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MATRIMONIAL SUPPORT

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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.

MATRIMONIAL SUPPORT

I
INTRODUCTION

1. Family Law Project

Our work in the field of Family Law resulted in our Report No. 20, Status of Children, and our Report No. 18, Matrimonial Property. We will in this Report go on to deal with the law of financial support between husband and wife insofar as it falls under the legislative jurisdiction of the province, and we will simultaneously issue reports on a proposal for a unified family court and upon the social services which should be available to courts which administer family law.

We will reserve for a later report the substantive law relating to the support of children. There are drawbacks to that procedure. The emotional and financial needs of children are an important concern of the law and the financial support of spouse with the financial support of children are in practice dealt with together. We think however that we can make appropriate recommendations now with regard to the support of spouses so as to avoid delay.

We expect to do much other work in the field. We hope to give consideration to the relationship between the private support obligation dealt with in this Report and the public funding of payments to separated spouses and children. We are well advanced in a study of the Family Relief Act. We expect to conduct and carry through a study of the law relating to the guardianship, custody and support of children and to extend that study to include the law relating to neglected children, wardships and adoptions. We have undertaken a study of the law affecting couples who live together without being married.

We expect to deal with other parts of family law, and we are taking steps to see that the sum total of all our work will constitute a set of coherent proposals in the field.

2. Meaning of "Support"

We have said above that in this Report we will deal with the law of financial support between husband and wife. There are other ways in which husbands and wives give "support" to each other, but they are outside this Report, which is intended to deal only with part of the economic relationship of the married couple, while having regard to the overriding responsibility of both to their children.

The law now speaks of "alimony" and "maintenance." Under Alberta usage "alimony" usually refers to financial support while the husband and wife are separated but still married, and "maintenance" usually refers to financial support after divorce or annulment, though the distinction is not always strictly made. We think that the use of the two words leads to confusion and to different treatment for parts of the same thing. Accordingly, we propose to use the word "support" to mean financial support during marriage and after its dissolution.

3. Historical background of the law of matrimonial support

The property arrangements of all societies at all times and in all places have been profoundly affected by marriage and the birth of legitimate offspring. Many ancient codes and the customs of innumerable tribal people provide for a bewildering variety of payments from one family to the other when a marriage is arranged between members of their respective families. Elaborate provisions are also frequently made for the maintenance of the woman and her minor children on the death of the husband or the breakdown of the relationship,

depending on the circumstances.

The expectation of the birth of offspring is fundamental to most marriages, and it is the fact that the woman will probably conceive and give birth to children who will require her constant attention during their early years that has led to the general provision in western societies that the husband and father assumes responsibility for the maintenance and support not only of their minor children but also of the mother who bore them.

The English common law is the source of the Alberta law of support. It, like many other legal systems, sought to ensure the stability of marriages by transferring to the husband through the marriage ceremony all personal property owned by his wife before the marriage and the right to manage and control and draw the income from her real property. In return the law rendered him responsible for her maintenance and support during her life, and until the end of the seventeenth century and in some places later it gave her the right to one-third of his goods on his death, and to receive the income of one-third of the land of which he had been seized during the marriage.

From at least the seventeenth century the propertied classes circumvented the husband's power over his wife's property by means of the settlement "to her separate use." Until the latter part of the nineteenth century the common law meant little to the labouring population, and the percentage of the population who actually lived under the common law was probably not large.

Until the industrial revolution brought machinery to bear on production there was no general theory that a husband should support a young and able-bodied wife. In

the pre-industrial era both husband and wife worked in or near their home. Women's work (spinning, weaving, brewing, dairy work including cheesemaking) was traditionally lowly paid, but was normally sufficient to cover the cost of her maintenance and make some contribution to the maintenance of the children. It was when the industrial revolution moved men's work away from the home to the factory and required continuous attendance to machinery that women were in many (but not all) areas squeezed out of the processes of production. The sudden affluence of comparatively large numbers of people and the desire of others to emulate them led to the theory that a man must expect to maintain his wife for life, even if she was young and childless. The theory was largely exploded by the war of 1914-18.

Many of the aberrations in English family law arose from the division of jurisdiction between the church courts and the common law courts. From the seventeenth century the Court of Chancery successfully invaded many areas of jurisdiction previously occupied by the common lawyers.

William the Conqueror's Edict of 1072 that common law and canon law should not be administered in the same courts led to the foundation of a separate system of church courts, which from before the Conquest had jurisdiction over all matters of marriage and the distribution of property at death. From the thirteenth century, however, the common lawyers proclaimed that matters concerning English land were for them alone. Thus the church, administering canon law, might hold a marriage valid, but if the widow wished to claim dower she must satisfy the common lawyers that she had been endowed <u>in facie ecclesiae</u>, that is, in public. The church by canon law might deem a child legitimate, but if he wished to claim his father's land as heir, the common lawyers might insist on proof of his birth after and not

before the marriage of his parents. Even the proof of wills dealing with land was taken from the canonists into the Court of Chancery.

With the upheaval of the Reformation from the sixteenth century the common lawyers increasingly curtailed the effective jurisdiction of the church courts and, from 1692 to 1724 the "reasonable part" of widow and children to a deceased man's chattels was abolished by statute. The common lawyers were quick to issue a prohibition on the activity of the church courts, but made few efforts to fill the gaps left by their ineffectiveness.

From 1753 Parliament increasingly intervened as regards the formalities of marriage, and from 1857 the whole jurisdiction of the church courts over laymen was transferred to the secular Courts of Probate and Divorce.

A.V. Dicey pointed out that it was the spread of education during the nineteenth century and the fact that women, some of whom were married, for the first time became capable of earning money more than adequate for their subsistence, that led from 1870 to the Married Women's Property Acts, which generalised for all married women the provisions that the Court of Chancery had previously confined to women on whom considerable capital property was settled. Increasingly after 1918 women, married and single, accepted and sought employment. Over the same period improved methods of contraception made family planning possible, and greatly reduced infant mortality emboldened women to resort to it. Rising standards of public health have led to a position in which the average married woman now has about two children, the last of whom will be at school before the mother reaches the age of thirty. The mother can then look forward to something like fifty years more of life. It is these facts

that have placed strains on marriage greater than it has ever before been required to bear, and led to a reappraisal of the whole duty of maintenance or support on divorce.

The English law of 1870, including the law relating to support between husband and wife, became the law of the Northwest Territories and later of Alberta. That included the law relating to marriage, to property and to support. The Divorce and Matrimonial Causes Act of 1857 (U.K.), as amended, was the first statute law of Alberta relating to matrimonial support, and its pattern is reflected in the statute law of today. The Domestic Relations Act (Alberta), which was first enacted in 1927, added little to its support provisions other than to extend them to cover cases of nullity and to make express provision for an independent action for alimony, which had already received some judicial recognition. The Divorce Act (Canada), which in 1968 superseded the provisions of the Domestic Relations Act relating to maintenance upon divorce, made some important changes: it gave the court power to order a wife to support her husband; while leaving the conduct of the husband and wife as a relevant factor in a decision upon maintenance, it removed the respondent's fault as a pre-condition and the applicant's fault as a bar; and it gave the court power to award a lump sum for maintenance.

In England, it was found necessary to provide a summary procedure for maintenance for deserted wives of low income classes, to whom the provisions of the Divorce and Matrimonial Causes Act, 1857, were of no value. The 1927 Domestic Relations Act (Alberta) introduced a similar procedure, which is now found in Part 4 of the Act. Under that procedure a deserted wife can apply for and obtain an order for support without having to show the formal grounds which would entitle her to some other form of matrimonial

relief such as judicial separation or divorce, though in order to obtain support for herself she must show that she has either been deserted by her husband or separated from him because of his cruelty or failure to provide support. Her own adultery is a bar to maintenance for herself. Maintenance for children can be obtained through the same procedure whether or not the wife has a valid claim on her own behalf. When S.A. 1977, c.64, is proclaimed, the procedure will be available to husbands as well as wives, and adultery will no longer be a bar.

We have so far mentioned only the duty of the husband to the wife and the wife to the husband. There is however a public aspect of the duty of support, which arises from the fact that one spouse, if not supported by another, is likely to be supported by public funds. The desire to protect those funds is reflected in the Maintenance Order Act, R.S.A. 1970, c. 222, which requires a husband or wife to support a spouse who is not able to work. The source of the Act is the English Poor Relief Act, 1601. Like the latter Act, the former allows the public authority providing support for one spouse to apply to a judge for a maintenance order against the other spouse, and, since its amendment by S.A. 1948, c. 48, it also allows the person entitled to support to bring the application. Applications under the Maintenance Order Act have in the past been rare or non-existent. The desire to protect the public funds, however, has resulted in various legislative measures intended to allow provincial authorities to obtain reimbursement for social allowances paid to wives and children, culminating in S.A. 1977, c. 92, under which the government will be subrogated to the rights of socially assisted persons to receive support from their spouses.

Social attitudes towards the relation between husband

and wife have also changed. Marriage in its economic as well as in its other aspects is seen more as something like a partnership in which the husband and wife sustain themselves and each other to whatever extent is reasonable in view of their circumstances and their way of life. Because of the rather broad terms in which the law is written Alberta courts have been able to give some effect to these changes.

Our present law reflects the influence of history, of legislation, and of social attitudes reflected in the courts. In assessing it, it is necessary to remember that it reflects these influences, and that it deals with matters which are of the deepest social concern today.

4. Division of Legislative Authority

In some circumstances, the Parliament of Canada has the power to make laws relating to matrimonial support. In other circumstances the provincial legislatures have the power.

(1) Matters under Federal Legislative Authority

Section 91 of the British North America Act gives to Parliament the exclusive power to make laws relating to "Marriage and Divorce." The power to make laws relating to divorce includes the ancillary power to make laws relating to the support of one divorced spouse by another, as well as laws relating to the support of the children of divorced parents.

Under the divorce power Parliament has enacted the Divorce Act. This Act empowers the Trial Division of the Supreme Court of Alberta, "upon granting a decree nisi,"

to order either spouse to make payments for the support of the other or their children. It also empowers the court to order either spouse to pay interim alimony while the divorce proceedings are being carried on.

(2) Matters under Provincial Legislative Authority

Section 92 of the British North America Act gives to the provincial legislatures the exclusive power to make laws in relation to matters coming within the class "property and civil rights in the province." That power is understood to include the power to make laws requiring one spouse to pay alimony or provide for the maintenance of the other and to provide maintenance for their children. Chief Justice Duff, speaking for the Supreme Court of Canada in Re Adoption Act, [1938] S.C.R. 398 at 402, held that the subject matter of the Deserted Wives and Children's Maintenance Act (Ontario) was at that time entirely within the control of the legislatures of the provinces; and the appellate courts of Alberta and Manitoba, in judgments which were referred to with apparent approval by the Supreme Court of Canada in Zacks v. Zacks (1973), 35 D.L.R. (3d) 420 at 429, have recognized that, except where they are ancillary to the main issue of divorce, alimony and maintenance are matters of property and civil rights within the exclusive jurisdiction of the legislatures (Whyte v. Whyte (1969), 7 D.L.R. (3d) 7 at 10 (Man. C.A.); Heikel v. Heikel (1970), 12 D.L.R. (3d) 311 (Alta. App. Div.)). It was under its jurisdiction over property and civil rights that the Alberta Legislature enacted the Maintenance Order Act and the Domestic Relations Act. Except in the case of nullity (and their possible application to divorce) the powers which those Acts give to the courts to order alimony and maintenance exist only while the parties are still legally husband and wife. Section 23 of the Domestic Relations Act, however, gives such a power after

a declaration of nullity of marriage, and the existence of the jurisdiction has been re-affirmed in Ontario and Alberta: Rose (Abroms) v. Rose (1970), 8 D.L.R. (3d) 45 (Ont. H.C.); Liptak v. Liptak [1974], 1 W.W.R. 108 (Alta. S.C.). We will discuss the case of divorce below.

(3) Matters of Doubtful Legislative Jurisdiction

Has sec. 11 of the Divorce Act (Canada) completely ousted provincial jurisdiction over matrimonial support at and after divorce, or is there still some function which could be performed by provincial legislation? The section is a valid exercise of a power which is ancillary or necessarily incidental to the divorce power: Jackson v. Jackson [1973] S.C.R. 205; Zacks v. Zacks [1973] S.C.R. 891. The mere existence of an ancillary power does not appear, however, to prevent a province from legislating on a matter of property and civil rights in the province (such as matrimonial support); the question, therefore, is whether or not Parliament has exercised its ancillary power so as to cover the whole field and exclude the province entirely.

It seems quite clear that a maintenance order under the Divorce Act supersedes any existing order made under provincial legislation and precludes any subsequent proceedings thereunder: Jackson v. Jackson, supra. The Appellate Division (Goldstein v. Goldstein [1976] 4 W.W.R. 646; McCutcheon v. McCutcheon (1977) 2 Alta. L.R. (2d) 121) and the Ontario Court of Appeal (Richards v. Richards (1972) 26 D.L.R. (3d) 264) have held that the Divorce Act occupies the whole field to the exclusion of provincial legislation; but the British Columbia Court of Appeal has held (Armich v. Armich [1971] 1 W.W.R. 207; Hughes v. Hughes [1977] 1 W.W.R. 579; see also Wojtowicz v. Wojtowicz [1974] 3 W.W.R. 577 (Sask. D.C.)) that an order under provincial legislation

remains effective unless and until an order is made under the Divorce Act and that an order may be made under provincial legislation in favour of a divorced spouse who did not seek or was not awarded maintenance on divorce; and, with regard to the case of a child (which may not be the same as the case of the spouse) the Nova Scotia Supreme Court, Appeal Division, has said much the same thing. The provincial Courts of Appeal are therefore divided on the question. The Supreme Court of Canada has not yet decided it: Beetz J., speaking for the court in Vadeboncoeur v. Landry [1977] 2 S.C.R. 179, expressly held that it had not been decided, and declined under the circumstances of that case to decide it. It is raised in A.G. of Quebec and Dame Diane Mary Glassco v. Archibald Cumming, a case which is now before the Supreme Court, and may be decided there. Until the question is decided by the court of last resort, we think that the provincial legislation should be framed so that it will apply to all fields which may ultimately prove to be open to it.

(4) Scope of Provincial Legislation

The application of provincial legislation is accordingly restricted. It can apply while the couple are living together. It can apply while they are separated informally or by agreement or by judicial separation. It can apply if a marriage is annulled. It cannot apply however in divorce proceedings or while an order made in divorce proceedings remains in effect, and it is far from clear that it can apply at all after divorce.

5. Relationship to Matrimonial Property Legislation

Alberta Bill 102 was introduced into the legislature in the fall session of 1977. It provided for the introduction of a discretionary system of division of matrimonial property

upon divorce, nullity, judicial separation, a year's separation, and some other circumstances. The bill was allowed to die on the order paper in order to provide an opportunity for comment. While we think it likely that the Legislature will make some provision for the sharing of property between the spouses when the marriage is dissolved or the relationship breaks down, we do not know that it will do so, and if it does so, we do not know the nature of the provision which it will make.

There is an obvious relationship between the subjects of matrimonial property and matrimonial support. In a comparatively small number of cases, division of property may obviate the need for any support. In a greater number it may affect the need of a wife or husband for support, and it may detract from the ability of a husband or wife to provide it. In most cases, however, there will be a continued need for the provision of support. The legislation dealing with support must therefore be sufficiently flexible to be appropriate to a case in which a substantial property division has affected the resources of both parties, a case in which there is no property to divide, and all cases in between. It must also be flexible enough to allow for variation of a pre-existing support order at the time of, or after, the division of property. We believe that the recommendations which we will make will provide for a sufficiently flexible law.

6. Relationship between Provincial Legislation and the Divorce Act

It would be desirable to have uniformity, or at least consistency, between the law of support embodied in provincial legislation and the law of support embodied in the Divorce Act (Canada). There are three main reasons for saying so. One is that the law should be as simple and clear as its subject matter permits, and that to have divergent

statutes dealing differently with different parts of the subject matter of support must inevitably detract from simplicity and clarity and must cause difficulty for the citizen who wants to understand his legal rights and obligations. The second reason is that unless all the law of support is based on one philosophy and designed according to one coherent plan it will have no demonstrable rationale and will not be consistent. The third is that the law of support should not provide an inducement to choose one matrimonial remedy over another and in particular should not provide an inducement either to divorce or not to divorce. For these reasons, and particularly the third, two members of our Board, while generally in sympathy with the recommendations which we will make in this Report, think that the object of the proposed legislation should be to achieve uniformity, or at least consistency, with the Divorce Act. For example, the reduction in emphasis upon the conduct of the parties which we will propose, or the increase in emphasis upon the encouragement of self-sufficiency, may in a particular case affect the amount of support available under the Act which we will propose and may therefore influence a party to bring, or try to avoid, divorce proceedings.

The view which prevails with the majority, however, is that, while the provincial legislation should be framed with the consequences of possible divorce proceedings in mind, it should have regard to other things as well. For one thing, except in the case of nullity it will deal with people who are still married and whose problems will not necessarily best be solved by conforming to a statute which assumes that they are not. For another, the law and the times are constantly changing, and we do not think that provincial legislation should merely advance to the point achieved by federal legislation ten years ago; indeed, as will be seen, we have been influenced by the views of the Law Reform Commission of Canada who think that the support provisions of the Divorce

Act should be materially changed and whose ideas may bring about a change in them. For a third, we think that changes in the Alberta law, if well conceived, will have an influence upon the legislators and judges who make and administer the law of the provinces and of Canada: we note that other provinces are making changes now, and we note that in Rowe v. Rowe (1975) 24 R.F.L. 306 (B.C.S.C.) Ruttan J. specifically applied some of the principles suggested by the Law Reform Commission of Canada. We do not see any course of action in which difficulties are not implicit, and we think that the best thing for Alberta to do is to devise a law of support which will be suitable here for today and for the foreseeable future and which will minimize the difficulties flowing from differences between that law and the Divorce Act, and to accept the difficulties that cannot be avoided.

