specialization of an individual judge may be for a fixed period.

The Committee is of the view that specialization will bring with it the advantage of continuity in particular cases, which is difficult to achieve if the judges are assigned to different sittings each week; and the advantage of experience in dealing with family law matters, which have aspects different from the administration of justice in general. Specialized judges have a much better opportunity to assess the benefits and limitations of the social services and to develop methods of using those services to the best advantage. While the Committee would not recommend the establishment of a unified family court for the sake of specialization, it is of the view that advantages of specialization in this unique field will outweigh the disadvantages.

Some concerns about specialization have been expressed to the Committee. One is that the great bulk of the cases in family law are based on similar facts and that after a long period of time a judge hearing them is likely to become jaded or alternatively is likely to become too closely involved with the social services and to lose objectivity. There are already in existence, however, specialized criminal and family law courts, and the proposed

Family Court will have a broader specialty than the latter now has. Further, the Committee thinks that it will be possible to arrange to transfer a judge out of the proposed Family Court to other provincial courts either when the judge feels the need of change or on a systematic basis. The Committee does not expect the judge to become too much involved with the social services if, as the Committee suggests, the social services are separately administered and the judicial role of the judges is stressed.

Another concern which has been expressed to the Committee is that the supply of first class judges willing to devote their lives to such a specialized field may not be great enough to meet the extra demands which will be placed upon it. The Committee notes, however, that the supply of good judges for the provincial courts specializing in criminal matters and in family matters appears to be increasing, and that the specialized family law bar also appears to be increasing. It thinks that the problem can be met, and that it can be minimized by arrangements for transfer out of the proposed Family Court when transfer is desirable.

The Committee does not see any practicable alternative to a specialized court. If the proposed Family Court were to be part of or associated with the Trial Division of the Supreme Court, it would be possible to have judges of the Trial Division sit on an assignment basis in the Family Court. That arrangement would in the Committee's view require junior judicial officers to do the maintenance, custody and enforcement work now done by the present Family Court and would require those junior judicial officers to be more narrowly specialized than the judges of the Family Court which the Committee proposes and their positions would be less attractive to highly qualified persons. While those

junior judicial officers might be enabled to move back and forth from the Provincial Court, a two-tiered court in which the judges in each court are members of another court would not in the Committee's view be practicable, and would not achieve the desired objectives.

(ii) Workload of the Courts

The Committee's proposal would transfer divorce, nullity, judicial separation, adoption, permanent wardship and some other matters to the Family Court and would give that Court the power to vary all maintenance and custody orders. The transfer would result in the proposed Family Court having substantially more work than the present Family Court, and would require the appointment of additional judges.

The workload of the Trial Division and of the District Court would be reduced accordingly, but that would probably be compensated for by the growth of other work in those courts.

(iii) Recruiting of Judges

It is obvious that the effective operation of the proposed Family Court will depend upon the appointment of judges in whom the legal profession and the public will have confidence. That involves finding judges of high abilities and conscientious devotion to the family law field. The Committee does not think that it can go further than to make this statement of the obvious; the appointment of judges of the Provincial Courts is the function of the Attorney General and it is for him and the Government to ensure that appointments are properly made in the light of their great public importance.

(iv) Chief Judge

The proposed Family Court should have a separate identity. It will have complex problems which will be very different from those of any other court. For these reasons, and because of the importance of the court, the Committee thinks that there should be a Chief Judge of the Family Court whose function relates to that court alone. The Chief Judge should, of course, possess the confidence of the public and of the legal profession.

(v) Present Judges of the Family Court

Some judges of the existing Family Court are not lawyers, and others do not have the qualifications required by the Judges Act. The Committee's view is that such judges should, to the extent possible, continue to exercise their present powers and perform their present duties, either as judges of the Family Court or as judges of the Juvenile Court.

(4) Procedures

Matters in the Family Court are customarily disposed of under a summary procedure, and so are matters dealt with by Family Court judges sitting as Juvenile Court judges. A summary procedure is suitable to most family law matters and should continue to be the rule. However, some of the matters under the jurisdiction of the proposed Family Court will require more elaborate procedures, e.g., some contested divorce and nullity matters and some property matters. The Committee's view is that provision should be made for more elaborate procedures where they are required, such as examinations for discovery and production of documents. In

order to ensure that these procedures are not used to impede litigants in matters which should be dealt with in a summary way, the Committee recommends that they be available only by leave of a judge of the proposed Family Court.