7. Structure of Report

We propose firstly to deal with the substantive law establishing and regulating the support obligation as between husband and wife (Parts II and III). We propose next to deal with the process by which the existence of the obligation is established and quantified in a particular case, and the process by which collection is effected. Because of the interrelationship between quantification (including variation) and collection, we have classified them both as "Enforcement of the Support Obligation," but for purposes of organization we will break down the discussion into Part IV (general discussion, and ways of making improved information available to the courts) and Parts V (orders of support), VI (collection) and VII (gifts and transfers for inadequate consideration). We should note here that, while this Report is not intended to deal with the substantive law of support between parent and child, we have found it necessary to include provision for applications on behalf of

children under the proposed summary procedure in Part V, and for the collection of payments for support of children under Part VI. We then deal briefly with the rules relating to the pledging of another spouse's credit for support (Part VIII), transitional provisions (Part IX), and amendments to other statutes (Part X). Finally, we will attach as Appendix A a draft of a proposed Act which would give effect to our recommendations.

II

NATURE AND PURPOSE OF MATRIMONIAL SUPPORT

1. Basis of Obligation

(a) Marriage

We believe that husbands and wives understand and expect that by marriage they assume obligations to each other. Society has the same understanding and expectation. That is true whether the relationship is regarded as one of contract, one of partnership or one of status, and whether marriage is regarded as a legal matter or a religious sacrament. One of those understood obligations is that of mutual support. That word is used in a sense which includes emotional and moral support. It is also used in a sense which includes financial support. Accordingly, we think that there is a broad general agreement in society that the law should recognize and under some circumstances enforce the obligation of one spouse to provide financial support for the other. We think that that is sufficient justification for a legal obligation of support. Another consideration which must be borne in mind is that if a family does not support some of its members they will become dependent upon some form of public assistance, and the family will thereby impose a burden upon taxpayers generally. The emphasis of this Report, however, while it recognizes the obligation to the public and provides for it,

is upon the relationship between the husband and wife.

(b) Void or voidable marriage

A voidable marriage has effect until a decree of nullity is granted. We see no reason to suggest that the duty of support should not apply to it. There is a more substantial question about a void marriage, which in law is no marriage at all. We do not think, however, that a mistake as to the legal validity of their relationship should deprive a woman, or man, of support which is no less necessary and no less expected merely because an apparent marriage suffers from some legal defect. On the other hand we do not think that a woman or man should be able to claim rights under a marriage which she or he knew was no marriage. Our recommendations so far are in accordance with those which we made in our Report #18, Matrimonial Property, and with the provisions of Alberta Bill 102, 1977.

Marriages celebrated under a legal system which permits polygamy are a special case: they are perfectly valid where they are celebrated but not in Canada. Report 18 would recognize for property purposes a potentially polygamous marriage, i.e., one which would permit a husband to have more than one wife or vice versa, but not an actually polygamous marriage, i.e., one where one spouse already has a spouse. Alberta Bill 102, 1977, does not give effect to our recommendation to that effect. We think however that the law should go farther in the case of matrimonial support. Two or more personal claims for support do not appear to us to involve the same theoretical and practical difficulties as two or more claims for the sharing of property. Accordingly, we think that the duty of support should apply to actually polygamous marriages celebrated under a system of law which recognizes polygamy.

Recommendation #1

That the proposed Act:

(1) extend the duty of support to the following:

(a) a marriage which is void,

(b) a marriage which is voidable, and

(c) a marriage which was entered into under a law which permitted polygamy, whether or not either party to it has, or at the time of the marriage or thereafter had, a spouse other than the other party.

(2) provide that the court shall not grant support in favour of a party to a void marriage if the party knew or had reason to believe the marriage was void.

2. Mutuality of Obligation

A question to be addressed at this point is whether or not the rights and obligations of husbands should be different from the rights and obligations of wives. We think that the law of Alberta should recognize, here as elsewhere, equality of status, rights and obligations between men and women. It has already done so, and so has the law of Canada. Since 1968 the Divorce Act (Canada) has empowered the court to impose upon a wife a legal obligation to support the husband and children of the marriage in the same terms as it has empowered the court to impose upon the husband a legal obligation to support the wife and children of the marriage, and since 1974 the Criminal Code (Canada) has imposed the same penalties on husband and wife for failure to supply necessaries. Since 1973, the same words in the Domestic Relations Act (Alberta) have empowered the court to impose a legal obligation upon either or both of the spouses in proceedings for nullity, judicial separation and alimony; and S.A. 1977, c. 64, upon proclamation, will make the protection order procedure under Part 4 of the Domestic

Relations Act available to husbands as well as wives. We have no doubt that the proposed support legislation should apply equally to husbands and wives.

At the same time, it must be recognized that it is usually the wife who needs financial support from the husband. That follows from the way of life adopted by most of the couples who do not arrange their affairs in such a way as to maintain the financial self-sufficiency of both members and from the fact that women on the average earn less than men, and it follows almost necessarily from the prevailing view that children must be nurtured by their mothers, particularly in their early years. Therefore, while the law should give equal treatment to husbands and wives, it must recognize that the facts, including the overriding need to protect children, almost always put wives at a financial disadvantage so that they require support from husbands.

3. Legal Statement of Obligation

An important question is whether the proposed Act should state the support obligation in positive terms, or whether it should merely confer a power upon the court to award support to either spouse and set out in general or specific terms the criteria by which the judge is to be guided in determining which spouse should receive support and in what amount. It is the latter course which has been followed in most Canadian and English legislation, and the Ontario Law Reform Commission thought it preferable to adopt it (though Ontario Bill 59, 1977, sec. 15, contains a statement of the obligation). The Commission said:

> Of necessity, any positive reformulation of the obligation must be founded upon a notion of relative economic need of the spouses; and the

> statement would have no significant legal effect by itself, unless the law were to regard breaches of matrimonial duty as wholly irrelevant to the imposition of support obligations. We are of the view that the Legislature should not attempt a definition of the inter-spousal support obligation in such absolute terms for essentially two reasons: first, it would invite intervention by the court in disputes between spouses during cohabitation which they might reasonably be expected to resolve by themselves or with the aid of marital counselling; secondly, as we have concluded elsewhere in this Report, the existing relationship between the performance of matrimonial duties and the imposition of support obligations at law should not be severed completely.

To that it may be added that it is the substantive powers granted, and directions given, by an Act of this kind that determine what the Act does.

We are impressed with these statements, and some members of our Board would give effect to them. There are, however, other considerations. We think that the law should state its basic rule for the benefit of those who live under it, and should not leave the rule to be inferred from provisions giving the court certain powers and some direction about using them. We think also that a general statement may be an aid to interpretation. We recognize that the statement of the rule will not of itself instruct the court or married couple what to do and that the questions raised by the Ontario Law Reform Commission will have to be dealt with in the proposed Act. We think however that, for the reasons we have stated, the proposed Act should state the support obligation and say that the obligation is enforceable as provided in the proposed Act. Since we regard it as the first duty of the parents to support their children, the proposed Act should make it clear that the statement of the obligation betwen husband and wife does not interfere with that duty.

Recommendation #2

That the proposed Act state the support obligation between husband and wife as follows:

(a) The parties to a marriage are mutually liable to support each other.

(b) The liability is enforceable as provided in the Act.

(c) The liability is subject to a liability of either party to support a child.

4. Extent and Purpose of Support

An important question is whether or not the law should put emphasis on the encouragement of economic self-reliance by each spouse.

In Alberta, as in other jurisdictions, the tendency has been to think of the wife as necessarily dependent upon the husband so that if the husband and wife separate, the husband should make provision for the financial support of the wife for an indefinite period. Of course, there is no absolute requirement that support go on indefinitely or that it be awarded at all, and the court can take into account the fact that the wife has ample property or earning capacity to support herself, but the tendency is to think of her as a continuing dependent. The legal mutuality of obligation imposed in 1968 by the Divorce Act (Canada), in 1973 by amendments to the Domestic Relations Act (Alberta) and in 1977 by the as yet unproclaimed S.A. 1977, c. 64, has not done away with that notion in fact, though leaving no foundation for it in law, and there is still a tendency to think of the wife as a continuing dependent upon, and a legal responsibility of, the husband, following separation and divorce.

The effects of the older view were stated in a frequently quoted passage by an American judge, Hofstadter, J. as follows (Doyle v. Doyle (1957), 158 N.Y.S. (2d) 909 at 912):

> Alimony was originally devised by society to protect those without power of ownership or earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.
>
> Ironically, inflated alimony awards are frequently not only financially disastrous to the man but psychologically deleterious to the woman. She remains hopelessly entangled in the web of the past, never establishing a new and independent life but "wandering between two worlds, one already dead and the other powerless to be born."
>
> In the field of matrimonial litigation and alimony awards the husband and wife are not the sole parties. Society itself has locus standi for it is deeply affected in vital aspects. For the benefit of all concerned, we must proceed in a climate of sanity that will reflect modern reality and in a spirit of sympathetic understanding that will achieve justice and equity.

In Canada, the Royal Commission on the Status of Women said in its Report:

> Maintenance and welfare are not desirable as permanent arrangements. The deserted spouse or parent should be helped to become self-supporting.

More recently, the Law Reform Commission of Canada has enunciated a different theoretical basis for determining support obligations. The Commission's basic premise (Report on Family Law, 1976, p. 39) is that financial provision, child care and household management are equal legal responsibilities of both spouses, which "leads to a concept of financial provision on dissolution of marriage as an assured right in the spouse who has financial needs following

from the marriage experience." The right is "primarily, but not exclusively, related to the division of the family functions." The Commission thinks (p. 40) that the unilateral risk of economic deprivation on dissolution of marriage resulting from the assumption of primary responsibility for child care and household management is inconsistent with marriage as a relationship between legal equals. The economic advantage of the wage-earner is a mutual asset to be shared, but only so long as is necessary for the supported spouse to become self-supporting: the supported spouse has an obligation to become self-sufficient within a reasonable period of time unless the economic disability flowing from the marriage is permanent (p. 41).

Under the Commission's recommendations, marriage itself would not create a right to support or an obligation of support. The right would be created by reasonable needs. These might flow from the division of function in the marriage, an express or tacit understanding between the spouses, or custodial arrangements with respect to the children, i.e., from arrangements made by reason of the marriage. It might also flow from a physical or mental disability affecting the ability of a wife or husband to be self-supporting, or from the inability of a spouse to obtain gainful employment, which inability might or might not be caused by arrangements made by reason of the marriage.

We think that there is much to be said for the Commission's general approach. We have already said that we think that the law should be based upon equality of status, rights and obligations. One equal is not entitled to call upon the other to do for the first what the first could reasonably do for herself or himself. It follows from that that the law should encourage each spouse to become economically independent upon separation or the dissolution

of their marriage, and we will later in this report discuss ways in which it should do so. We say here that the proposed Act should expressly provide that a spouse living separate and apart from the other has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation where it is practicable and reasonable in all the circumstances to do so.

We recognize, of course, that the wife or husband often cannot become self-sufficient, or that it will take time for her or him to become self-sufficient. The protection of children is an overriding object of the law, and custodial parents sometimes need financial support while caring for them. Older women who have not worked outside the home for years find that they have no skills which will enable them to find appropriate employment. The legislation must be flexible enough to allow for such cases.

Recommendation #3

That the proposed Act state the obligation of self-sufficiency as follows:

> *Notwithstanding the liability imposed by Recommendation 2, where the parties to the marriage are living separate and apart, each has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation unless (having regard to the welfare of a child or children of a marriage and other circumstances) it is unreasonable or impracticable for him to do so.*

5. Relevance of the Conduct of the Spouses

The Supreme Court of Alberta has power under the Domestic Relations Act (Alberta) to award maintenance to a wife or

husband entitled to an order for judicial separation or restitution of conjugal rights. That means that the wife or husband must establish the grounds for one of those remedies, i.e., that the other spouse is guilty of a "matrimonial offence" such as adultery, cruelty or desertion. It also means that she or he may be disentitled by having committed a matrimonial offence herself or himself, or by having condoned or connived at the other spouse's matrimonial offence or by having colluded with the other spouse in bringing the action. These rules are somewhat relaxed under the protection order procedure in Part 4 of the Domestic Relations Act, under which the wife need only show that she is deserted by her husband or living apart from him because of cruelty or non-support. The wife's uncondoned adultery is a bar to her claim under Part 4 but S.A. 1977, c. 64, upon proclamation, will do away with the bar.

The Divorce Act (Canada) places less emphasis on matrimonial offences. While divorce is still available for matrimonial offences, it is also available on additional grounds based on "marriage breakdown." Once a divorce has been granted, the court has power to award maintenance to either party "if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them." The misconduct of the wife is therefore no longer an absolute bar, and the court is entitled to treat the conduct of each spouse merely as one factor, though one which is given some prominence by the language of the section.

Should the conduct of a spouse be taken into account in deciding whether there is a duty of support? Should it be taken into account in fixing the amount of support? These are vexed questions.

The trend in England and Canada has been to reduce the

importance of fault. With that trend we are in full agreement. A support award should not be made, or its amount fixed, as a punishment for the bad conduct of the spouse who pays it or as a reward for the good conduct of the spouse who receives it. Rarely will one spouse be entirely responsible for the breakdown of the marriage and the other entirely free of responsibility. Matrimonial "offences" are often the result of marriage breakdown rather than its cause. The emphasis on fault embitters a process which already gives too much occasion for bitterness, and is likely to reduce the chances of reconciliation and to be injurious to the interests of the children. Accordingly, liability should not depend upon proof of the fault of one, and proof of the fault of the other should not be a bar.

Should consideration of conduct be ruled out entirely? The answer of the Royal Commission on Family and Children's Law for the Province of British Columbia was yes. (Seventh Report, Family Maintenance, 1975, p. 23-24). So was that of the Law Reform Commission of Canada, except for conduct which induces need or which artifically or unreasonably prolongs need (Report on Family Law, 1976, p. 43). Both Commissions would carry to its logical conclusion the proposition that maintenance is not compensation for services or for inflicted wrongs but is rather an obligation arising from the circumstances of husbands and wives during marriage and at the time of breakdown. On the other hand the English Matrimonial Causes Act, 1973, sec. 25, after listing a number of factors to be considered, goes on to provide that the court is to exercise its powers so as to place the parties as far as is practicable "and having regard to their conduct, just to do so," in the position in which they would have been had the marriage not broken down. We have already mentioned sec. 11 of the Divorce Act (Canada) which requires the court to have regard to the conduct of the parties as well as to their other circumstances. The Ontario and Manitoba Law

Reform Commissions have also recommended that the conduct of the parties be a factor to be considered (Report on Family Law Part VI, Support Obligations (OLRC), 1975, p. 9; Report on Family Law Part I, The Support Obligation (Man. LRC), 1976, p. 21) though the existing and proposed legislation in the two provinces takes a more restricted view of the effect of it. S.M. 1977, c. 47, sec. 5 (which is not yet in force), appears to preclude the consideration of conduct except for its economic consequences. Ontario Bill 59, 1977, as introduced in the fall of 1977, restricts the consideration of conduct to cases in which it is "a course of conduct that is an obvious and gross repudiation of the relationship," and press reports suggest that it will emerge even more restrictively worded.

Our view is that in general the conduct of the spouses should not be a factor which the court may consider, as there should be no element of reward or punishment in the award or its denial. We can however conceive of cases in which the conduct of a spouse has amounted to a refusal to undertake the obligations of marriage, or has amounted to a repudiation of the relationship. We think that in such cases it would be wrong to require the other spouse to provide financial support, and that to do so would be to disregard the ordinary person's sense of values. We think that the best way to balance these conflicting considerations is, firstly, to provide that the conduct of the parties is in general not relevant, and, secondly, to add a qualification to the effect that if the party seeking support has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, the court may reduce the amount of support granted or deny it altogether. We appreciate the force of the fear expressed by the British Columbia Royal Commission on Family and Children's Law at p. 23-24 of its Seventh Report that one spouse will be tempted to argue that the behavior of the

other spouse merits the description of "gross misconduct" and we appreciate also the force of the feeling of some members of our Board that the term is difficult to apply and that the history of the phrase "gross negligence" in another context is not something to be emulated. We recognize also that there is a danger that too much time will be spent in debate over the question whether or not misconduct is "gross." We do think however that the statute should make it clear that conduct is a factor in, and only in, a restricted group of cases, and we see no better way for it to do so. To ensure that the former bars based on conduct are done away with we think that the proposed Act should specifically say so.

Recommendation #4

That the proposed Act provide that:

(1) Subject to subsection (2), the conduct of the parties is not relevant to a decision as to whether or not to make an order for support or to a decision as to the amount of support.

(2) If the court finds that the party seeking support has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, it may reduce the amount of support granted or deny it altogether.

(3) No absolute or discretionary bar to another form of matrimonial relief applies to an application for an order for support.

6. Criteria for Making Decisions about Support

In our Working Paper we said that we preferred a statutory provision that the court look at all the circumstances relating to the financial positions of the husband and wife, including a number of listed factors. We suggested however that in the interests of uniformity the proposed Act should conform to the Divorce Act (Canada), which, apart from its reference to conduct, is very general in its terms. The Manitoba and Ontario Law Reform Commissions and the British Columbia Royal Commission have departed from the Divorce Act pattern and so have S.M. 1977, c. 47, and Ontario Bill 59, 1977. Having reconsidered the question, we think that the proposed Act should follow the course which we preferred rather than that followed by the Divorce Act. In practice, the effect may not be very different: the court may give such effect as it thinks appropriate to each of a group of factors which are listed without special emphasis, and it may go outside the list to consider other circumstances. We think, however, that it is useful for the Legislature to indicate those things which are important and we think that the courts will pay attention to what it says. We think, however, that the Legislature should not attempt to prescribe for the almost infinite number of possible cases a mechanical formula or a closed or even weighted list of factors.

Accordingly, we think that the proposed Act should first require the court to have regard to all the circumstances relating to the financial positions of the parties and should then go on to include among those circumstances a specified list. Obviously the financial resources of the husband and wife should be considered. These include property, income and potential earnings, and they will be affected by a property distribution between the couple or by

one of them being in possession of the matrimonial home. The financial needs of each are also of fundamental importance. Age and health affect earning capacity and need. In deciding upon need, the standard of living of the family, past and present, should be a consideration, but the court should have regard to the realities of the resulting situation, including the needs of the paying spouse as well as the needs of the dependent spouse. The custody of children is obviously a relevant factor and, since their interests must come first, will in many cases be the one which will dictate the financial arrangements.

We have already said that the dependent spouse should try to reach self-sufficiency and that the court should have power to fix support payments with a view to enabling and encouraging the dependent spouse to become self-sufficient. The list of factors should therefore include the extent to which the payment of support to the dependent would increase her or his earning capacity by enabling her or him to undertake a course of education, training or re-training, or to establish herself or himself in a business or occupation or otherwise achieve financial self-sufficiency.

We think also that, apart from the existing circumstances, it is appropriate to have regard to the duration of the marriage and the effect of the responsibility assumed during the cohabitation on the earning capacity of the applicant. In the case of a short marriage, the earning capacity of the dependent spouse may be affected little or not all, but in the course of a long marriage, her or his withdrawal from her or his financially productive occupation may make employment difficult or impossible to obtain.

The husband may marry or live with another woman and may have children by her, and the combined financial needs

of the two families may be greater than their combined incomes. Legislation cannot solve intractable problems of that kind, and the best we can do is to leave it open to the court to consider the husband's responsibility to both. In a proper case the court should also be entitled to consider his responsibility to other dependents such as parents or a child who is a young adult still attending an educational institution. Our recommendation therefore is that the court have a discretion to consider the legal or moral obligations of the husband and wife. Though two members of our Board are fearful that such broad language may result in undue prejudice to the wife needing support, our prevailing view is that the discretion of the court will be a sufficient protection.

The list of factors should also include the terms of any agreement as to support made between the parties. That would include a formal written agreement, the effect of which will be dealt with later in this Report. It would also include any agreement which the husband and wife make or which their conduct implies, including an arrangement under which one manages the house or cares for the children.

Finally, we think that the list should also include a support order made by another court. We have primarily in mind an order of the Family Court, which we think should be before the judge in Supreme Court proceedings, but we would include an order of another court as well. What another judge has done in proceedings between the same parties seems to us to be relevant and material in some cases, even though not binding.

Recommendation #5

That the proposed Act provide that in deciding whether to make an order granting or denying support, and the amount and conditions of the order where

support is granted, it is the duty of the court to have regard to all of the circumstances of the case relating to the financial positions of the parties, including:

(a) the care and custody of a child or children of the parties;

(b) the duration of the marriage and the effect of the way of life of the parties on the earning capacity of each;

(c) the income, property and other financial resources or benefits which each of the parties has or is reasonably likely to have in the foreseeable future, and any entitlement under the Matrimonial Property Act or the Matrimonial Home Possession Act;

(d) the extent to which the payment of support to the applicant would increase his earning capacity by enabling him to undertake a course of education, training or retraining or to establish himself in a business or occupation or otherwise to achieve financial self-sufficiency;

(e) the earning capacity, including the potential earning capacity of, each party;

(f) the financial needs of each party, having regard to the past and present standard of living of the family;

(g) the age and health of each party;

(h) a legal or moral obligation of either party for the support of any other person;

(i) the provisions of any order of support between the parties made by another court;

(j) an agreement, oral, written or implied by conduct, including an arrangement under which one party manages the home or cares for the children or both.

III

COMMENCEMENT AND DURATION OF DUTY OF SUPPORT

1. Commencement

It is implicit in Recommendation #2, page 20, that the mutual obligation of support between husband and wife should arise from the fact of marriage, and that Recommendation suggests that the proposed Act set out the obligation in general terms. There remains a substantial question whether or not the court should have power to make an order of support while the husband and wife are living together. If it cannot, the dependent wife or husband would have no recourse for non-support, apart from the laying of a charge under section 197 of the Criminal Code. One view is that a wife who is not receiving enough money for the proper support of herself, and, more particularly, the children, should be able to apply to the court for support whether or not she and her husband are living together; Manitoba's suspended Act (S.M. 1977, c. 47, secs.3 and 7(1)) appears to contemplate such applications and we understand that there is legislation before the United Kingdom Parliament which would permit limited applications. However, the majority view of our Board is that recourse to law is foreign to a continuing marriage, and is likely to bring about the breakdown of a marriage relationship which might otherwise survive.

We would make one qualification. If the remedy were to spring into existence only upon separation, a dependent wife might not have the financial means to withdraw herself or her children from an intolerable situation. We think that the appropriate qualification is that suggested by the Ontario Law Reform Commission (Report on Family Law Part VI, Support Obligations, p. 86), that "the court should be able to award maintenance whenever it is established that spouses are experiencing marital discord of such a degree that they

cannot reasonably be expected to live together." We do not think that any further legislative definition of the degree of discord would be of value.

Recommendation #6

> *That the proposed Act give the court power to make an order of support*
>
> *(a) where the parties are living separate and apart, or*
>
> *(b) where, although the parties are not living separate and apart, they are in the opinion of the court experiencing marital discord of such a degree that they cannot reasonably be expected to live together.*

2. Duration

(a) During Marriage

The duty of support should last throughout marriage, subject to any provision which may be made for its termination in special circumstances. It should continue to exist notwithstanding a judicial separation or separation in fact.

(b) Upon divorce or nullity

Although support upon and after divorce is dealt with by the Divorce Act (Canada) we think, as we have already said, that the proposed provincial Act should be broad enough to fill any gaps which are left by it.

Support upon and after nullity is dealt with by the Domestic Relations Act (Alberta). There is an argument that, except as it arises from failures in the solemnization of marriage, nullity falls within the class of subject "Marriage

and Divorce" which is within the legislative jurisdiction of Parliament, but Parliament so far has not tried to legislate with regard to it. Provincial legislation should continue to deal with support following a decree of nullity.

What should the proposed Act say about divorce or nullity? Clearly it should allow the court to make an order which will have effect after either. But when should the applicant have to put forward a claim? The Domestic Relations Act does not suggest a time limit. We think, however, that the law, while requiring the spouses to support each other, should take steps to ensure that claims for support are brought forward at an early time and not left standing.

Section 11(1) of the Divorce Act which provides that the court may grant maintenance "upon granting a decree nisi of divorce" has prompted a considerable amount of judicial debate. Initially the courts interpreted "upon" to mean contemporaneously with the granting of the decree nisi. Following the Supreme Court of Canada decision in Zacks v. Zacks [1973] 5 W.W.R. 289, the Alberta courts have given the word an extended meaning. The leading case in the courts of the province is Goldstein v. Goldstein [1976] 4 W.W.R. 646 (App. Div.) where McGillivray C.J.A. said: "In my view, once a divorce is granted, the court is thereafter in a position, as an incident of that divorce, to regulate, as a matrimonial matter, the affairs of husband and wife and children, and we should so hold." How far the Supreme Court of Canada is prepared to go remains to be seen.

Should a wife or husband have to bring support proceedings before, or soon after, dissolution? Some members of our Board think so. The relationship is ended for most purposes and the law should try to end the support obligation also unless there is a demonstrated need at the time. Rights should not be slept upon, and unadvanced claims should not

be kept hanging over the heads of ex-spouses for an indefinite period. There is an analogy to proceedings for the division of matrimonial property which, if Alberta Bill 102, 1977, is enacted in its initial form, will have to be brought within two years of dissolution.

Our prevailing view, however, is that the cutting off of all claims would be too harsh. The need for support is continuing and prospective, unlike a claim to property accumulated while the marriage relationship continued. Support proceedings take into consideration the financial position of the respondent at the time and are unlike a claim to share in the benefit of property which may have declined in value or have been disposed of. The need of the one spouse for support, or the ability of the other to provide it, may not come into existence until later. We think, therefore, that the law, while it should provide a strong inducement to bring actions promptly, should not close the door entirely on a meritorious claim by a spouse, or, for that matter, by the public authority which provides financial assistance to a spouse. Our recommendation is that the wife or husband be required to bring a support application before or within two years after dissolution of the marriage but that the court have power in exceptional circumstances to entertain an application later. No distinction should be made between the spouse who sought dissolution of the marriage and the one against whom it was sought.

Recommendation #7

That the proposed Act provide that:

(1) Except with the leave of the court given by reason of exceptional circumstances an application for support shall be brought before or within two years after the date of the final dissolution of the marriage.

(2) Insofar as the Act relates to support after divorce it is subject to the Divorce Act (Canada).

(c) Death

If the spouse who is liable for support dies, should the duty of support fall on his estate?

It may be argued that the marriage obligation is understood to last only until death; that the support obligation is very personal; and that support during the liable spouse's lifetime discharges his or her obligation. If so, the surviving spouse, particularly if divorced, should not be able to follow the other's property after death. However, the death of one spouse does not do away with the need of the other and we have concluded that his or her property should be available in proper cases for the support of the survivor.

The next question is how that liability should be imposed and discharged. To require an estate to provide for periodic payments over an indefinite period would impose great difficulties of administration and might well be unfair to its beneficiaries. The purchase of an annuity for the surviving spouse is not a satisfactory way out of the difficulties because support orders are and should be variable. Further, the court cannot adjust all competing claims in proceedings for support. For example, there may be a widow or widower of a divorced spouse, and there may be children, all with moral claims, and the estate may not be adequate to satisfy all their needs.

We have therefore concluded that all support claims following the death of the spouse responsible for support should be considered under the Family Relief Act (Alberta) and not the proposed Matrimonial Support Act, and we will in a later report make recommendations for changes in the Family Relief Act to deal with the claims of former spouses whose marriages have been dissolved. This recommendation should not give rise to problems in cases of orders made

under provincial legislation. In the case of divorce, if a support order is framed in such a way as to continue after the death of the responsible spouse there will be some difficulty. We do not see anything that can be done about that by provincial legislation, and, if such a case occurs, the court will have to take the support order into account in applying the Family Relief Act. Such cases should not be frequent.

If it is the dependent spouse who dies before the respondent spouse, we see no reason why any further payment for support should become payable. The need of the dependent spouse has clearly ceased to exist. We will deal later in this Report with the matter of arrears which have accrued before the death of the respondent spouse.

Recommendation #8

That the proposed Act provide that

(a) the liability of a party to a marriage to support the other under the Act, and

(b) an order of support under the Act

terminates upon the death of either party.

(d) Remarriage or Cohabitation

If the dependent spouse remarries, what should happen? Since we are not here dealing with the case of death, remarriage presupposes a case in which the first marriage has been dissolved or annulled. We note that sec. 82(4) of the Family Law Act (Australia) provides that a support order ceases to have effect upon the remarriage "unless in special circumstances the court having jurisdiction otherwise orders,"

and that the Scottish Law Commission has recently made a similar recommendation (Memorandum #22, Family Law and Financial Provision, March 1976). We note also that remarks of the Appeal Division of the Supreme Court of Nova Scotia in O'Handley v. Creemer, December 13, 1977, S.H. 13287, (though probably influenced by the fact that a lump sum and the needs of children were involved) suggest that remarriage may not be a change of circumstances which should affect the original lump sum award. We think, however, that remarriage is such a complete repudiation of the relationship under the first marriage that the right to support, and any order of support, should terminate.

What if the dependent spouse, without remarriage, merely lives with a successor to the liable spouse? No doubt such a relationship may resemble a remarriage, and similar relationships should have similar consequences. No doubt it may well be thought wrong to require a husband to support a wife who has left him to live with another man. However, we do not think that the right to support should automatically terminate. The facts of the matter will often be unclear. The law of support should not be enforced in such a way as to compel chastity in either party. We think that it is enough that the husband be able, as he will be able, to apply for variation or discharge of the order of support on the grounds that the financial position of the wife has changed, if indeed it has.

Recommendation #9

That the proposed Act provide that:

(a) The liability of a party to a marriage for the support of the other party terminates upon the remarriage of the other party.

(b) An order of support in favour of a party to a marriage terminates upon the remarriage of that party but not so as to affect liability for amounts which fall due before the remarriage.

IV

ENFORCEMENT OF CLAIMS FOR SUPPORT

1. Introduction

The recommendations we have so far made in this Report provide for the basic legal obligation of support between husband and wife. We now turn to a discussion of the enforcement of claims arising from breaches of that obligation. By "enforcement" we mean the whole legal process by which the claim is quantified and payment compelled if compulsion is necessary, i.e., the application for the order of support and the steps taken to collect the proceeds of the order. Our view is that the parts of the enforcement process as we have defined it are so interrelated that it should be considered as one process. The judge who makes an order of support takes into account the likely effect of the collection process on the spouse whom he orders to pay. A spouse's willingness to pay will often be affected by his or her perceptions of the fairness or otherwise of the order of support. So will a judge's willingness to apply stringent collection procedures. The law should recognize these relationships.

We have deferred discussion of parental support to a later report. We must, however, deal in this Report with some aspects of the enforcement of a child's claim for support. For one thing, the Protection Order procedure in Part 4 of the Domestic Relations Act (Alberta) is now available for children as well as wives, and any legislation substituted for it will have to provide for children's claims.

Secondly, once an order of support is made, practicality requires that the same machinery be available for the collection of money for the child as for the collection of money for the spouse. We will accordingly in this Report make interim proposals for the incorporation of the child's claim in the summary procedure which we will propose, and we will also make proposals for collection which will apply equally to the claims of spouses and children.

2. Objectives and Limitations of an Enforcement System

The principal objective of the system of support obligations is to obtain money for spouses and children who need it. The importance of that objective can hardly be over-emphasized. As we have already said, a second objective is to reimburse the state (in this case, the province) for the cost of providing such support when the other spouse, or a parent, can provide all or part of the necessary money but does not do so.

The system of enforcement inevitably has effects other than the collection of money. It deprives the paying spouse of the use of the money paid, which he is likely to want, and which he may need for himself. It also takes away the benefit of the money from other dependents of the paying spouse, whose needs are of the same kind and may be as great as those of the spouse or child claiming support. It may do additional damage to the life of the family if a father becomes embittered towards his child because the law compels him to pay for the child's support, or if he moves away in order to escape payment and discontinues any real relationship with the child. It may impose an unnecessary economic cost upon society if a spouse capable of self-support is supported or if a man chooses to move from job to job, or to move to another jurisdiction, or to be idle, rather than pay. It imposes upon society the economic cost of maintaining the court

system and the collection system. If great numbers of people perceive the enforcement system as harshly and unfairly directed against them, the law as a whole will fall into disrepute. The design of the system of enforcement must take the possibility of these secondary effects into account, both because of considerations of fairness, and because the system will break down if its harshness provokes too many spouses and parents to resist payments; there are too many ways to avoid payment upon paying a price such as changing jobs and places of residence, and there may come a point at which the system simply cannot cope with great numbers of collection procedures.

We hope that recommendations which we make in our Report 26, Administration of Family Law: Support Services, will make the collection of support awards easier by lessening the antagonism in support proceedings. We hope also that recommendations which we make in this Report will help by providing for support awards which will be seen as fairer between spouses. More spouses should be prepared to honour support awards which contemplate termination and are made for the purpose of enabling the claimant spouse to achieve self-sufficiency, and we hope that the Divorce Act (Canada) as well as provincial legislation will be changed accordingly. In Parts IV to VI of this Report we direct ourselves to the problem of improving the enforcement system so that it will be at once efficient in the protection of the dependent spouse and children and fair in relation to the respondent spouse and his or her other dependents.

There are two other things that must be borne in mind in any consideration of the subject of the enforcement of the private support obligation between husband and wife.

One is the inadequacy of individual incomes. It is all too often the case that the earnings of a couple, even if

sufficient to support the couple and their children in one household, are not sufficient to support them all in two. The earnings are even more likely to be inadequate if, as often happens, the spouse whose earnings are the principal support of the couple forms a relationship, marital or otherwise, with a successor to the other spouse. Very often, the court can only decide which household is to be dependent upon social assistance. An English Committee on the Enforcement of Judgment Debts (Cmnd. 3909, 1969, p. 337) stated the problem well:

> This is not a problem of enforcement but of economics, and we cannot too strongly or too often invite attention to the simple fact that no improvements which we can suggest in the machinery of the courts will put more money into pockets of husbands and debtors or enable them to meet commitments beyond their capacity to pay.

The second thing which must be borne in mind is the existence of social assistance. However unpalatable, undesirable, and inadequate, dependence on it may be, it at least ensures that a spouse or child will not be left without the necessitites of life. It also means that because support payments often go to repay social allowances advanced to a supported spouse, they are often collected, in effect, for the benefit of the general revenue of the province.

We will now summarize what we have said about the enforcement of the support obligation, or claims arising under it. The process by which an award is made and the process by which the money is collected should be regarded as parts of one process for the enforcement of the support obligation. The main purpose of the process is to see that spouses and parents perform that obligation. The enforcement process, however, must operate fairly, and must be seen to operate fairly, upon all concerned, including the liable spouse and his other dependents: and it must operate

in as humane a way as possible and with the maximum regard for the exigencies and even the sensibilities of the liable spouse. All these considerations require that support orders and enforcement orders be made by properly informed courts and that collection mechanisms operate efficiently but fairly and with a view to minimizing adverse economic and social consequences. Our object in this Report is to make recommendations for an enforcement system which will have these characteristics.

3. The Existing System of Enforcement

We will here give a brief outline of the present enforcement system, which we have defined to include the making of orders of support and the collection of the amounts awarded. Later in this Report we will amplify parts of the outline.