A concern that has been expressed is that providing for the more elaborate procedures in the proposed Family Court must necessarily cause either the present expeditious machinery or the more elaborate procedures to suffer. The Committee does not think that that result will follow. The great bulk of cases should be dealt with through a simple procedure. The judges of the court administering the more elaborate procedures will be qualified lawyers and should be able to manage them properly in the comparatively small number of cases in which they will be appropriate.

In view of the additional responsibilities which would be given to the proposed Family Court, the Committee attaches great importance to the preparation of Rules of Court. The Rules should not complicate those matters which should be dealt with by a summary procedure, but they should make provision for interlocutory proceedings by leave of the court and they should provide for such things as service ex juris and garnishment. Some of the Rules may be patterned after the Alberta Rules of Court, and some of the latter Rules may be incorporated by reference. The Rules should be prepared when the Committee's proposal has been accepted in principle and decisions have been made as to the precise structure of the court.

(5) Appeals

The Committee recommends that an appellant have a choice between an appeal to the Appellate Division and an appeal to a panel of three judges drawn from the Family Court. A

litigant who wishes to appeal from the panel of three judges should have the further right to appeal to the Appellate Division, but only by leave of a judge of the latter court. The Committee expects that if an important question of law or policy is involved the appellant will go to the Appellate Division in the first place, but that in most cases a matter of amount or a complaint about the assessment of evidence will be involved and the appellant will be likely to choose the appeal to the Family Court panel. Supervision by the Appellate Division will tend to ensure adherence to general legal principles, and supervision by the Family Court bench en banc will tend to ensure uniformity of approach by Family Court Judges.

The Committee makes its recommendation for alternative forms of appeal because it is of the view that an appeal to the Appellate Division will often be impractical. The great bulk of family law matters involve questions of fact, urgent matters such as custody, or matters which, however great their importance in human terms, involve small sums of money which do not appear to justify the cost of such an appeal. It is for that reason that the Committee would not confine a litigant to a right of appeal to the Appellate Division. The Committee also considered an appeal to a judge of the Trial Division either de novo or on the record but does not like trials de novo and does not want to suggest an appeal from one single judge to another single judge.

(6) Social Services

The Committee is of the view that a number of social services should be available through the Family Court to the judges and to the litigants. These should include intake

and information services, legal representation, conciliation services, investigative services in relation to custody matters, and follow-through services including collection services and conciliation of access disputes. The Committee does not express any view as to the extent or organization of these services since those subjects are being considered by the Social Services Committee convened by the Institute. The Committee, however, wishes to comment on two matters.

The first is the relationship between the judge and the social services. The Committee has already said that the function of the judge is the judicial function of adjudicating upon evidence properly before him. There should be no blurring of the roles of adjudication on the one hand and conciliation and investigation on the other. Social workers will give evidence before the judge and when custody or a juvenile matter is involved the judge may ask the social services to investigate, but the services themselves should be separate and apart from the judge. The availability of social services should be a principal characteristic of the proposed Family Court, but when the stage of adjudication is reached the court should be a court of law.

The Committee's second comment is that the social services should be available to litigants but that there should be no compulsion or coercion upon litigants to use them.

5. INTERIM STEPS

There will be some lapse of time before the proposed Family Court can be created and clothed with the exclusive jurisdiction recommended by the Committee. Some interim steps can be taken by the Legislature at any time, and the Committee recommends that they be taken as soon as possible.

One of the major problems experienced by the existing Family Court is that it is responsible for enforcing maintenance orders made by the Supreme Court but has no power to vary them to meet the different circumstances which they often perceive when an order comes before them for enforcement. The Committee recommends that two steps be taken as soon as possible to reduce the number of such cases. The first is to empower the judges of the present Family Court to make maintenance orders in favour of spouses, ex-spouses and children both before and after divorce, and the Committee recommends that legislation be passed to that effect. The second is to provide that maintenance orders made by the Family Court will survive a decree of divorce, nullity or judicial separation unless the Supreme Court judge grants an order in different terms, in which event the Family Court order would be deemed to be amended accordingly.