The Trial Division of the Supreme Court of Alberta has jurisdiction under section 11 of the Divorce Act (Canada) to make an order of support ancillary to divorce. The procedure is an adversary procedure by way of petition and appearance before a Supreme Court judge with the usual interlocutory procedures being available, e.g., examinations for discovery and production of documents. In many cases the amount of support has been agreed upon. In many others an award is made in the absence of a respondent husband or wife or no award is made because of the absence of a respondent wife or husband. The award is usually, though not necessarily, included in the decree nisi.

The Supreme Court also has jurisdiction under the Domestic Relations Act (Alberta) to make an order of support in an action for a declaration of nullity, an action for judicial separation, an action for restitution of conjugal rights, and an action in which alimony is the only relief claimed. These are also adversary procedures.

A spouse entitled to receive a payment under a Supreme Court order of support has the same remedies as any creditor who obtains a money judgment in the Supreme Court. The most important of these are the writ of execution and the garnishee summons. The creditor spouse also has the right to examine the other spouse in aid of execution. It is for the creditor spouse to take steps to collect the money; there is no service attached to the Supreme Court to give her or him any special assistance.

A creditor spouse has additional remedies. Under the Alimony Orders Enforcement Act (Alberta), a Supreme or District Court judge may commit the respondent to jail for not more than a year if the respondent's failure to pay is due to refusal or neglect, though not if the failure is due to inability to pay. We understand that this remedy is still used. Another remedy applies only to alimony, that is, to orders made in proceedings for judicial separation, proceedings for restitution of conjugal rights, or proceedings for alimony alone: the creditor spouse may register the order at a land titles office where,under sec. 21 of the Domestic Relations Act, it becomes a form of security against land owned by the respondent spouse in the land registration district.

Finally, a Supreme Court order of support may be filed in the Family Court and enforced in that court by the "show cause procedure" which we will describe below.

The Family Court has original jurisdiction to make orders of support under sec. 27 of the Domestic Relations Act, referred to as the "protection order" procedure. The order may be made in favour of a deserted wife, a deserted wife and a child, or a child alone. Proceedings are commenced by summons and the procedure is summary.

Sec. 28 of the Domestic Relations Act provides a special procedure for the enforcement of orders made under sec. 27, and sec. 6 of the Family Court Act (Alberta) makes the procedure available for the enforcement of Supreme Court orders filed with the Family Court. The proceeding is commenced by a summons served on the respondent husband requiring the husband to attend at the court to "show cause" why he should not be committed to jail for failure to pay. The husband can be committed if he does not appear upon the summons or if he does not satisfy the court that he is not able to pay the money. Family Court workers will issue the summons and arrange for service, and upon occasion will attempt to persuade the respondent to pay the amounts awarded. The procedure varies somewhat from Family Court to Family Court. Upon proclamation of S.A. 1977, c. 64,it will be available to both husbands and wives in relation to orders made by both courts.

A very substantial proportion of deserted wives obtains social assistance from the Department of Social Services and Community Health. Many wives who receive social assistance apply to the Family Court for support. That is very often done at the suggestion of a departmental worker, and at least some wives think that they must apply in order to obtain or continue to receive social assistance, though that does not appear to be an actual requirement. A provincial welfare worker is empowered by sec. 7 of the Family Court Act to make an application for support to the Family Court on behalf of a wife or child receiving a social allowance, and the government will have a full right of subrogation when S.A. 1977, c. 43,comes into effect.

4. Problems with the System of Enforcement

We are satisfied that the enforcement system does not work as efficiently as it should. That is the view of those in receipt of support whom we have interviewed.

It is the view of the staff members who administer the system. It is a widely held view, as indicated by the following passage from a paper prepared for the Uniform Law Conference of Canada (Payne, Maintenance Rights and Obligations: A Search for Uniformity, 1977):

> The Law Reform Commission of Canada has estimated that some degree of default occurs in 75 per cent of all cases wherein maintenance has been ordered by the courts. Although the law provides a variety of remedies to facilitate the enforcement of maintenance obligations, the complexity of the diverse procedures and the fragmentation of jurisdiction between the courts effectively preclude a dependent spouse from personally enforcing a maintenance order. Nor can the frustrated spouse look to the legal profession for assistance. Lawyers are frequently unable or unwilling to institute enforcement proceedings, particularly when difficulties are encountered in tracing the defaulting spouse or where the legitimate cost of the necessary legal services are disproportionate to the amount of unpaid maintenance. Furthermore, with some exceptions, the courts will not assume a primary responsibility for ensuring due compliance with their orders.

There is however a dearth of reliable information from which firm conclusions can be drawn about the nature of the present problems and about their solution. One thing which is not clear, for example, is the extent to which problems of collection are attributable to inability to pay, the extent to which they are attributable to unwillingness to pay, and the extent to which they are attributable to inefficiencies in the collection system. We believe that research studies should be made to obtain that information and we are endeavouring to have such studies designed and funded. We think, however, that available information suggests that improvements should be made in the enforcement system now and should not await the outcome of lengthy studies.

Part of the difficulty of collection of support awards

arises from unresolved philosophical conflicts. Most people would agree that one spouse should be responsible to some extent for the support of the other. There is much less general agreement as to the extent of the obligation, and it is quite likely that many spouses resist payment because they think that the obligation imposed upon them is unfair. That feeling may be exacerbated if a spouse is compelled to surrender custody of children to the other spouse and is then compelled to support the custodial spouse so that she may be free to care for the children. It is likely to be exacerbated if there are two households and insufficient money, a situation which causes difficulty not only as a practical matter but also as a philosophical and emotional one. We think that improvements in the substantive law, while they will alleviate these problems, will not completely solve them.

Then there is a question as to whether, assuming the existence of the support obligation, the system proceeds fairly. Often one spouse will agree to an unfair support award for the sake of getting something else; for example, one spouse will agree to pay too much support or accept too little support in order to get a divorce, or because of the fear that the custodial parent will use a refusal to agree as a pretext to turn the children against him or her. A further problem is that the system may appear unfair if an order is made which does not reflect the facts of the situation.

The intervention of social assistance gives rise to a further philosophical problem. It is one thing to say that one spouse should support another. It is a rather different thing to say that one spouse is under a duty to reimburse the state for supporting the other spouse, and to say that the power of the state and of the courts should be exerted to

make him do so. That is what is done, and we think that it will have to continue to be done, but the courts and court staff are likely to be less enthusiastic in collecting money, and respondent spouses less enthusiastic in paying money, for the benefit of public funds. The intervention of social assistance also puts the supported spouse in a different position. She or he has no financial interest in seeing that the other spouse pays, and may have strong personal and emotional reasons for not wanting to take steps to compel the other spouse to pay. Should she or he be compelled to take unwanted proceedings or to participate in them? It is impractical to suggest that the law will be changed so that she or he will not have to appear as a witness, but it must be recognized that the system of enforcement creates situations which will increase ill will between the spouses. We do not see any present alternative, but we think that it must not be forgotten that the system of enforcement exists in part for the reimbursement of public funds.

Then there are problems with the system itself. One of these is its appearance to the spouse who is to be made to pay. Apart from feeling that it favours his wife or ex-wife, the husband, who is usually the respondent, may well see the system as impersonal and punitive when its contact with him commences with a summons which threatens him with jail and requires him to go, usually unaided, into a court which appears to him to be working at the instance of the other spouse. We hope that some of our recommendations will alleviate that problem.

Another problem with the system is the cumbersome and inefficient nature of the remedies. The traditional creditors' remedies in the Supreme Court, garnishee and execution in particular, require legal assistance, and, because they deal only with existing indebtedness and are expensive, are ill suited to the collection of small monthly

payments. Proceedings under the Alimony Orders Enforcement Act or under the "show cause" procedure in the Family Court involve finding the obligated spouse, serving him, bringing him to court and threatening him with jail, all of which is very cumbersome and gives an intransigent spouse much opportunity to delay and to evade payment. If his circumstances are such that he can move from place to place easily, it is always difficult and usually impossible to keep up with him and to extract payment from him. Some of our recommendations will be directed towards making remedies more flexible and effective, and others towards providing a better administrative system to see that available remedies are used more effectively.

There are problems of administration. Family Court staffs do not have the administrative support necessary to pick up all defaults in payment at an early date when collection is likely to be relatively easy. Some spouses who are entitled to the benefit of orders of support will bring defaults to the attention of the court staff, but it seems that in at least some cases they do not do so because they do not have confidence that the system will produce payment for them. The problem is much greater in connection with supported spouses who are receiving social assistance. Arrears become substantial, and accordingly less likely to be collectible, before the Maintenance and Recovery Branch is advised of a default and instructs collection proceedings. Something can be done about that problem if it is perceived to be one which justifies substantial efforts to resolve it.

The law orders the respondent spouse to pay, but often lets him flout the order with impunity. He may therefore hold the law in disrespect. An applicant spouse perceives that although court orders are solemnly pronounced and are supposed to be enforced, the respondent spouse does not

in fact pay. She may also hold the law in disrespect.

The system therefore has paradoxical effects. It is at once harsh and inefficient: it often operates harshly upon the respondent spouse, but more often he or she is able to evade it so that the burden falls either on the other spouse or on the child needing support or upon the public funds.

There is no complete remedy for the problem, but it can be alleviated by measures to increase the efficiency of the collection process, tempered by measures to ensure that the system does not operate too harshly upon the respondent and by measures to increase the perceived fairness of the awards made by the system. The adverse economic and social consequences of failure to pay cry for the attention which they must receive, but the adverse economic and social costs of stricter collection procedures must be borne in mind as well.

We wish to make it clear that we are not criticizing persons. We have no reason to doubt that those involved in the system do their best to cope with the circumstances in which they find themselves, including a system which is the product of history and of the society in which we find ourselves. Indeed, we have been impressed with their desire to do effective jobs, and we are satisfied that improvements in the system will be as welcome to them as to those affected by it.

5. Information

1. The need for information in the system of enforcement

(a) Information needed to make a just award

A support order is likely to be reasonable and

enforceable only if it is based upon adequate and accurate information about the financial position of both spouses. That is the advice we have received from the Social Services Committee upon whose advice our Report 26, Family Law Administration: Court Services, is based, and it is the advice which we have received from the Committee on Matrimonial and Child Support which is advising us on the general subject of the funding of support payments. Accordingly, we will in this Report make recommendations intended to ensure that a support award will be based upon a proper appreciation of the effect which it will have on both parties.

In the Supreme Court, the procedures available in litigation generally are available in proceedings for divorce, nullity, judicial separation and alimony. Witnesses can be compelled to testify and to produce documents. Pre-trial procedures, including discovery of documents and examinations for discovery, are available and can be used to ascertain the assets, liabilities and income of a husband or wife. It is generally assumed that one party can require the other to produce the other's copies of his income tax returns or T4 slips. It appears that examinations for discovery and notices to produce documents are, however, less common in matrimonial proceedings than they are in other kinds of law suits. It appears also that the court adjudicates upon support in only a small proportion of divorce cases; that in the great majority, the parties negotiate and settle the amount in advance; and that in most cases the court accepts their agreement. While these negotiations are guided by forecasts as to what the court would do upon an adjudication, they are also strongly influenced in many cases by the urgency with which one party wants a divorce, the desire of the parties to reach final settlement, and their desire to negotiate arrangements for custody and access to children. In many cases, also, the support award is made on the basis of the wife's estimate of her husband's income based on the

type of job he had before he left her. In many cases no evidence as to the husband's income is before the court.

Pre-trial procedures are not available in the Family Court. Where the parties are not represented, as is often the case, the judge must interrogate them at the hearing in order to elicit information as to their financial position. We do not think that that is a procedure which is likely to elicit adequate and accurate financial information, and we do not think it is one which tends to cause the court to be perceived as an impartial arbiter. Further, the judge has no practical means of verifying the information elicited. We think that the judge should be entitled to assistance in assessing the financial situation of each party, not only to save expensive court time but also to ensure that awards are fair and are perceived to be fair. We think that there is some support for this view in information which we obtained from an examination of a number of Family Court files in Edmonton, Fort McMurray and Lethbridge though the number of files examined was not sufficient to justify statistical conclusions of general application. In the three centres 45%, 40% and 68.4% of the husbands referred to in the files respectively claimed to have no income at all, a state of affairs which seems unlikely to be true in such a high percentage of cases. These considerations suggest that there is a need for better means of providing information to the court, and we will now proceed to discuss ways in which the information can be provided. In saying so we are not being critical of judges who must proceed on the basis of what is made available to them, and we are not suggesting any derogation from the judicial function or judicial responsibility. Our proposals are directed towards giving the court the information that is needed to make the best possible decision. They apply equally to the present courts administering family law and to a unified family court if one is created.

(b) Information for collection purposes

Fairness and efficiency require that the judge be provided with better financial information at the time he makes an award. Fairness and efficiency also require that the judge have adequate and accurate financial information when he is dealing with default in payment. Judges of the Supreme Court now deal with such default under the Alimony Orders Enforcement Act. Judges of the Family Court deal with it under Part 4 of the Domestic Relations Act.

It should be noted here that our view is that the respondent spouse should, at any hearing in the enforcement process, be entitled to show that there has been a change in circumstances or that there is additional evidence which suggests a variation of the award. That is a further reason for having proper information before the judge in a collection proceeding. He may even of his own motion point out that a variation should be applied for if the award is inappropriate by reason of the present financial situation of the obligated spouse or of the dependent spouse or by reason of a change in custody of the children.

Better information should also be available to others engaged in the collection process, including court officials and litigants. Without it they can neither take collection procedures outside the court nor bring before the court properly considered applications for collection remedies.

In general, we think that the information which should be available for collection proceedings is much the same as the information which should be available at the time of the award. We will therefore discuss ways of making it available for both.

2. Locating the Respondent

(a) Need to locate the respondent

In most cases it is necessary to locate a defaulting spouse in order to collect support payments from him. That is obvious. We think that it is also obvious that it is necessary to locate him in order to make a reasonable award against him. An award made after substitutional service and in the absence of current financial evidence is less likely to be suited to his circumstances.

(b) Present means of locating and serving the respondent

In Supreme Court matters, the most important being divorce, it is for the petitioner to arrange to find and serve the respondent. That is usually attended to by the petitioner's lawyer, who will apply for an order for substitutional service if the respondent cannot be located. The services of the sheriff's office are of course available.

In Family Court matters workers in services attached to the Family Courts make efforts to locate respondent spouses. They do so by whatever methods their ingenuity suggests. The most common methods are searches of directories and the making of enquiries from offices maintaining records of large numbers of people. Family Court workers have no legal power to demand information.

Family Court summonses have most commonly been served by the police. In Edmonton, the sheriff's office is now serving them. The Calgary police are still serving summonses. In some other places the R.C.M.P. are serving them, though in some they have resisted doing so. On some occasions workers in the Family Court services effect service themselves.

We think that administrative improvements should be made for the benefit of both of the courts and for the benefit of the litigants in them. We deal with these in our Report 26, Family Law Administration: Court Services, and will not repeat them here. Our recommendations here are for changes in the law and in court procedures designed to improve the information available to the court and court workers.

(c) Information from government agencies and employers

A number of government agencies collect information about individuals which includes their addresses and occupations. That information would obviously assist courts and spouses in locating respondents for the making and the collection of awards. So far as information concerning Alberta residents is concerned, it appears that the most valuable information is that maintained by the Alberta Health Care Insurance Commission; their records appear to include the most comprehensive and the most up-to-date employment information, as it is up-dated monthly. The records of the Motor Vehicles Branch, which are available to the public and therefore to Family Court workers, appear to be useful, though less so since the introduction of the five-year driver's license has made the information more likely to be stale. The records of other provincial agencies, and police records, might also be of value. Unemployment Insurance records and Canada Pension Plan records would be of great value in locating persons not resident in Alberta. So would income tax records. These federal records are not as up-to-date as those of the Alberta Health Care Insurance Commission.

Apart from administrative problems, the use of records of government agencies raises a very important question, that of confidentiality or privacy. That is in itself a

question to which great attention must be paid, particularly if the compulsion of the state is used in order to obtain information for a government agency and if the information is obtained for the purpose only of a particular public policy.

The feeling that privacy should prevail was expressed in 1956 by the English Royal Commission on Marriage and Divorce when they said (Cmnd. 9678, para. 1148):

> We are satisfied that it would be wrong to require Government Departments to disclose the husband's address, whether to an officer of the court or the wife. Against the right of a wife to maintenance must be balanced the right of the husband to have his privacy respected; in our view, the latter must prevail.

It appears however that the government of the day did not share that view. The Finer Report, the Report of the Committee on One-Parent Families of 1974 said (Cmnd. 5629, Vol. 1, p. 124-125):

> In 1957, the government gave authority for the first time for the disclosure to court, on request, of addresses from official records to facilitate the initiation of maintenance and affiliation proceedings, and the enforcement of orders. The principal records are the central social security records of the Department of Health and Social Security, and the National Health Service Register, Passport Office and Ministry of Defence records are also available for this purpose....Parallel arrangements have been made in the divorce jurisdiction for obtaining the address of a husband for the assistance of a wife seeking to obtain or enforce an order for maintenance for herself or the children. The request to the department is made by the Divorce Registrar, and the address is passed on by him to the wife's solicitor (or, in proper cases, where she is acting in person to the wife herself) on an undertaking to use it only for the purpose of the proceedings.

More recently the Ontario Law Reform Commission said (Report on Family Law, Part VI, Support Obligations, p. 193-94):

> We are of the view that both those who are receiving welfare assistance, and those who are not, should receive the same help in locating their missing spouses....
> We therefore recommend that personnel of the Enforcement Branch be used to trace missing spouses or parents so that maintenance, custody or affiliation proceedings may be initiated or maintenance or custody orders enforced. To this end such personnel should be empowered to require all Ontario government ministries and agencies to disclose from their official records the addresses of those being sought.