The Committee indeed would like to recommend that upon registration in the Family Court for enforcement a Supreme Court maintenance order become an order of the Family Court so that the Family Court could vary it. It appears to the Committee, however, that it is doubtful that the province has the power to make such a provision, particularly in cases of divorce, and that such a provision will have to wait the general solution to the constitutional problem.

The Committee also recommends another interim step. Jurisdiction to grant permanent wardship should be transferred from District Court to the present Family Court. The present division of jurisdiction under which permanent wardships are within the jurisdiction of the District Court and temporary wardships are within the jurisdiction of the Family Court creates an awkward situation as the remedies are very closely

associated and it should be possible to obtain either in one court without the need for a new proceeding in another court.

APPENDIX C

ESTABLISHED BY:
THE GOVERNMENT OF ALBERTA
THE UNIVERSITY OF ALBERTA
THE LAW SOCIETY OF ALBERTA

402 LAW CENTRE
THE UNIVERSITY OF ALBERTA
EDMONTON, ALBERTA T6G 2H5
TELEPHONE (403) 432-5291
432-3074

THE INSTITUTE OF LAW RESEARCH AND REFORM

January 24, 1977

MEMORANDUM TO MEMBERS OF BENCH AND BAR

Re: Courts Administering Family Law

The attached memorandum invites the views of the Judges and of the legal profession on a subject of great concern to the people of the province, the structure of the courts administering Family Law.

Attached to the memorandum is a report prepared by the Committee on the Administration of Family Law of which I am the nominal chairman. Having arrived at the point of preparing that report, the Committee decided that before a final decision is made as to what should be recommended, there should be further consultation with the Bench and the bar. The memorandum is therefore sent out at the instance of the Committee, but it is also in accordance with the Institute's view that there should be the greatest possible consultation on the subject.

One copy of the memorandum is going to each member of the Appellate Division, the Trial Division, the District Court and the Family Court. One copy is going to each firm or individual practitioner and, in the case of a firm, should be passed to the person most interested in the subject. More copies are available upon request.

Comments should be made to me or to a member of the Committee. It would be appreciated if anyone who proposes to make an extensive comment would let me know so that further steps will not be taken in ignorance that it is coming.

W.H. Hurlburt

UNIFIED FAMILY COURT

MEMORANDUM

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M E M O R A N D U M

I

PURPOSE OF MEMORANDUM

The purpose of this memorandum is to solicit the considered views of bench and bar on proposals for a single court to have jurisdiction in matters of family law, including the following:

(1) Divorce, nullity, judicial separation and restitution of conjugal rights.

(2) Alimony and maintenance between spouses.

(3) Guardianship of the person, maintenance and custody of children.

(4) Affiliation proceedings.

(5) Neglected children, including temporary and permanent wardships.

(6) Adoptions.

(7) Variation and enforcement of orders.

(8) Criminal matters within the family. (The present view is that "family law" should include criminal matters so long as the family element exceeds the criminal element. Clearly murder belongs in the criminal courts and common assault between husband and wife belongs in the proposed Family Court, but it is not clear just where the line should be

drawn.)

(9) Juvenile matters.

(10) Injunctions and restraining orders in family matters.

(11) Questions of property between husband and wife.

II

HISTORY

There has been much study in Alberta and elsewhere in Canada of the structure of courts exercising jurisdiction in family law matters. The studies have all suggested a Unified Family Court and the establishment of social services within the family court setting. The studies include the following:

> Institute of Law Research and Reform--Working Paper, Family Court 1972 (various alternatives for establishment as part of Supreme Court or, if that is not possible, as a separate superior court)
>
> Response of the Calgary Bar--Family Law Subsection of the Canadian Bar Association in Alberta, 1972 (Family Court at Provincial Court level with speedy appeal by trial de novo to Trial Division)
>
> The Law Reform Commission of Canada, Report on Family Law, 1976 (Supreme Court level)
>
> The Ontario Law Reform Commission, Reform of Family Law, Part V, 1974 (Supreme Court level)
>
> The First Report of the Royal Commission on Family and Children's Law, British Columbia, 1974 (Combined administrative and social services; supreme, county and Provincial Courts in same courthouses; see alternative 6, p. 10)
>
> The Honourable Emmett Hall's report in Saskatchewan, 1974 (maximum provincial jurisdiction in Provincial Court)

The Quebec Civil Code Revision Office, Report of the Family Court, 1975 (Superior Court)

The Prince Edward Island Unified Family Court 1975 (Part of Provincial Supreme Court; now functioning)

It was in this climate that in early 1976 the Institute of Law Research and Reform invited the Committee on Administration of Family Law to examine the structure of the courts administering family law and to make proposals for providing the most effective administration of justice in the family law field. Members of the Committee were nominated by the Attorney General, the Chief Justices and Chief Judges of the Courts, the Law Society of Alberta and the Institute. A copy of the report made by the Committee in July is attached.

III

ALTERNATIVE PROPOSALS

Before the Committee makes it report final, and before the Institute considers the report, it has been thought desirable to circulate this memorandum to the bench and bar to get considered views on those alternative proposals which appear to be within the range of practicability for Alberta. The ones chosen are those which have been or are being implemented in other provinces or which have received substantial support in our discussions and which therefore appear to be within the range of practicability. We will now describe those alternatives.

(1) Committee Recommendation

In its attached report the Committee made a proposal which may be summarized:

(i) That one court, known as the Family Court of Alberta, have original exclusive jurisdiction in Family Law matters.

(ii) That the court be based upon the existing Family Court and consist of provincially appointed judges.

(iii) That an action in the Family Court, or some one or more of the issues therein, may by leave of a judge of the Supreme Court be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason such action or issues may be more conveniently tried in the Supreme Court; and that the Supreme Court should have power to transfer the action or one or more of the issues back to the Family Court.

(iv) That judges of the Supreme and District Courts be empowered ex officio to sit in the Family Court, and that Provincial Judges should be empowered ex officio to sit in the Juvenile Court. The intention of this recommendation is to maintain the level of service available to people living outside the larger population centres.

(v) That the proposed Family Court have a chief judge whose function relates to that court alone.

(vi) That judges of the present Family Court who are not lawyers or do not have the qualifications required by the Judges' Act continue, to the extent possible, to exercise their present powers and perform their present duties, either as judges of the Family Court or as judges of the Juvenile Court.

(vii) That provision be made in the proposed Family Court for procedures such as examinations for discovery and production of documents which may be required of the more complex matters which would come within the jurisdiction of the proposed Family Court. In order to ensure that these procedures are not used to impede litigants in matters which should be dealt within in a summary way, however, the Committee recommends that they be available only by leave of a judge.

(viii) That Rules of Court should be prepared which would not complicate those matters which should be dealt with by a summary procedure but should deal with interlocutory proceedings and such things as service ex juris and garnishment.

(ix) That a litigant who wishes to appeal from the proposed Family Court have a choice between an appeal to the Appellate Division and an appeal to a panel of three judges drawn from the Family Court. If the appeal is taken to the panel of three judges there should be a further right of appeal to the Appellate Division, but only by leave of a judge of the Appellate Division.

(x) That social services be available through the Family Court to the judges and to the litigants. These should include in-take and information services, legal representation, conciliation services, investigative services in relation to custody matters, and follow-through services including collection services and conciliation of access disputes.

(2) Proposal by Some Edmonton Members of the Trial Division

An alternative proposal has been suggested by some members of the Trial Division. It is transcribed almost verbatim from their letter.

(i) All family law matters would be brought into a Family Law Division of the Trial Division of the Supreme Court of Alberta. That Family Law Division would be the Unified Family Court. Judges of the Trial Division of the Supreme Court of Alberta, sitting in Family Law Division either permanently or temporarily (we would prefer the latter), would actually preside over the more serious matters involving family law such as those matters involving the division of property on divorce.

(ii) The Trial Division of the Supreme Court of Alberta would be assigned all the support facilities, such as counselling and investigative services, now possessed by the provincial Family Court. Those services, and the administration of the court in general, would be under the direction of a judge of the Supreme Court. Whether he is styled an Associate Chief Justice, or a Chief Justice of the Family Division or a President of the Family Division, is of no particular significance.

(iii) Those matters of a family law nature which are now handled by judges of the District Court could be handled by the same judges as a second tier of the Family Division. The District Court judges would retain their identity as such, but for administrative purposes their function in what are regarded as family law matters (e.g. C.U.P., adoptions and permanent wardships) would be subsumed under the presiding judge of the Family Division.