The Government of Ontario appears to have accepted that view, subject to the requirement of a court order. Sec. 76 of Ontario Bill 59, 1977, would give the court power to order "any person or public agency" to provide the court with any recorded particulars of the address of the respondent for an application for support or for an enforcement proceeding.

The proper balance must be struck between the public and private interests in the protection of privacy, on the one hand, and the collection of support payments, on the other. We think that the proper balance is to require the Alberta Health Care Insurance Commission to disclose upon judge's order, or to a clerk of the Supreme Court or the Family Court without order, the address of a respondent spouse and the name and address of his employer. These are among the most public of the respondent's characteristics and the restricted invasion of his privacy which would result is, we think, justified by the object to be achieved and the legal and moral obligation being enforced. The provision that only a court official could demand the information would also, we think, give some protection against abuse, though it

is obvious that by the time the obligated spouse appears in court the information will be known to the other spouse.

The next question is: for what purpose should the information be used? Its principal purpose is to facilitate the service of process. That would include the petition, summons, or other process by which an application for support is commenced. It would also include the summons or other process commencing a collection proceeding in which Family Court services are involved. The employer's name would also be available for use in the collection process so that the respondent's wages could if necessary be attached. Use of the information should be confined to the purposes of the proceedings.

Section 25(1) of the Alberta Health Care Insurance Act (R.S.A. 1970, c. 166) provides as follows:

> Every...person...shall preserve secrecy with respect to all matters that come to his knowledge in the course of his employment and which pertain to basic health services rendered and benefits paid therefor and shall not communicate any such matters to any other person except as otherwise provided in this section.

It will be observed that a proper interpretation of this section suggests that it is only information which "pertain[s] to basic health services rendered and benefits paid therefor" which is not to be communicated. The address of an obligated spouse and his employer's name and address do not seem to us to fall within that category, so that special authority to give them to the court may not be required. However, so as to ensure that the Commission is not left in doubt as to its right and duty to disclose the information, we think that the section should be amended by a positive statement that the address and employer's name should be made upon order or to a clerk of the court.

Some federal records would be useful in locating spouses resident outside Alberta. Unemployment Insurance records would be of some value, particularly if notices of change of employment come to be required. As did the Ontario Law Reform Commission, we accordingly recommend that the federal government be asked to pass legislation requiring the Unemployment Insurance Commission to disclose the address of a respondent spouse, though to minimize the administrative problems of such a proposal on a nation-wide scale, the information should only be available at the request of a judge and when other attempts to trace the spouse have failed. We think that similar legislation should be suggested with regard to Canada Pension Plans records. In view of the special considerations relating to income tax records we do not make any suggestion with respect to them.

The social insurance number of the respondent would facilitate access to the two sets of federal records. Sometimes it will be known to the other spouse, but not always. We think that it would be helpful to empower the courts to obtain the social insurance number from the Alberta Health Care Insurance Commission. A judge's order should be required, and the number should be sought only when the respondent appears to have left the province and other means of locating him have failed. It seems to us that the giving of the additional information is justified under the circumstances, and the Commission in many cases will have it.

We have considered whether to recommend, as did the Ontario Law Reform Commission in the passage we have quoted, that information from the records of all provincial government agencies be made available. While sympathizing with this recommendation, we have concluded that we should not make a similar one; we do not have enough information as to what records are involved and what the effects of such a provision would

be. If it should appear later that information from other specific sets of government records would be useful, consideration could be given to amending the legislation to make it available.

An employer may be reluctant to disclose the whereabouts of a respondent who is his employee. The clerk of the court should be entitled to ask for the information, but if it is refused, the court should have power to make an order for disclosure.

Police records may be helpful in locating a respondent spouse who cannot be located otherwise. We think that administrative arrangements should be made with the police forces under which they would disclose the respondent's address and employer's name. They should only be asked to disclose information in their records, and they should be entitled to decline if they consider disclosure to be undesirable. We do not think that the arrangement should be embodied in legislation.

One other administrative procedure would, we think, have practical value. The records of the Motor Vehicles Branch across the country would be of some substantial value in locating spouses who have left Alberta. We understand that a person who moves into another province from Alberta can surrender his Alberta operator's licence and obtain one from the other province without passing tests which would otherwise be necessary. The other province will then return the licence to Alberta. If the Alberta Motor Vehicles Branch records could show the name of the province by which the licence was returned, which we understand is not now done, that would give a lead to the new province of residence of the spouse. We would recommend that the question of having this information retained in useable form by the Motor Vehicles Branch be explored and if practicable implemented.

Recommendation #10

(1) That the proposed Act provide that:

(a) A Clerk of the Supreme Court or the Family Court is entitled:

(i) to obtain from the Alberta Health Care Insurance Commission such particulars as the Commission's records may contain of the address and employer's name of a person against whom proceedings for matrimonial or child support, or for collection of money owing under an order of support, have been commenced or are contemplated, and

(ii) to obtain from the employer of such a person such information about the address and location of the person as the employer may have.

(b) A judge of the Supreme Court or Family Court may by order

(i) require the Alberta Health Care Insurance Commission or an employer to provide the information referred to in subsection (a), and

(ii) upon being satisfied that the address of the person has not been ascertained after reasonable efforts and that there is reason to think that the person has left the province, require the Alberta Health Care Insurance Commission to provide the social insurance number of the person if the same is in its records.

(c) Secrecy of the information provided under subsections (a) and (b) shall be preserved except as required for the purpose of the proceedings.

(d) A person who communicates information to a clerk or under order in accordance with subsections (a) and (b) is protected from legal liability for doing so.

(e) This provision applies notwithstanding anything to the contrary in the Alberta Health Care Insurance Act.

(2) That the following administrative arrangements be made:

(a) An administrative arrangement with the police forces under which they would, unless they consider disclosure to be undesirable, disclose such particulars as are in their records about the name and address of a person against whom proceedings for matrimonial or child support, or for collection under an order of support, have been commenced or are contemplated, and

(b) If found practicable, an administrative arrangement that the Motor Vehicles Branch maintain a record of the province which issues a driver's license upon surrender of an Alberta driver's license so that the province where the surrender takes place can be identified.

(3) That the provincial government recommend to the federal government that Parliament be requested to enact legislation requiring that information from the records of the Unemployment Insurance Commission and the Canada Pension Plan about the address of a person against whom support or collection proceedings have been commenced or contemplated, be made available upon order of a Supreme Court or Family Court judge who has satisfied himself that reasonable attempts to locate the employee have failed.

(d) Service of process

We have said that the Family Court services should assist applicant spouses by arranging for service of process by which proceedings for support or collection are commenced. We think that the Family Court services should also give that assistance to litigants in the Supreme Court. That would be a significant extension of the service, particularly as it would include divorce petitions in which support is claimed, but we think that any argument which requires that it be provided for Family Court litigants applies to Supreme Court litigants. If a unified family court is established the distinction would in any event disappear.

The next question is how the Family Court services should make those arrangements. As we have said, the police

have in the past served most Family Court summonses. That has been a necessary arrangement, and it is one that should be continued in the absence of a better arrangement, but we think that there are some drawbacks to it. From the point of view of the police, routine service of process is a derogation from their principal function of preserving law and order. Then, because of that fact, service of Family Court process is not likely to receive their first attention. Finally, involvement of police tends to make the process look like a criminal and punitive process.

We have considered suggesting that workers attached to the Family Court services should serve process, and we can see arguments in favour of such a suggestion. Workers in the Family Court services would presumably determine their priorities in accordance with the exigencies of family law work, something that has not been invariably done in the past. The process server might well pick up information which would be useful in the enforcement process. He might also be able to answer the respondent's questions about the system. However, our tentative view is that service by Family Court workers is not likely to be efficient. The sheriff's offices already provide service throughout the province, and it would be better to try to work out a satisfactory arrangement with them rather than set up an expensive duplicate system. There are many efficiencies in dealing with the service of documents in bulk, as the travelling time per attempted service can be greatly reduced. Our understanding is that the experiment in using the sheriff's office at Edmonton is providing relatively efficient service at relatively low cost. If so, it should be continued, and if it continues to prove efficient, similar arrangements should be made elsewhere. Care should of course be taken to see that family law work will be treated as important and urgent, and that the administrative processes of the court and of the sheriff's offices are as

far as possible geared to each other. If it appears after adequate trial that the use of the sheriff's office is not satisfactory, consideration should then be given to having process served by Family Court workers.

We would also suggest one experiment which has already been tried but not on a large enough scale to justify the drawing of conclusions. That experiment is the service of summonses by mail. Service of that kind, of course, would not be legally valid unless the person served appears or admits service. It seems reasonable to hope, however, until the contrary is proven, that a substantial majority of respondent spouses would act upon the receipt of process by mail and that the result would be a significant reduction in cost and the freeing of workers in the Family Court services to deal more effectively with the intransigent minority. It seems reasonable to hope also that there would be psychological side-benefits, as many respondent spouses are likely to feel more threatened by formal personal service than by receiving a document in the mail. The danger, of course, is that many respondent spouses may simply ignore the service by mail and that it may become another element of delay and of confusion in court schedules. We hope that that problem might be avoided by the use of discretion in deciding to attempt mail service and by including material which will persuade most respondents to communicate with Family Court workers before the date of the proposed hearing.

We think that on an experimental basis the Family Court Services should be authorized to retain private location services to locate respondent spouses who cannot otherwise be found. Our understanding is that private firms will work on the basis that they are paid only if they are successful in locating the person being traced. Some money should be budgeted for that purpose and if the experiment is successful the practice could be made permanent. Care should be

taken to ensure that methods used by any agency retained by the court are compatible with the methods of a civilized court system.

In summary, we think that the nature of proceedings for support and the circumstances of those involved in it require that the Family Court services give assistance to some claimants in the service of process, and we see no reason why the same assistance should not be given to all claimants in both the Supreme Court and the Family Court. Efforts should be made to find ways of serving process as expeditiously and cheaply as possible.

Recommendation #11

That the following administrative arrangements be made:

(1) That the Family Court services provide assistance in serving initiating process for spouses claiming support in the Supreme Court and the Family Court and for spouses bringing collection proceedings in the Family Court.

(2) That the police be asked to serve process only if other services are unavailable or if there is danger of breach of the peace.

(3) That the use of the sheriff's office at Edmonton for the service of process be continued, and that arrangements be made with sheriffs' offices elsewhere for the service of initiating process.

(4) That if the use of the sheriffs' offices does not, after it has been given adequate trial, meet the exigencies of the court, consideration be given to service of process by Family Court staff retained for that purpose.

(5) That the Family Court services be authorized to experiment with the use of private services to locate respondents who cannot otherwise be found, taking care that the private services use methods which will not discredit the Family Court or the Family Court services.

(6) That experiments be conducted with service of process by mail on the basis that service would not be legally valid unless the respondent appears or admits service, the experiment to be assessed and put on a permanent basis if it improves the efficiency of the court system and discontinued if it does not.

3. Financial Information

We have previously made the point that adequate financial information is necessary for the making of reasonable and enforceable support awards. We will now discuss ways in which the information available to the court can be improved.

(a) Statements of financial information

We think that either spouse should be entitled to demand financial information from the other. The information should be that which the court needs in order to assess the needs and resources of each spouse, and it should be available upon an application for support (including an application in divorce or other matrimonial proceedings) or on an application for collection, though in the latter case information about the applicant's finances is not needed. The court should have power upon application or of its own motion to require a party to provide the information.

In Supreme Court proceedings, either party should be able to demand the information with or without examinations for discovery and discovery of documents. We accordingly recommend to the Rules of Court Advisory Committee and the Lieutenant-Governor in Council that appropriate provision be made in the Alberta Rules of Court, which, under R. 562(1) of the Alberta Divorce Rules, would apply to divorce proceedings as well as to other matrimonial proceedings. In the Family Court it would be desirable to have rules of court

to the same effect but, failing such rules, it will be necessary to deal with the matter by statute. We think that a form asking for basic financial information should be prescribed, and that is best dealt with by rules of court or by regulations. Either party should be able to demand the information, but one who does so should be required to file his own. A statement of financial information should be admissible in evidence. We do not think that a sanction would be useful other than the drawing of adverse inferences, the making of an order of support against a respondent who does not comply, and the dismissal of the application of an applicant who does not comply. We include a possible form in the rules attached as a schedule to the proposed Act, but only as an indication of what we have in mind.

In Supreme Court matters, lawyers are usually involved, so that completing the financial statement should not usually present great difficulty. In some Supreme Court matters and in many Family Court matters, litigants do not have lawyers, and we think that the system should allow for that fact. There are many people for whom the filling out of the form would be daunting and we therefore think that Family Court services should provide help, either through the intake process or through the fact-finding agency which we will discuss later in this report. An applicant who is in receipt of a social allowance will already have filled out a form in connection with the application for the allowance, and we think that if the form is up-to-date a copy of the form or of the relevant part of it, should be accepted in lieu of the prescribed form so as to minimize the paperwork.

Similar proposals have been made by the Ontario Law Reform Commission (Report on Family Law, Part VI, Support Obligations, p. 173) and the Ontario Commissioners to the Uniform Law Conference of Canada (1976 Proc. 276) and

embodied in Ontario Bill 59, 1977. We have diverged from them in two ways. The first is to suggest that the information be made available only upon demand; we are inclined to put more emphasis on flexibility and less upon universal conformity to the proposal. The second is to suggest that the information in the first instance need not be verified by affidavit; we are inclined to put more emphasis upon keeping the procedure as simple as possible, and, where there is a hearing, the party who provides the information can be asked to confirm it under oath.

The procedure we envisage would require a party, particularly a respondent, to provide information before there is any adjudication of his liability. While that will not usually be harmful, there may be some cases in which it is, and two safeguards should be provided. One is that the information should not be put in the public file, though of course it would be before the court at the hearing and could be referred to there and in reasons for judgment. The second is that a party should be entitled to apply to the court for an order relieving him of the obligation of providing the information. That would normally be granted only until it has been decided that, assuming financial resources, the respondent may be ordered to make support payments.

We think that the court (that is, either the Supreme Court or the Family Court) should have specific power to require either spouse to produce copies of income tax material, including returns and T4 and other slips. If that power is included in rules or statute it would be as firmly based as the provincial legislature could make it.

We will later in this Report discuss the right of the

government to bring an application for reimbursement of money paid for the support of a socially assisted wife or child. The recommendation which we will now make will cover such an application.

Recommendation #12

(1) That the proposed Act provide as follows:

(a) A party to a proceeding in which support or collection of money under an order of support is claimed may at any time

(i) give notice to another party to the proceeding, or

(ii) apply to the court for an order,

requiring the other party to file a statement of financial information in the form and containing the information prescribed by the rules.

(b) A party who gives a notice or obtains an order under subsection (a) shall file a statement of financial information.

(c) This section applies with necessary changes to an application brought by the government under the Social Development Act, but a statement of financial information filed by the government shall relate to the socially assisted spouse whose rights have vested in the government.

(2) That the procedure and forms be as set out in the Schedule to the proposed Act.

(3) That the Alberta Rules of Court be amended to make provision for statements of financial information similar to Recommendation #12(1).

(4) That the Family Court services provide information and advice to a party in the preparation of a statement of financial information.

(b) Agency to procure and evaluate financial information

Under the Divorce Rules and the Alberta Rules of Court, a party to a support proceeding in the Supreme Court can require another to submit to examination for discovery, including the answering of questions under oath as to his financial resources and needs. Similarly, a party can require the other to disclose all documents in his possession, and that probably includes his income tax returns and other materials. The procedure is useful but expensive. It is not available in the Family Court, and we have already said that we think it unsatisfactory that the only practical step which the Family Court can take to obtain information is to cause a party to be examined at the hearing.

The recommendations we have made concerning the provision of financial information by the parties, if adopted, should improve the situation. However, the court will not, without more, have any ready way of verifying the information and ensuring that the party has understood the questions except by examination at the hearing. Viewing as we do the fairness of the award as fundamental to the collection process, we think that there should be available to the court a procedure under which it can require the spouses to attend upon an agency charged with gathering and evaluating financial information for the assistance of the court in dealing with an application for an order of support or an application for collection.

Such a mechanism exists in British Columbia, a mechanism which has been influenced by proposals made earlier in Alberta. The Debtor Assistance Act (S.B.C. 1974, c. 25) empowers a court to refer to the Debtors Assistance Board for an inquiry and written report any question in a proceeding that relates to the financial resources of a debtor and his

ability to pay his debts. It goes on to provide that the report may be received as prima facie proof of the truth of the facts in it. The Debtors Assistance Board has extensive powers to subpoena anyone who may reasonably know anything about the financial affairs of a party, including the debtor, his employees, agents and creditors, though it appears that it has not been necessary to make use of these powers in support matters.

The British Columbia Family Court will upon occasion make an order requiring the parties to go to the office of the Debtors Assistance Board. It may do so in connection with an application for a support order or for variation, or in connection with collection proceedings. A Family Court worker then arranges an appointment and tells the parties that the Board will want to see bank statements, charge account and credit card statements, T4 slips and pay stubs, and the Debtors Assistance Board worker usually confirms the appointment by telephone and suggests again that they bring those papers along. A member of the Board's staff interviews them, obtains financial information, and makes a report to the court.

We think that a somewhat similar arrangement should be made in Alberta.

The Alberta counterpart of the British Columbia Debtors Assistance Board is the Family Finance Counselling Service of the Department of Consumer and Corporate Affairs which still performs the function and has the powers of the Debtors Assistance Board established by the Debtors Assistance Act, R.S.A. 1970, c. 86. It also administers the Orderly Payment of Debt provisions of the Bankruptcy Act, R.S.C. 1970, c. B-3, and makes orders under them. The Service is accustomed to counselling debtors. In the course of so doing it gains experience in obtaining and verifying

information from debtors, and that experience is the kind which is needed for the function we have in mind. Its experience is also useful in determining the reasonableness of expenses claimed, as it sees many people living on comparatively small incomes.

The Family Finance Counselling Service therefore appears likely to be an appropriate agency to receive references from the courts where it has offices and sufficient personnel. Its powers of subpoena and of administering oaths may be of value, though, as we have said, the British Columbia Debtors Assistance Board has not had to exercise them. We do not, however, think that there should be a statutory delegation to the Service of the function of receiving references and making reports to the courts in support matters. Rather, we think that the legislation should provide that the court may require the parties to appear before a person or agency named in the order, or in rules of the court, and that the person or agency so named has for the purposes of the proceeding the powers set out in the legislation. That would enable the courts to arrange with the Family Financial Counselling Service for references where the Service could readily cope with them, and to make arrangements with other individuals or agencies where that would be more appropriate. We are inclined to the view that the financial information service would not be most efficiently carried on by the Family Court services as it appears to be a different function from those performed by the Family Court services, and it is doubtful that staff members devoted to it would find their time efficiently used. It would, however, be possible to experiment with the furnishing of the service by the Family Court services if that is thought desirable.

The precise functions of the agency giving the service would be to interview the parties; to obtain from them all

relevant information as to their means and needs; to verify the information where verification appears desirable; and to report to the court the results of the investigation. It would not be acting as a debt counsellor or as a conciliation service but as an official delegate of the court to obtain information and relevant documentary material; indeed one possible disadvantage to the proposal would be that, having acted as a fact-gathering authority, an agency might well have compromised its ability to act in the same case as a debt counsellor. The agency would not have the power to infringe upon the judicial function by making a recommendation as to the amount of support which one part would make to the other, but short of that it would have power to comment on the information which it puts forward. Its report should be admissible in evidence.

The court order would require the parties to appear before the agency and give the necessary information and documentation. We do not think that the agency would need the power to administer an oath as the information can be verified under oath at the hearing (though the Family Finance Counselling Service apparently has the power under the Debtors Assistance Act). It should be empowered to make inquiries from third parties, such as employers, but need not have any compulsory powers with regard to them. A third party would normally give the necessary information if it is lawful for him to do so and if the alternative is a subpoena by the court.

We think that the great advantage of the proposal is that it would give the court a better means of obtaining adequate information. We think that persons trained to elicit information, and able to elicit it in the less emotional and more relaxed atmosphere of an office, would be able to obtain more adequate information. Such persons would also be able to verify by inquiry such things as

employment income, something which the court cannot effectively do, at least in the absence of staff members whose function is to do the sort of thing we are proposing.

There would also be other advantages. When the court is obliged to elicit information itself, it assumes an inquisitorial role which is likely upon occasion to make it appear less than completely impartial; if the information is gathered elsewhere and put before the court that danger is lessened. There should be a saving in court time, which should reduce cost, though against that would have to be set off the cost of the time of the agency.

We do not think that the proposed procedure will be used in every case, or indeed in a substantial number of cases. The court will in most cases be able to obtain enough information by other means. Only a massive system could cope with extensive use of the procedure and the court should make use of it only in cases in which the information brought before the court by other means is incomplete or in which the court has the feeling that it is not accurate. It will be an additional means of achieving fairness in a proper case and of showing litigants that the court is willing to take steps to achieve that end and has the power to do so.

Recommendation #13

(1) That the proposed Act provide that:

(a) The Supreme Court or the Family Court may order a party to a proceeding in which support or collection of money under an order of support is sought

(i) to attend upon a person or agency named in the order or in the rules

(ii) to answer the questions of the person or agency concerning his financial needs and resources, and

(iii) to produce documents requested by the person or agency and relevant to the proceedings.

(b) The person or agency shall

(i) interview the party about his financial needs and resources and examine the documents produced by him,

(ii) take such steps to verify the information as the person or agency thinks proper, and

(iii) file a report with the court.

(c) A person or agency acting under subsection (b) has power to make inquiries from another person but not to compel an answer.

(d) A party to the proceeding

(i) is entitled to examine a report filed under subsection (b), and

(ii) upon giving such notice of his intention to do so as is reasonable in the circumstances, is entitled to cross-examine the person who prepares the report.

(e) A report filed under subsection (b) is admissible as evidence of the statements made in it.

(2) That the government in consultation with the Chief Justice of the Trial Division and the Chief Judge of the Provincial Court make arrangements

(a) for the Family Financial Counselling Service of the Department of Consumer and Corporate Affairs to be available to be named as an agency referred to in subsection (1), and

(b) for other persons or agencies to supply the service where it is not practicable or not desirable that the Family Financial Counselling Service do so.

(c) Information from employer

Under the present law an employer can be compelled to appear in court and to give evidence as to the earnings of a spouse involved in support proceedings. We think, however, that a means of obtaining the information should be provided which will be less inconvenient to employers and which will be more frequently used. We therefore recommend that the court in a support proceeding be empowered to require an employer to furnish a written statement of salary or wages, which should indicate the gross salary or wages and an itemization of each deduction to arrive at net take-home pay. The statement should then be admissible as evidence. As a matter of convenience, the clerk of the court should be able to request the employer to give such a statement though without the power to compel him to do so. The provision should be made specifically applicable to the Crown so that the provincial government would make a statement available with regard to one of its employees. The federal government should be requested to make legislative or administrative provision for the furnishing of similar statements. The court should have power to specify the information required so as to be able to deal with special problems.

Recommendation #14

(1) That the proposed Act provide that:

(a) The Supreme Court or the Family Court may order the employer of a party to proceedings in which support or collection

of money under an order of support is sought to furnish a written statement of the party's wages, salary or other remuneration and deductions therefrom for the period or periods specified in the order.

(b) In contemplation of a hearing in such a proceeding the clerk of the court may request from the employer a written statement of the party's wages, salary or other remuneration and deductions therefrom for such period or periods as he may consider relevant but has no power to compel the employer to provide the statement.

(c) A statement given pursuant to subsection (a) or subsection (b) is admissible as evidence of the statements made in it.

(d) An employer who in good faith provides information under subsection (a) or subsection (b) is not subject to liability for so doing.

(e) This section is binding on the Crown.

(2) That the federal government be requested to make legislative or administrative provision for the furnishing of statements similar to those referred to in Recommendation 14(1) with regard to employees of the federal government and federal government agencies.

V

ORDERS OF SUPPORT

1. Introduction

We have dealt with the basic law of support between husband and wife and with some aspects of the enforcement system common to proceedings in any court.

It is now time to discuss the proceedings in which orders of support may be made, and the powers of the courts in such proceedings. We will recommend that it should continue to be possible to bring proceedings in the Supreme Court under the usual procedures of that Court, and that it should also continue to be possible to bring summary proceedings in the Family Court. It will be convenient to discuss separately these two different forms of proceedings.

It is well to bear in mind that a subsisting order dealing with support may be the first order made on an application, or it may be an order which has varied a previous support order. In addition, under our recommendations it will include an order giving effect to or varying the terms of an agreement as to support. We think that the proposed Act should include a definition of "order of support."

Recommendation #15

That the proposed Act define an order of support as follows:

"Order of Support" means an order which fixes the obligation of support by granting or denying it, whether originally, or by varying a previous order of support, or by giving effect to or varying the terms of an agreement as to support, and except in matters in the Supreme Court includes a summary order of support.

2. Supreme Court Orders of Support

(a) Proceedings in which orders of support may be granted

The Supreme Court now has power to deal with support in a divorce action, in a judicial separation action, or (if any are brought) an action for restitution of conjugal rights. It also has power to make an order for support in an action brought for that purpose alone. This is as it should be, and the proposed Act should contain similar provision for proceedings which are under the legislative jurisdiction of the province.

Recommendation #16

That the proposed Act contain the following provision:

A party to a marriage may apply to the Supreme Court for an order of support

(a) in a proceeding limited to that object, or

(b) in a matrimonial proceeding,

and Recommendations #1 to #9 apply.

(b) Kinds of support which may be ordered

(i) Money Payments

(1) Periodic payments

The Domestic Relations Act confers on the court power to order one spouse to make periodic payments for the support of the other, a power which is normally exercised in favour of monthly payments though it is not so restricted.

The proposed Act should, of course, do likewise. It should go on to say that the order may require payments to be made for a limited time or until the happening of a specified event, and that it may provide for changes in the amount of payments.

The powers last mentioned are probably implicit in the court's general discretion, but we think it important that the proposed Act emphasize the encouragement of economic self-sufficiency where that is reasonable and practicable. An example of a case in which an order for periodic payments for a limited time would be appropriate would be that of a separated wife who needs support for a period of re-training or further education which is likely to make her self-supporting. An example of a case in which an order for periodic payments until a specified event would be appropriate would be one in which a wife with custody of a child will be self-supporting when the child finishes school. The making of such orders will bring it home to both parties that the payments will come to an end, though of course if things do not work out as the court expects, the order may be varied. Orders of that kind, of course, will not be appropriate where the attainment of economic self-sufficiency is not reasonable and practicable.

The proposed Act should also give specific power to the court to order periodic payments for any period after the commencement of proceedings so that the court can guard against undue prejudice to the applicant from delay in the proceedings. The power may exist now but should be made explicit.

(2) Lump sum payments

Section 11 of the Divorce Act (Canada) empowers the court to require a spouse to pay a lump sum for the

maintenance of the other spouse. The Domestic Relations Act (Alberta) does not. Should the lump sum be available in proceedings under provincial legislative jurisdiction?

We think that it is clear that the court should have power to award a lump sum on dissolution of marriage. It may be useful in a particular case to provide money for a house or car or for the payment of debts incurred by the previous failure of the husband to provide support. It may serve as a reserve of capital to meet contingencies. These considerations apply to voidable marriages and to innocent spouses in void marriages as well as to divorce, so that power to award a lump sum should be available in annulment proceedings.

The need is not so clear if the marriage is not dissolved. The need for money to buy a house or serve as a reserve of capital to meet contingencies may not be thought as great. The possibility of a reconciliation (which might be discouraged by the air of finality imparted by a large lump sum payment) may be greater while the marriage continues. Then again, it may appear futile to provide for a lump sum during marriage when the whole question of support may be re-opened upon the divorce. These considerations might suggest that provincial law should not provide for lump sum payments.

On the other hand, the same circumstances which justify a lump sum upon divorce may be present upon a judicial separation or even a consensual separation. It is not the divorce itself which creates the need, and a wife who is not divorced needs money for the same things as one who is. We therefore think that the court should have power to order one spouse to pay a lump sum to the other even if the marriage is not being dissolved. The possibility of a later divorce must be reckoned with, but

we think that the court will take that possibility into account in making the order for a lump sum payment, and that the divorce court will take into account the fact that the lump sum payment has been made.

The lump sum is not deductible for income tax purposes by the spouse who makes it, while periodic payments are. In the usual case, the spouse who makes the payment pays income tax at a higher rate than the dependent spouse, and the present tax laws therefore tend to discourage lump sum payments as compared with periodic support payments. That is a financial circumstance which the parties and the court should take into account, but we do not see that there is anything to be done about it.

Recommendation #17

That the proposed Act provide that upon an application under Recommendation #16 the court may make any one or more of the following orders:

(1) (a) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other commencing at or after the date of the filing of the application and continuing for an indefinite or limited period or until the happening of a specified event.

(b) an order requiring one party to the marriage to make a lump sum payment to or for the benefit of the other either at one time or by instalments.

(2) An order for periodic payments under subsection (1)(a) may provide for a specified change in the amount of the payments at a specified time or upon the happening of a specified event.

(ii) Transfers and Settlements of Property

As we have said, Canadian courts do not have a general

power to order one spouse to transfer specific property to the other. The usual power is to require one spouse to pay money to the other. We are satisfied however that there are cases where support can better be given by a transfer of property than by the payment of money. For example, a transfer of property in a proper case would make the matrimonial home fully available to the dependent spouse, and there may be cases where it would be better for the respondent spouse to transfer property than to have to dispose of it in order to obtain money for a lump sum payment. The court should not have to proceed by indirect means to obtain such a result; it should have the power to order the transfer of property or an interest in property, including a beneficial interest in trust property. The need for such a power is less clear if the marriage is not being dissolved. Our recommendation, however, is that the proposed Act give it not only in nullity proceedings but also in any other proceedings in which support is granted, though we would expect the court to use the power much more sparingly in the latter. We expect that the court will use the power as it uses the power to grant lump sums; it should not be used to effect the kind of general adjustment of the property rights of the husband and wife which should be made under matrimonial property legislation.

Another question is whether the court should have power to vary ante-nuptial and post-nuptial settlements. The Divorce Act does not give such a power, which may indicate that the matter is not one of great practical importance. There are few settlements in Alberta to which it would apply. However, section 24 of the Domestic Relations Act does confer jurisdiction on the Supreme Court in nullity proceedings to make such order as "seems fit with regard to the property comprised in an ante-nuptial or post-nuptial settlement made on the parties to the marriage." We think that the power might as well be carried forward and that it

might as well be available in nullity proceedings and also in proceedings for support between husband and wife not involving dissolution of marriage.

Our recommendations will replace the present powers of the court in the limited circumstances contemplated by sections 22 and 25 of The Domestic Relations Act and will carry forward its powers under section 24. So far as children are concerned these sections appear to be dead letters and may be repealed, leaving the rights of children to be considered in our project on that subject.

Recommendation #18

That the proposed Act make the following provision for transfers and settlements of property:

(1) In granting an application for an order of support, the court may make any one or more of the following orders:

(a) an order requiring one party to the marriage to convey or transfer property or an interest in property to or for the benefit of the other party, and

(b) an order varying, suspending or terminating an ante-nuptial or post-nuptial settlement made on the parties to the marriage, but not so as to affect adversely the interest of a third party benefitted by the settlement.

(2) An order requiring a party to convey or transfer property may authorize another person to execute the conveyance or transfer on behalf of the party.

(iii) Possession of the Matrimonial Home and Household Goods

In our Report No. 18, Matrimonial Property, we concluded that the law should not be changed to confer automatic co-ownership of the matrimonial home upon the

husband and wife. We decided that either the deferred sharing regime or the alternative discretionary system recommended in that Report would be sufficient to provide an equitable sharing of matrimonial property, including the matrimonial home. Our reasons for reaching this conclusion are set out at pp. 137-141 of that Report.

In Report No. 18 we also considered the issue of possession of the matrimonial home and use of the household goods and chattels. We concluded that a discretionary power should be conferred upon the court to make the matrimonial home available for the exclusive use of one spouse on an interlocutory basis or for an indefinite or fixed period of time. This discretionary power would also extend to the granting of the right of exclusive use of household goods and chattels owned by either or both spouses. We accordingly recommended that a Matrimonial Home Possession Act should be enacted. That recommendation and the reasons for it are set out at pp. 141-146 of Report No. 18.

(iv) Interim Support and Costs

The claimant spouse often needs support while matrimonial proceedings are being carried on. The court can award interim alimony in favour of the plaintiff in actions for declaration of nullity, judicial separation, restitution of conjugal rights, or for alimony alone. The power does not apply "where the plaintiff has from any source whatsoever sufficient means of support independent of the defendant." It has been held that a wife with liquid assets but no income is not entitled to interim alimony (McKenzie v. McKenzie (1965) 51 W.W.R. 182 (App. Div.)).

In a divorce action the court may order either spouse

to pay interim alimony for the maintenance of the other. The court is to award what it "thinks reasonable having regard to the means and needs of each of them."

Court decisions have established that the standard of support under the Domestic Relations Act is that the interim alimony should be enough to maintain the plaintiff "modestly and in retirement" until the action has been disposed of. In a recent decision a Local Master in Ontario held that because of the wording of section 10(c) of the Divorce Act the amount awarded need no longer be restricted by the application of that standard (Schein v. Schein (1973), 12 R.F.L. 347). The Ontario Court of Appeal, however, had earlier used the phrase "modestly and in retirement" in dealing with section 10(c) (Krisman v. Krisman (1971), 23 D.L.R. (3d) 412).

We are not entirely satisfied with a standard which restricts the amount of interim support to what is necessary to enable the applicant to "live modestly and in retirement." However, our impression is that the courts make adequate awards of interim alimony, and we do not think that we should recommend a change in an area in which the law is working satisfactorily. We think it enough that the proposed Act empower the court to make such interim order as it deems fit and just, with provision for continuation of interim support in the event of an appeal. The proposed Act should also give specific authority for the making of an order for interim costs. Rule 396 of the Alberta Rules of Court, which provides a mechanism for avoiding unnecessary applications for interim alimony and costs, will not be affected by our recommendation, but section 17 of the Domestic Relations Act would be replaced.

Recommendation #19

That the proposed Act make provision for interim support and costs as follows:

Where an application is made for an order of support the court may when it thinks it fit and just to do so make either or both of the following orders:

(a) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other party until the application or an appeal is disposed of, and

(b) an order requiring one party to the marriage to make a payment or payments to or for the benefit of the other party on account of necessary disbursements of and incidental to the proceeding in which the application is made.

(v) Final Orders

Orders of support can be varied. Circumstances change, and the changes cannot be foreseen. An order apparently adequate to protect a dependent spouse may become inadequate because of inflation or because of the illness or loss of employment of the dependent spouse. An order for payments apparently fair to the respondent spouse may become oppressive to him if he becomes ill or unemployable. In general we do not recommend a change in that aspect of the law.

We can, however, conceive of cases in which final settlement would be in the interest of both spouses. A husband might well go to extraordinary lengths to raise a lump sum for support if he could be assured that it was the last demand that would be made. The lump sum might be more beneficial to the wife than an uncertain and possibly uncollectable claim for future periodic payments. The husband and wife may each be fully self-supporting and both may want to live their lives free of any further relationship

with each other. Recognizing the danger that a dependent spouse may agree to a spuriously attractive settlement which would leave her in want, and recognizing also that the public funds may suffer if circumstances change, we nevertheless think that the court should have power to make an award and declare it to be final in the sense that, once the spouse against whom it is made does what it requires, his liability for the support of the other spouse is satisfied and no further order for support can be made against him. We think also, though with less conviction, that the court should have power to dismiss an application for support and make the dismissal equally final. These would be discretionary powers and we are satisfied that the court would exercise them only in the clearest of cases and after anxious consideration. It would be necessary for the order to say specifically that it is final. We think that such provisions would clear up uncertainty about the effect of a dismissal of an application under the present law.