(iv) The present judges of the provincial Family Court would then form a third tier of judges in the Trial Division of the Supreme Court. They would not be members of the Trial Division of the Supreme Court. They would be judges of the Family Division with powers limited by the warrants which would be issued to them by the federal government. They would continue to look after many kinds of matters which they now in fact deal with. However, because they would be part of a single unified Family Division, there would not be the problems of forum shopping which now exist, and which the Committee has so clearly analyzed.

(v) The precise delineation of responsibilities between the first tier and the third tier could be in part spelled out by statute, and in part left to administrative direction by the administering judge. However, we do not contemplate any significant shift away from the Supreme Court of jurisdiction over matters involving contested divorces or property. Perhaps the one field in which the present provincial court judges should have principal or exclusive responsibility is the enforcement of maintenance awards. However, this area may not be quantitatively significant in terms of judicial time if, as in British Columbia, 95% of the money collected is through the efforts of counsellors and not through the adjudicative process.

(3) Variation of Proposal (2) suggested by some members of the Committee

If proposal (2) is considered for adoption, some members of the Committee have suggested that it might be varied somewhat, and be as follows:

(i) The province would establish The Family Court of Alberta.

(ii) The Chief Justice of the Court would be permanently and exclusively a member of it and would be a Superior Court Judge in rank, federally-appointed.

(iii) All the Judges of the Trial Division of the Supreme Court and District Court Judges as local Judges of the Supreme Court would be Judges of the Family Court. This would be the so-called first-tier of the Court.

(iv) There would be a second-tier of the Court consisting of provincially-appointed judges permanently assigned to the Court.

(v) All domestic matters would be in the Family Court. The precise detail of what judge would handle what matter would require considerable study, definition, and some change of provincial and federal statutes. In general, however, it would be contemplated that those matters that must be handled by federally-appointed judges would be handled by the Trial Division and District Court judges. All other matters would be handled by the provincially-appointed judges. They would, however, be handled in the physical facility of the Family Court. All matters which affected a family would be in one central file.

(vi) The continuity of this Court would be provided by its Chief Justice and by the fact that the provincially-appointed judges would be permanently appointed to it. The assignment of Trial Judges and local Judges of the Supreme Court to the Family Court should be on a rotation basis, and would be a matter of co-operation between the Chief Justice of the Trial Division of the Supreme Court, the Chief Judge of the District Court and the Chief Justice of the Family Court.

The principal differences between this alternative (3)

and alternative (2) are as follows:

(i) The matters now in District Court jurisdiction would be dealt with by the Family Court judges, where constitutionally possible and otherwise by the Trial Division and local judges of the Supreme Court. Adoptions, C.U.P.'s and Permanent Wardships can constitutionally be handled by provincially appointed judges and are so handled in most provinces: Re: Adoptions Act, etc. (1938) SCR 398).

(ii) The social services would not be under the direction of a judge (though a judge would be entitled to call upon the social services for assistance).

(iii) It would be made clear that the administration of the court would be unified.

(4) The Unified Family Court as part of the District or Supreme Court

Proposals (2) and (3) provide for a Family Law Division of the Supreme Court in which there would be 2 or 3 tiers of judges with different jurisdictions. As an alternative, jurisdiction in Family Law could be conferred upon a division of the Supreme Court (or, for that matter, of the District Court) in which all judges are appointed under section 96 and are of equal jurisdiction. That would involve section 96 judges doing the work now done by Family Court judges.

Manitoba is setting up a pilot project on these lines. In the St. Boniface District there will be a Family Law

Division of the Court of Queen's Bench. Members of the Court of Queen's Bench, and County Court Judges sitting as local judges, will deal with all family law matters including those things now dealt with by the Court of Queen's Bench and matters such as applications under the Wives and Children's Maintenance Act, but not including juvenile delinquency matters, an omission which may be thought to detract from the court as a unified family court. It appears that all judges of the two courts will sit by assignment. The necessary legislation has been passed but not yet proclaimed and there is a tentative start up date of spring 1977.

(5) Separate Family Court

A separate family court could be established which would have exclusive jurisdiction in all family law matters and to which the Governor General would appoint all of the judges. Ontario is establishing one variant of this proposal. A pilot project in Hamilton, Ontario will call for the appointment of three county Court judges. They will sit exclusively in the Unified Family Court and provincial legislation will make them ex officio judges of the Family Court. The Unified Family Court is not given exclusive jurisdiction in family law matters and litigants will continue to have resort to family, county and superior courts. The judges for a separate Family Court could come from the present Family Court or elsewhere.