We think, however, that the power should be limited to cases in which the marriage is dissolved. We do not think that it should apply while the legal bond remains, and in any event the order could not really be final in such a case as divorce would be available to the parties and the divorce court would not be bound by the order. Our recommendation would therefore apply only to cases of nullity, as that is the only form of dissolution which is under the legislative authority of the province.

Some questions arise. What if the respondent does not pay an amount awarded by a final order? In such a case, we think that the court should have the power to re-open the whole question of support. What if the order contains provisions for security? It seems to us that the court should have power to vary them. Should the court have power to vary the order until its provisions are fully

carried out? In the absence of default we think not. The order should be the final quantification of the support obligation, subject only to payment being made.

Recommendation #20

That the proposed Act make the following provision for final orders:

(1) This section applies if an application for an order of support is made in proceedings in which a declaration of nullity or decree absolute of nullity is granted.

(2) In addition to its other powers the court may

(a) in allowing the application declare the order of support to be final and not capable of variation, and

(b) in dismissing the application declare that the liability of the parties to support each other under the Act is terminated.

(3) If a party ordered to make payments or settle or transfer property for support under subsection 2(a) does not comply strictly with the order of support, the order is subject to variation under the Act.

(4) When

(a) an order under subsection 2(a) is fully complied with, or

(b) an order is made under subsection 2(b),

the liability of the parties to support each other under this Act is terminated.

(vi) Security for payment of support

Under section 23 of the Domestic Relations Act (Alberta) the court in a nullity action may order a party to secure payment of support to the other. Under section 11 of the Divorce Act (Canada) it may do so in a divorce action. We

think that the court should have that power. However, we think that improvements should be made.

The court can order a party either to pay or to secure. It cannot do both: (Van Zyderveld v. Van Zyderveld [1977] 1 S.C.R. 714). That situation is not entirely satisfactory. On the one hand, security may be very valuable in a particular case as it ensures that the dependent spouse will ultimately be paid. On the other hand, enforcement of many kinds of security is a long process, while enforcement of a personal obligation may be much more expeditious. We think that in a proper case a court should be able to give both remedies. To maintain flexibility it should have the power to order security when it makes the support order or thereafter, and it should have the power to vary the order relating to the security.

Then there is an important mechanical problem. The court's power is to order the husband or wife to secure. It is doubtful that that includes the power to effect the security by order, though we have seen orders that purported to do so. We think that two things should be done. One is to make it clear that the court can direct someone else to execute the security. The other is to make it clear that the court itself may impose the charge. That in turn would render it necessary to provide some means of enforcing the charge, and we think that the court should have power to appoint a receiver, order sale of the property which is subject to the security, and dispose of proceeds of the sale. In addition, the charging order should be made specifically registrable in the same way as a mortgage of the property charged. Finally, the court should have power to order a transfer of property in trust as an alternative way of providing security.

Whether the security is contained in the order, or whether it is contained in a document executed pursuant to the

order, the court should retain power to vary it.

Under section 21 of the Domestic Relations Act an order or judgment of the Supreme Court for alimony may be registered in any Land Titles Office and it will then have the effect of a charge like a life annuity on all the respondent's land in the Land Registration District. That result is objectionable from the point of view of the spouse against whom the order is made because it confers power on the other, at will, to tie up real property in excess of that needed for security and in cases in which it is perfectly apparent that he or she is capable of paying and will pay. It is also objectionable because no provision is made for removal or variation of the order. On the other hand, the section applies only to alimony orders and is unavailable to many spouses who need protection. We do not think that it should be carried forward into the proposed Act, as we think that our recommendations will allow the court to give better protection to the dependent spouse while avoiding unnecessary prejudice to the respondent.

Recommendation #21

That the proposed Act provide for security for payment of support as follows:

(1) Upon or after making an order of support the Supreme Court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following:

(a) charge specified property or a specified interest in property with the payments,

(b) order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security instrument charging specified property or a specified interest in property with the payments,

(c) order the party liable under the order or other person on his behalf to convey specified property or a specified interest in property to a trustee upon specified trusts, and

(d) suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it.

(2) Upon default in payment of an amount charged on property under paragraph (a) of subsection (1), the court may

(a) appoint a receiver of rents, profits or other money receivable from the property or interest, or

(b) order sale of the property or interest upon notice to all persons having an interest in it,

and in either event, it may direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.

(3) An order or instrument under subsection (1)

(a) is registrable in the same way as a mortgage of the property described in it, and

(b) does not affect an interest in the property acquired in good faith and for value without notice before such registration.

(4) Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter.

(c) Agreements as to Support

It often happens that a husband and wife who have

separated enter into an agreement dealing with the legal aspects of their relationship. The agreement may deal with a whole range of subjects including division of property, support of a dependent spouse, and support and custody of children. The agreement may be entered into at or after the time of separation or as part of the preliminaries to a divorce. What should the relationship be between such an agreement, on the one hand and the mutual obligation of support and the power of the court to order support payments, on the other?

It is clear that upon divorce the court has power to award support despite the terms of an agreement between the parties; the court's power is granted by statute and is not ousted by agreement: Hyman v. Hyman [1929] A.C. 601 (H.L.). The situation in proceedings short of divorce is not quite so clear. In Gandy v. Gandy (1882) 7 P.D. 168 the English Court of Appeal thought that the wife was bound by an agreement, and the Ontario Court of Appeal so held in Smith v. Smith [1955] 3 D.L.R. 808 (C.A.). On the other hand, there is at least some grounds for thinking that other statutory discretions can be exercised despite an agreement of the parties, and Findlay v. Findlay [1952] 1 S.C.R. 96 was dealt with on the basis that either the remedy under the Ontario Deserted Wives and Children's Maintenance Act or the remedy under a separation agreement was available.

There are arguments based on the principle of preservation of contract and on the principle that it is better that the parties agree than that an adjudicated settlement be forced upon them. These arguments suggest that a husband and wife who have made an agreement should be bound by it. There are however arguments on the other side. The interests of children are often dealt with in an agreement,

and the law cannot permit the parents to bargain away the rights of children. Agreements at the time of separation or divorce are often signed under emotional stress. Often a husband or a wife will have an overriding concern to obtain a divorce or custody, and will agree to pay or receive an amount of support which is unconscionably great or small. By the very nature of things, it is not possible to forecast the future, and substantial periodic payments which a spouse can manage while employed at a high income may be oppressive when his or her employment terminates, and an income which may be adequate to support a dependent spouse may become inadequate by reason of health problems or inflation. These considerations suggest that the parties should not necessarily be bound by their agreement.

In our Working Paper we advanced the tentative view that either party should be able to apply for variation of the agreement by arbitration or legal proceedings if the agreement was unfair or its performance had become unfair to either side. The Ontario Law Reform Commission at p. 127 of its Report on Family Law, Part VI, Support Obligations agreed. Their recommendation does not appear to have been carried forward into Ontario Bill 59, 1977, but sec. 72 of the recent Manitoba legislation S.M. 1977, c. 47 (now suspended) provides that the existence of a separation agreement does not prevent an application by either spouse for relief. Our view remains substantially unchanged. We think the present law unsatisfactory upon dissolution because it is doubtful that it gives the court power to relieve against a separation agreement for the benefit of a paying spouse. In cases other than dissolution, the same criticism applies, together with the further difficulty that it is not as clear as it should be that the court can make an order in the face of the agreement. We will make a recommendation which would permit the court to make a support order in the same terms as an agreement or in different terms.

How much attention should the court pay to such an agreement? Our opinion is divided. Some members of our Board think that the agreement should stand unless it can be shown to have been unreasonable when made or to be currently unfair because of a substantial change in the circumstances of one or both parties. The prevailing view, however, is that, while the court should have to consider the agreement and the circumstances surrounding it, it should consider it as part of all the circumstances of the case and should then proceed to make whatever order is fair under all the circumstances; we think that the natural tendency of courts to pay attention to agreements in all cases will cause them to pay as much attention to support agreements as is desirable. The public interest requires that the support obligation be fairly performed as between each husband and wife, and it also requires that an agreement between a husband and wife not be allowed to make one of them a public charge.

The next questions are: what is the status of the agreement after amendment and what is the status of the amending order? Should the agreement be superseded, or merely suspended?

The present law is in doubt. In Horne v. Roberts (1969) 5 R.F.L. 15 (B.C.S.C.) Dryer J. held that the making of a maintenance order merely suspended the effect of an agreement so that the termination of an order by the death of the respondent revived the agreement and allowed the applicant to claim under it against the respondent's estate. In Re Finnie and Rae (1977) 16 O.R. (2d) 54 (Ont. H.C.) Craig J. disagreed with Dryer J. and held that the maintenance order superseded the separation agreement. We do not attempt to say which view of the present law is correct, but we think that the decision of Craig J. expresses the policy which should be embodied in the law for the

future. The making of an inconsistent order is a judicial finding that the agreement has become inappropriate to the circumstances of the parties, and the further passage of time is not likely to make it appropriate again.

There are two ways to give effect to the view that the agreement should be superseded. One is to treat the agreement as amended by the order. The other is to treat the support provisions of the agreement as having been taken out of it for all purposes and embodied in the order. We prefer the second, so that the rights of the husband and wife will thereafter be enforceable in the same way as other court orders, and so that the same provisions for variation, termination and relief against arrears can be applied to them. Once it has been necessary to bring the affairs of the couple before the court it should be recognized that until they agree otherwise it is the court order upon which their mutual financial relationship is based.

That proposal gives rise to some practical difficulties. One is that a separation agreement may deal with a whole range of property, support and custody issues between the spouses so that it is difficult to change one part without doing violence to the whole pattern of the agreement. The precise nature of a particular provision may not be clear, as, for example, a provision for the transfer of a house to one spouse (which may have the elements of property division and elements of support) and a provision for payment by the other spouse of the premiums for insurance on the house. We think that that is a problem which can be dealt with only in the particular case, and that the law should leave it to the court to decide whether there is an agreement as to support and what parts of it deal with support. Another difficulty will arise if the court order is not drawn in such precise terms as to make it clear just what parts of the agreement it is dealing with. In order to avoid that

difficulty we think that there should be a specific requirement that the order identify those parts of the agreement and make clear just what effect the order has on them.

There are two specific points that we would mention. We think that the court should be able to strike out a clause requiring a party to remain chaste in order to obtain support as being an offensive invasion of the private life of the wife to whom it applies. We also think that the court should have power to relieve against payment of arrears under a separation agreement in the same way as it can relieve against the payment of arrears under a support order.

Our discussion relates to agreements whether made on the eve of separation, during separation, or in the course of matrimonial proceedings. In the latter event, it appears to us that the support provisions should be identified and included in the order made in the proceedings or incorporated by reference to minutes of settlement. As we have said it would then be the order which would be the governing instrument and not the agreement or the minutes of settlement, from which the support provisions would be taken to be excised. Provincial legislation however cannot deal with the subject in divorce proceedings.

We do not think that our proposals will discourage the making of agreements. They are made now in the knowledge that the divorce court may not accept them. Even if they are only a factor in the court's decision, they will, if it is clear that both sides had equal bargaining power and understood the situation, be an indication of what the parties themselves thought reasonable to which the court will pay sufficient attention without legislative direction, and they will enable the parties to arrange their affairs so long as neither asks for the intervention of the court.

Recommendation #22

That the proposed Act contain the following provisions dealing with agreements as to support:

(1) The Supreme Court may make an order of support whether or not the parties have made an agreement as to support, and notwithstanding any term of the agreement.

(2) By an order of support under subsection (1) the court may do any one or more of the following:

(a) vary, discharge, or temporarily suspend and again revive the agreement as to support and any of its terms which relate to support, including the deletion of any requirement that a party remain chaste as a condition of receiving support, and

(b) relieve the party liable under the agreement from the payment of part or all of the arrears or any interest due thereon.

(3) An order under the section shall

(a) identify the terms of the agreement which relate to support,

(b) specify those of such terms which are to be varied, discharged or suspended and the effect of the variation or suspension, and

(c) incorporate those of such terms which are not to be varied, discharged or suspended.

(4) An order which complies with subsection (3) supersedes the terms of the agreement which are identified under sub-paragraph (a) thereof.

(d) Variation of Orders of Support

(i) Prospective variation

The courts have power to vary the support orders which they make. Section 26(1) of the Domestic Relations Act

(Alberta) provides for upward or downward revision of the amount, and for suspension and revival of the order if the means of either party have changed or if the dependent spouse has been guilty of misconduct or has remarried. Section 11(2) of the Divorce Act (Canada) empowers the court to vary or rescind an order on the basis of the intervening conduct of the parties or on the basis of changes in their circumstances. Section 28(5) of the Domestic Relations Act empowers a Family Court to vary a summary order upon proof that the means of husband or wife have altered.

These powers are quite broad. The courts however tend to approach an application for variation on the basis that the original order must be taken to have been appropriate when made. That is for good reason. A general principle of the administration of justice is that the parties to litigation should bring their whole cases before the court and that the adjudication, when made, should be final, subject only to appeal. If actions could be re-opened and re-litigated freely, litigants would be harassed unduly and the administration of justice brought into disrepute. For these reasons some members of our Board would leave much as it is the law on the variation of orders of support.

The majority think however that there are some other considerations to be taken into account. The first one arises from the recommendations in this Report for a stricter enforcement procedure, some of which have been anticipated by S.A. 1977, c.64 and c.92. In view of the great social problem involved in the collection of support payments we think that the greatest possible care should be taken to ensure that orders of support are as fair as human limitations permit. The greatest possible care, however, will not prevent the making of some orders on inadequate or erroneous information, and we think that the power of variation should be expanded so that the courts

can correct such unsuitable orders in the light of the situation disclosed at the hearing of the application to vary. That will have the further advantage that respondents, since they can have the order of support reviewed if they have proper grounds, will have more difficulty in resisting collection on the basis of allegations that the orders are unfair.

For these reasons we think that the court's power to vary should be expanded somewhat. We think that the appropriate way to do that would be to add to the grounds of variation a further one, namely, the availability of material evidence which was not previously before the court. In theory that might permit a spouse to sit back and withhold his evidence from the first hearing, and it might produce a series of consecutive applications which will clutter up the courts and harass one party or the other. In practice, however, we do not foresee that the courts will have too much difficulty in controlling the situation. The prospect of a future application to vary hardly seems to be a sufficient reason for a respondent to allow an order to be made against him in an amount which he would otherwise oppose. The court will still attach importance to the previous order and will have to be shown that it was in fact too harsh on one party. We do recognize that if orders of support are enforced more strictly as we will suggest later in this Report, there are likely to be more applications to vary; but we think that will be in the public interest because it will mean that the system is working more efficiently and more fairly. The court should of course take into consideration upon an application to vary the kinds of circumstances which it should take into consideration upon an application for an order of support in the first instance.

(ii) Arrears

We turn to the vexed question of arrears. It is generally assumed that the courts of Alberta possess a discretionary power to reduce or discharge arrears payable under a support order granted under provincial legislation or under a maintenance order under the Divorce Act. With regard to arrears on a maintenance order made under the Divorce Act, there may be some doubt about their power: see, for example, Ewert v. Ewert (1972), 6 R.F.L. 153 (Sask. Q.B.) and Richards v. Richards (1972), 26 D.L.R. (3d) 265 (Ont. C.A.).

We believe that in some cases it is fair to relieve a respondent spouse of some or all of the arrears under an order of support. It may be that the spouse liable for support payments was unable to pay but did not apply for variation because he or she was not pressed by the claimant spouse who was able to provide for herself or himself. The conduct of the claimant spouse may have lulled the respondent spouse into ill-advised inactivity. There may even have been explicit or tacit approval by the claimant spouse of the failure of the respondent spouse to pay under the order. To permit the claimant spouse to enforce arrears which may have been accumulating for an extended period of time could result in serious economic hardship for the respondent spouse, and the threat of enforcement may be used as a bludgeon. Also, as the Ontario Law Reform Commission has indicated, the large amount of arrears may act as almost a psychological barrier and may deter future compliance with the support order. There are of course other cases, in which it is unfair to the spouse in whose favour the order is made, or to the government which has provided social assistance to her, to allow the liable

spouse to escape a perfectly proper liability. The claimant spouse may have vigorously pursued the respondent spouse but still failed to enforce the order, or may not have known how to locate him or her. She or he may have only been able to survive without the support payments by borrowing or by depleting her or his capital. We think that the proposed court should have a discretionary power to discharge all or part of the arrears under an order of support.

In our Working Paper we tentatively recommended that without leave of the court no enforcement proceedings should be permitted in respect of arrears which are more than one year old. The Ontario Law Reform Commission was very critical of such a rule. It said:

> Such a rule improperly reverses the normal onus. While it may be fair in particular cases for the court to relieve against accumulated arrears, it is quite another matter to require a dependent spouse to apply for leave of the court to enforce a valid maintenance order. An order reducing or eliminating arrears of maintenance constitutes extraordinary relief and in establishing entitlement to such an order the onus should always be borne by the party against whom the original order was made.

And one Commissioner would not give the court any power to relieve against arrears. On the other hand, the recommendation of the Law Commission for England and Wales at p. 45 of Law Com. No. 25, Report on Financial Provisions in Matrimonial Proceedings was similar to that in our Working Paper and was embodied in sec. 23 of the Matrimonial Causes Act, 1973 (U.K.).

We recognize the strength of the Ontario Commission's argument. However, for the reasons we have given in support of a power to relieve against arrears and because

of the serious hardship which may be imposed upon a husband or wife by sudden collection measures for a large sum of money, we recommend that, without leave of the court which granted the order of support, no proceedings shall be taken for the collection of arrears which are more than one year old. If there is a danger that the husband or wife will abscond or take steps to impede collection, the court should be able to grant leave ex parte, but in that event the proceeds should be held until he or she has been given an opportunity to argue the merits of the leave.