(6) British Columbia Plan

Judges of the provincial Family Court and judges of the Supreme Court (including County Court judges sitting as local judges) will continue to exercise their respective jurisdictions, but Family Court judges are able to make reports on custody and maintenance which the Supreme Court

may receive as evidence in divorce matters. The administrative and social services are unified and available to both Family Court and Supreme Court judges, and the two courts sit in the same court houses. A pilot project has been in existence for more than two years.

IV
SPECIFIC PROBLEMS

We now turn to a number of questions which should be borne in mind in deciding what alternative proposal or proposals would be workable.

(1) Specialized Judiciary

One question which should be considered is whether the judges sitting in a unified family court should be partly or wholly specialized. The Committee proposal involves specialization, and any proposal involving a lower tier will also include specialization unless its members can transfer into other courts.

The issues surrounding a specialized judiciary are easily divided into advantages and disadvantages and include:

A. Advantages

1. Continuity in particular cases.

2. Special interest, training and experience in dealing with family law matters.

3. Opportunity to assess the strengths and limitations of the social services.

4. Opportunity to develop methods of using the supporting services effectively.

B. Disadvantages

1. Cases in family law are based on similar facts and there is a possibility of pre-judging individual cases.

2. Possibility of becoming too closely involved with social services resulting in a loss of objectivity.

3. Difficulty of securing judges prepared to devote their lives to a specialized field.

4. No discernible trend to a specialized judiciary in other areas of the law, though most of the Provincial Courts engage in criminal law exclusively, or family law exclusively.

5. Family law should not be developed separately from the rest of the civil law in the province.

(2) Fragmented Jurisdiction

A major concern of the Committee has been the problems of fragmented jurisdiction described at pages 3-5 of the attached report. In a one-tiered court, stays of proceedings cannot be imposed by threat of proceedings in a higher court or a higher tier, proceedings need not be moved to another court or another tier in order to get a complete remedy, and a maintenance order could be amended without going back to another tier or another court which originally

made the order. Plans for a court with two or more tiers should include solutions for these problems.

Consideration should also be given to the ability of the proposed court to attract judicial officers to a lower tier which will have the same specialized jurisdiction as the present Family Court without the separate identity and organization of that court.

(3) Procedure

The Committee's opinion is that a judge of Family Court should act judicially upon evidence placed before him in open court with legal rights being ascertained and enforced. Having said this the Committee recognizes that many family law problems are better dealt with by a summary procedure and this should continue to be the practice. However, some matters coming before the family court will require more elaborate procedure, e.g., some contested divorce and nullity matters and some property matters. There must therefore be provision for more elaborate procedures where they are required. The Rules of the Family Court must necessarily provide both for Summary procedures and for the more elaborate procedures and must provide a means of determining when in fact the latter may be invoked.

(4) The Mainstream

A concern of the Committee has been that Family Law not develop outside of the mainstream of law within the province. The question raised is why should the province's Supreme Court be excluded from jurisdiction in family law? For example, the Murdoch case involved questions of trusts, contracts, partnership, matrimonial property and family

strife. Should these litigants have been denied resort to the Supreme Court?

On the other hand, to put all family law matters in the Supreme Court would produce too great a workload on the existing court. There would necessarily have to be an immediate appointment of 15 additional judges. An alternative would be for the province to appoint referees or masters to assume certain jurisdictions.

Further, many family law matters are not within the traditional work of the Supreme Court. A recruiting problem could well arise if the caseload of the Court was heavily weighted to family law.

Desiring a unified family court the Committee attempted to deal with this issue by means of the appeal and transfer provisions. Accordingly the Committee recommended that an action, or some one or more of the issues therein, may by leave of a judge of the Supreme Court, be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason an action or issue may be more conveniently tried in the Supreme Court. The Committee thought that the availability of an appeal to the Appellate Division, either directly, or, with leave, from the Family Court Bench en banc, will build in the important questions of law and policy being appealed to the Appellate Division, thus assuring adherence to general legal principles.

With regard to appeals the Committee proposed giving litigants two alternatives:

(i) an appeal to a panel of three family court judges. This appeal route has two advantages,

1) it is more expeditious for most family law problems--being quick and less costly,

2) supervision by the Family Court Bench en banc will tend to ensure uniformity of approach by family court judges.

(ii) an appeal directly to the Appellate Division or, with leave of the Appellate Division from the appeal to the Family Court Bench en banc. It is expected that important questions of law and policy will be appealed to the Appellate Division, thus assuring adherence to general legal principles.

(5) Judicial Services to Smaller Centres and Rural Areas

At present, family and juvenile matters receive judicial service from:

a) the Family and Juvenile Courts which have 8 originating courts and 28 circuit locations, and

b) the Provincial, District and Supreme Courts of the province. Judges of these courts are also available on circuit to deal with many family law matters while they are performing their general judicial duties throughout the province.

The maintenance of service throughout the province is a problem. Ideally there should be judicial services available to deal with legal problems as they arise; this is particularly true in matters of family law. So that services outside the main urban centres will not suffer, the Committee made its recommendations that Supreme Court Judges, including Local Judges, be empowered to sit in the Family

Court and that Provincial Judges be empowered to sit as judges of the Juvenile Court.

(6) Constitutional Problems

Any proposal for a unified family court raises constitutional problems, which must be taken into consideration in deciding what proposals are practicable.

The establishment of a unified family court can be accomplished only with the co-operation of Parliament, the Legislature, the Federal Executive and the Provincial Executive. That follows from the constitutional division of legislative power and from section 96 of the B.N.A. Act. If anything is to be done it is necessary to start with the assumption that the approval of both governments can be obtained. Statements made by the Minister of Justice, and the Attorney General indicate that they appreciate the importance of establishing such a court, though not necessarily that they agree on its place in the judicial system.

There remains a question as to whether a practicable arrangement can be made even if both governments agree on the same plan.

The British North America Act contains the following provisions:

> S. 96: that the Governor General is to appoint the judge of the superior, county and district courts in each province.
>
> S. 96: that the judges are to be selected from the Bars of the various provinces. (Note: that

the Judges Act provides that no one is eligible for appointment unless he is a barrister or advocate of at least 10 years' standing).

S.99: that judges of the Superior Courts are to hold office during good behaviour and are to be removable by the Governor General on address of the Senate and House of Commons.

S. 100: that salaries of the judges of the Superior, district and county courts are to be fixed and provided by the Parliament of Canada.

(i) Can the unified family court be provincially appointed?

The Institute asked Professor P.N. McDonald of the Faculty of Law, University of Alberta to consider the Committee's proposal which is described as (1) above and in the attached report. His opinion is as follows:

1. S. 96 inhibits only the provincial legislatures and not the Federal Parliament, from conferring the powers of a superior, district, or county court judge on a judge not appointed under the section.

2. It follows from the above that divorce and other matters within federal jurisdiction may be assigned by Parliament to provincially appointed judges.

3. Property rights during the subsistence of marriage and on termination, fall within the

jurisdiction of the provinces under S. 92(13). The moot point is whether parliament enjoys an ancillary power to deal with the disposition of matrimonial property as a matter of relief corollary to divorce, judicial separation and nullity.

4. An important remedy in family law matters is the injunction. However, the variety of grounds upon which the injunction is granted in matrimonial causes makes it difficult to pin down its constitutional place, federal or provincial.

5. Assuming that property matters and injunctions, in at least some aspects, are within provincial jurisdiction, there is a question as to whether or not the province can give jurisdiction over them to provincially appointed judges. In order to answer that question it is necessary to ask a further one: to what extent does the adjudicative power in relation thereto broadly conform to the type of jurisdiction exercised by the superior, district and county courts? We might safely conclude that property matters and injunctions are traditionally associated with superior courts.

6. There is no answer in the decided cases as to whether the Governor General may grant limited appointments to provincially appointed judges which would enable them to undertake matters which would otherwise have to be dealt with by a section 96 judge.

7. The Supreme Court of Canada decision in A.G. for British Columbia v. McKenzie (1965), S.C.R. 490 makes it clear that a judge may be given some section 96 functions without having all the powers of a section 96 court. However, it established the corollary that an adjudicator need not be appointed as a section 96 judge in order to exercise section 96 functions; he need only be federally appointed.

8. The Ontario Supreme Court in Wilson v. McGuire (1883), 2 O.R. 118 has sanctioned a mixture of functions in one person i.e., a person appointed federally to the county court and provincially to the Divisional Court.

9. Professor McDonald concludes:

"The Governor General may grant limited appointments to provincially appointed judges to enable them to undertake section 96 matters, but (1) the appointments must be to separate court, and (2) the Governor General must be free on the face of the legislation to appoint to that court persons other than the provincially appointed judges."

He continues:

"It is my opinion, unequivocally, that the limited appointments would necessarily carry with them the requirement that the appointees be selected from the Bar of the province (section 97), that the judges be removable only on address of both houses (section 99), and that Parliament provide for salary (section 100)."

(ii) Can a two-tiered court be created?

In an earlier opinion for the Institute Professor W.R. Lederman posed the question "May a province establish a single family court that includes judges appointed by the Governor General in Council and also judges appointed by the Lieutenant Governor in Council, as long as the functions of the latter judges are confined to those functions which a province may validly confer on provincially appointed judges?" His answer was: "My opinion is that there may be a single family court, but that this would have to be a court composed of two sections or divisions, for the two different types of judges."

(iii) Can the B.N.A. Act be amended by Parliament?

Under the 1949 amendment to the British North America Act, Parliament has power to amend the Constitution of Canada subject to a number of exceptions of which the relevant one is "as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the government of a province." Professor McDonald's view was as follows:

> "There is sufficient doubt as to the power of Parliament to amend S. 96 to 100 of the B.N.A. Act to make it inadvisable to rely on amendment as a device for effecting a plan for a unified family court."

(iv) Will the Federal and Provincial Governments come to agreement?

We have said that, because of the constitutional division of powers and S. 96, the establishment of a unified family court requires federal-provincial co-operation.

One factor in deciding upon the proposal to be made is the likelihood or otherwise that the two governments can agree on it.

What degree of co-operation can be expected between Alberta and Ottawa? Will Ottawa be prepared to assume responsibility for appointing and paying the judges necessary to adjudicate in a unified family court? Will Alberta be willing to reliqnuish all or some of its appointing powers in family law matters to the federal government? Will Ottawa be prepared to amend the Judges Act to provide for appointees with less than 10 years standing? As we have said, a Unified Family Court cannot be established unless Ottawa and Alberta agree on the same plan.

V

CONCLUSION

Your views on the subject are solicited. They will be most helpful if you have considered the enclosed material carefully and if you indicate your reasons for them.

The areas to which you might address yourselves are as follows:

(1) Should the law be changed so that one court will have jurisdiction in all family law matters.

(2) If so, which of the alternative proposals do you agree with, and if none of them, how should the court be established?

Further information can be obtained by telephone (432-5291, Edmonton) or letter.

The views communicated to the Institute will receive the careful consideration of the Committee and of the Institute's Board of Directors, at whose request they are solicited.

January 24, 1977

W.H. Hurlburt
Director
Institute of Law Research
and Reform
402 Law Centre
University of Alberta
Edmonton, Alberta

ACKNOWLEDGEMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney-General and the University of Alberta, makes the Institute's work possible.

At page 1 of our Report, we referred to the work of the Special Committee of the Law Society under the chairmanship of Stuart S. Purvis, Q.C. We should record here the great debt under which we find ourselves to Mr. Purvis for his thoughtful, energetic and pioneering work in the field, a debt which we think is shared at least by the people of this province. The value of his contribution is public, but the amount of time and effort which he expended, and the expense to which he put himself, are not.

We are much indebted also to the Committee on Administration of Family Law, whose names appear at p. 4 of this Report. The references to their work throughout the Report demonstrate its value, but we repeat here that the care, the thoroughness, and the breadth of thought and experience which they applied to it provided a firm professional foundation for the completion of this Report.

We are grateful to Mr. Justice W. J. C. Kirby and Dr. Max Wyman of the Board of Review, Provincial Courts, for their encouragement and for access to the Board's materials, and to James L. Lewis, counsel to the Board, for attending and contributing to the meetings of the Committee on Administration of Family Law and his assistance generally.

We have received much help and advice from members of bench and bar some of it formal and some informal, and we express our gratitude to all who took time to help us.

We have as usual benefited much from law reform work elsewhere, of which the work in Canada is the most relevant. We have referred to it in the Report and will not describe it further here.

We received much help from Eleanor Boddy in the preparation of our Working Paper. H.M. Kay, then a law student, provided us with useful research and a valuable selection from the literature on the subject.