What should happen to arrears if the spouse receiving support dies? It may be felt that the right to enforce an order of support is so personal that it should not pass to the estate; obviously it can no longer provide for the support of the person for whom it was designed. However, we do not think that the husband or wife should have an additional incentive to try to delay payment to a spouse who is elderly and in poor health and whose death is likely, and if support is withheld it may well be that the estate will be responsible for debts incurred because it was not forthcoming. The death should not make any difference in the law applicable to the arrears, though it may affect the disposition which the court makes in a particular case.

Then what should happen if the spouse liable under the order dies? Under our previous recommendations the order will come to an end, but the question of arrears remains. We think that much the same provisions should apply; that the arrears accumulated within the year preceding the death should be a debt of the estate; and that the Court should have power to declare older arrears to be a debt as well.

(iii) Recommendation

We will now make our recommendations about variation of orders of support in the Supreme Court and about enforcement of arrears.

Recommendation #23

That the proposed Act make provision for the variation of orders of support as follows:

(1) Where it is satisfied that, since the making of an order of support,

(a) there has been a material change in the circumstances of either party, or

(b) material evidence is available which was not previously before the court,

the court may, on the application of either party,

(c) vary, discharge or temporarily suspend and again revive the order or any of its terms,

(d) relieve the person against whom the order was made from the payment of part or all of the arrears or any interest due thereon, and

(e) make such other order permitted by Recommendations 17, 18, 20, 21 and 22 as the court considers appropriate in the circumstances.

(2) In deciding the application, the court shall have regard to all the circumstances relating to the financial positions of the parties, including those factors listed in sub-paragraphs (a) to (j) of Recommendation #5.

(3) This section is subject to Recommendation #20.

Recommendation #24

That the proposed Act make provision with regard to the enforcement of arrears as follows:

(1) Payment of an amount due and unpaid under an order of support may be enforced in the same manner as payment of an amount due and unpaid under a judgment of the court which made the order of support.

(2) Except with leave of the court referred to in subsection (1), a party is not entitled to enforce the payment of an amount due under an order of support which became due more than twelve months prior to the commencement of the enforcement proceeding or step.

(3) Leave shall not be granted ex parte under subsection (2) unless the court is satisfied that the party liable under the order of support is likely to attempt to remove himself or his property from the province.

(4) On an application for the leave required under subsection (2), the court may

(a) refuse leave,

(b) grant leave subject to such restrictions and conditions as the court thinks proper, or

(c) discharge the arrears in whole or in party.

(5) Where leave to enforce is granted ex parte, no money paid into court or received by a sheriff in respect of any period more than twelve months prior to the bringing of the enforcement proceeding shall be paid out until the other party has been given notice and afforded an opportunity to be heard on the merits of the enforcement.

Recommendation #25

That the proposed Act provide for the death of a party to an order of support as follows:

(1) Upon the death of the party liable under an order of support

(a) an unpaid amount which became due not more than one year before death is a debt of the estate of the deceased party, and

(b) upon the application of the other party, the court may order that the whole or any part of an unpaid amount which became due more than twelve months before death is a debt of the estate of the deceased.

(2) Payment of an unpaid amount which is due to a party under an order of support at the date of his death may be enforced by the personal representative of his estate.

3. Summary Orders of Support

(a) Need for Summary Procedure

Part 4 of the Domestic Relations Act (Alberta) provides a summary procedure by which a married woman may apply to a "magistrate" for "maintenance" for herself or for children, or for both, and upon proclamation of S.A. 1977, c. 64 it will make the procedure available to a husband as well. Orders in Council under sec. 4 of the Family Court Act (Alberta) confer jurisdiction on Family Court judges to hear these applications and some Provincial Court judges hear them where there are no Family Court judges. The first question is whether there should be a summary procedure for applications for support.

The procedure under Part 4 is similar to that exercised by magistrates in England where it was introduced to provide summary relief for deserted wives and children who might be expected to be, and predominantly were, people of low income and little or no property. The procedure has served a similar purpose here, and in addition provides the government with a means of recovery of money paid to wives and children by way of social allowance.

Some considerations might suggest that a summary procedure for support is no longer necessary. Social assistance provides quick financial help and has reduced the number of cases in which a wife needs quick relief against her husband. Formal proceedings in the Supreme Court can provide quick relief in the form of interim orders. The cheapness and quickness of a summary procedure may preclude arrangements for furnishing proper financial information to the court and may therefore militate against fairness. Nevertheless, we think that a summary procedure should be available. Some wives still need a quick and inexpensive remedy available locally under a procedure which has a minimum number of steps and which can, if necessary, be followed without legal representation. We think also that there are cases in which the availability of a proceeding for a limited and possibly temporary objective may postpone, or even avoid, the final breakdown of the marriage relationship. For these reasons, we think that the Family Court should continue to have jurisdiction to grant summary orders of support under a summary procedure, and that judges of the Provincial Court should have jurisdiction to do so when judges of the Family Court are not available. We think, however, that the limitations inherent in a summary procedure must be recognized: it should be restricted to fairly narrow issues of fact and law; remedies under it should be limited; and an order made under it should be subject to being superseded by an order made by the Supreme Court under the more elaborate procedures of that court. We think also that the summary procedure should make provision for better financial information.

Part 4 of the Domestic Relations Act allows a wife to apply on behalf of the children of herself and the husband, and it allows a divorced wife to apply on behalf of the <u>legitimate</u> children of herself and her divorced husband. We are not in a position to deal in this Report with the substantive law of support between parent and child, though we

hope to do so at a later time. We will however recommend here that the proposed summary procedure allow claims on behalf of children so as to avoid a legal situation under which Part 4 of the Domestic Relations Act would apply to applications on behalf of children while a different summary procedure would apply to applications on behalf of wives and husbands.

If a unified family court is established, we think that a summary procedure will continue to be necessary. However, in that event the nature and characteristics of the new court may well require changes in the summary procedure and the recommendations which we will now make, and any summary procedure which is adopted, should then be reviewed.

Recommendation #26

(1) That the proposed Act provide for summary orders of support as follows:

(a) either party to a marriage may apply for a summary order of support on behalf of the children of the parties, on behalf of herself or himself, or both.

(b) The application shall be made

(i) to a judge of the Family Court upon whom the Lieutenant Governor in Council confers or has conferred jurisdiction under section 4 of the Family Court Act, or

(ii) if a judge described in sub-paragraph (i) is not available, to a judge of the Provincial Court sitting as a judge of the Family Court for the purpose of the proceedings.

(2) That the Family Court Act be amended by adding the following words at the end of sub-paragraph (a) of section 4(1):

and applications under Parts 3, 4 and 5 of the Matrimonial Support Act.

(b) Law applicable to Summary Proceedings

The law which applies to applications to the Supreme Court in proceedings for alimony under Part 3 of the Domestic Relations Act (Alberta) is different from the law which applies to applications to the Family Court for maintenance under Part 4. In the Supreme Court, the applicant must be able to show that she or he is entitled to judicial separation or restitution of conjugal rights (i.e., that the respondent has committed one of a number of matrimonial offences); and the claim may be barred if the applicant has herself or himself committed a matrimonial offence. In the Family Court the applicant must show that she has been deserted by her husband or that she is living apart from him on account of his cruelty or his unjustified neglect to supply her with necessaries. Her adultery is at present a bar, but upon the proclamation of S.A. 1977, c. 64, it will cease to be. Under section 23 the Supreme Court has power in case of nullity (and after divorce if provincial legislation can so provide) to secure or order payment of such periodic sums "as the Court considers reasonable having regard to the fortune, if any, of that other party, the ability to pay of the party against whom the order is made, and the conduct of both parties"; the Act gives no direction to the court about the standard by which the court should decide the amount of alimony in a proceeding for alimony alone. Under sec. 27 the Family Court judge has power to make an order for such periodic payments "as the magistrate considers reasonable having regard to the means of both the husband and wife."

We have already made recommendations in Parts II and III of this Report about the nature and purpose of the support obligation between husband and wife and about its commencement and duration. These recommendations are sufficiently general in their terms to apply to summary applications for orders of support, but we will at this

point make a formal recommendation to make it clear that they are intended to do so. Because the proposed Act will not at this time deal with the substantive law relating to the parental duty of support, however, it will be necessary at this point to bring forward from Part 4 of the Domestic Relations Act the standard by which support for a child is to be determined, i.e., that the amount is to be such as the judge considers reasonable having regard to the means of the parent.

Recommendation #27

(1) That the law as proposed in Recommendations 1 to 9 inclusive apply to proceedings for summary orders of support in favour of a party to a marriage.

(2) That the amount awarded for the support of a child under the summary procedure be such amount as the judge considers reasonable having regard to the means of the respondent.

(c) Powers of court of Summary Procedure

(i) General

We said at p. 107 that we think that the summary procedure should be restricted to fairly narrow issues of fact and law, that the remedies under it should be limited, and that an order made under it should be subject to being superseded by an order made by the Supreme Court under the more elaborate procedures of that court. We gave as our reason for the restrictions the limitations inherent in a summary procedure. An additional reason which is relevant here is that sec. 96 of the British North America Act imposes constitutional limitations on the powers which can be conferred upon provincially appointed judges. Because of these considerations we do not recommend that the court of summary procedure have power to order lump sum payments, the

transfer of property, or any form of security for payment, all of which would be available in the Supreme Court. The court of summary procedure would, of course, have to have the power to order periodic payments, and we see no need to impose a limitation on that power.

(ii) Agreements as to support

The fact that there is an agreement between a husband and wife dealing with support does not affect the needs of a wife or husband. The court of summary procedure should therefore have power to make an order even if there is such an agreement. We do not think, however, that it should have power to vary, discharge or suspend the agreement itself; that can more appropriately be done, and it may be that under the constitution it can only be done, by the Supreme Court after formal proceedings.

(iii) Variation and arrears

The court of summary procedure should have the same powers of variation over summary orders of support as the Supreme Court has over Supreme Court orders, and the same provisions with respect to the effect of the death of a party should apply.

(iv) Costs

The power of the Family Court to award costs in summary proceedings for support depends upon secs. 744 and 772 of the Criminal Code (Canada) which, being included in Part XXIV of the Code, are made applicable by sec. 31 of the Domestic Relations Act (Alberta) to summary proceedings for maintenance under Part 4. The power is to award only a number of specified costs to the court, peace officers, witnesses and interpreters and does not include any allowance for lawyers' fees. We understand that in practice the

power is rarely if ever used. The next question is whether the proposed Act should give the court of summary procedure power to award costs and whether that power should extend to solicitors' fees. The answer to the question could well have an important effect on the nature of the summary proceedings.

We are most anxious that the summary proceedings be inexpensive. To require one party to reimburse the other for expenses which would have been incurred anyway would not increase the total cost of the proceedings, but to require him to reimburse the other for a lawyer's fees is likely to encourage the employment of lawyers and will increase the cost of those proceedings in which lawyers would not otherwise be retained. That is an important consideration; but there are others. The court of summary procedure will be a court of law and a party may have as much need of legal advice and representation there as in another court; support services attached to the court can give help but that help will not always be adequate. We therefore think that fairness between parties will sometime require the award of costs including lawyers' fees and we recommend that the court of summary procedure have power to award them. We think that the level should be kept low, but would leave it to be established by rules or regulation. While we would not expect the court to award costs frequently, we think that that should be a matter for the judges.

(v) Interim Relief

In general, we do not think it desirable that a court of summary procedure should grant interim relief; its function is to dispose of the whole application quickly. However, there will be cases in which for one reason or another, justice will require an adjournment and in some

of those cases interim relief will be necessary. We will accordingly recommend that the court of summary procedure have jurisdiction to grant it.

(vi) Recommendations

We will now make recommendations about the powers to be exercised by the court of summary procedure.

Recommendation #28

That the proposed Act confer powers upon the court of summary procedure as follows:

(1) In proceedings under the Part of the proposed Act providing for summary orders of support the court may

(a) order a party to a marriage to make periodic payments for support to or for the benefit of the other party or of a child of the parties, commencing on or after the date of the filing of the application and continuing for an indefinite or limited period or until the happening of a specified event,

(b) exercise with respect to a summary order of support the same powers for the variation, discharge or suspension thereof as the Supreme Court may exercise with respect to an order of that court,

(c) order a party to pay such costs, including solicitors' fees, as the rules prescribe,

(d) when granting an adjournment of an application make either or both of the following orders:

(i) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other party until the application or an appeal is disposed of, and

(ii) an order requiring one party to the marriage to make a payment or payments to or for the benefit of the other party on account of necessary disbursements

of and incidental to the proceeding in which the application is made.

(e) make an order of support whether or not the parties have made an agreement as to support and notwithstanding any term of the agreement.

(d) Procedure on applications

(i) General

A proceeding for maintenance under Part 4 of the Domestic Relations Act (Alberta) gives some of the appearance of a criminal proceeding, and it has the further drawback that it is likely to appear to the respondent to be biased. Under section 27(2), a justice of the peace, upon being satisfied by the applicant's affidavit that the husband is in breach of his support obligation, may summons the husband to appear before a magistrate. Then, the summons is usually served by a policeman (though it should be noted that some steps have been taken to change that situation in Edmonton, and that we have already made recommendations for change). If the respondent does not appear, he is arrested under warrant and brought before the court. The procedural provisions of Parts XXIII and XXIV of the Criminal Code (Canada) are incorporated except where they are contrary to the intent of Part 4. We think that these aspects of the summary procedure should be changed so that it will be much more like an ordinary civil procedure for the adjudication of disputes. We have concluded that the initiating document should still be called a summons; it is a word which is likely to attract the attention of the recipient, and it is used on a small claims summons which is a familiar civil document. We think that its form and language should make it clear that there is no prejudgment of the case.

Some members of our Board feel that the wife or husband who applies for a summary order of support should

be required to specify in the summons the amount claimed for support of the applicant and the amount claimed for any child for whom support is claimed. They believe that it is proper to ask the applicant to direct her or his mind to the amount needed for support, and that it is only fair to the respondent that he or she should be told the amount for which he or she is in jeopardy. They also think that in some cases the respondent will consider the amount claimed to be reasonable and that he or she will agree to pay it, so that unnecessary court hearings will be avoided and the parties will be paying and receiving under a decision made by themselves rather than one imposed by the court. The majority of our Board, however, while acknowledging the force of all this, think that such a requirement would often require a decision to be made by a deserted wife lacking information about her husband's income and sometimes without experience on which to found a reasonable assessment of her own needs and those of the children. Accordingly, we do not recommend the imposition of such a requirement.

Another characteristic of the protection order procedure is that it does not provide help for the respondent in any way. We think that the summons should point out to the respondent that he has a right to dispute the claim and that it should be accompanied by a statement of the basic facts alleged by the applicant and by a notice advising him of the services available to him through the court.

We have mentioned that if the respondent does not appear the present remedy is to have a warrant issued and to have the respondent arrested and brought before the court. We think that the remedy should be the remedy usually available in civil proceedings, namely, that the court have power to give judgment, i.e., make a summary order of support, in the absence of the respondent. That will enable

the applicant to take collection proceedings.

The appropriate way to commence an application for variation, discharge or suspension of a summary order of support is by notice, and our recommendation will so provide. If the application is made by the person receiving support its effect will be to increase the amount payable and it should be accompanied by a notice giving information and by a statement of basic facts similar to those accompanying the summons which originates the proceedings for a summary order of support. If the application is made by the person liable for support it should be accompanied by the more complete statement of financial information which we have previously provided for in Recommendation #12.

Section 30(1) of the Domestic Relations Act gives the Family Court a discretion to hear applications for maintenance under Part 4 in camera, and we understand that the court habitually does so. We have reservations about a departure from the salutary rule that in general courts should conduct their business in public, particularly when applications for support in the Supreme Court are conducted under that rule. We have not, however, made any investigations which would enable us to express an informed opinion on the subject. We will therefore include a similar provision in our recommendation and in the draft legislation solely because it now exists and we do not have a sufficient basis for a conclusion that it should be changed.

There may be cases under the summary procedure which could better be disposed of by the procedures of the Supreme Court. The court of summary procedure should accordingly have the power to order that a case be transferred to the Supreme Court, though the Supreme Court should have power to transfer it back if it becomes apparent that the remaining issues can suitably be dealt with under the summary

procedure.

Many of these procedural matters are better dealt with in rules of court than in a statute. They are, however, of great importance in the enforcement system as we conceive it. We propose to deal with them in draft rules in a schedule to the proposed Act. We propose to go further by drafting suggested forms as part of that schedule. We do so with some hesitation as we have not discussed the forms with those who will have to administer the system. It is our hope that before the proposed Act comes into force there will be time to have the whole question of rules of court gone into, and that the forms will receive particular attention. We think, however, that that process should not delay the adoption of appropriate legislation, and we have therefore drafted the proposed Act in such a way that it would, if adopted, provide the essential rules and forms, but would allow them to be replaced later.

Recommendation #29

That the proposed Act provide rules of procedure for applications for summary orders of support as follows:

(1) The clerk of the Family Court shall provide the applicant for a summary order of support with a summons in Form A in the Schedule to the proposed Act or such other form as may be prescribed by the rules.

(2) The summons shall

(a) require the respondent to appear before the court at a named time and place for a hearing on the merits of the application for an order of summary relief,

(b) give notice of the claim being made,

(c) inform him that he has the right to dispute the claim, and

(d) warn him that if he does not attend the hearing the court has power to make a summary order of support in his absence.

(3) The summons shall be served upon the respondent personally or in such manner as the court may direct.

(4) A statement of facts in Form B in the Schedule to the proposed Act, or in such other form as may be prescribed by the rules shall be served with the summons or at such other time as the court may direct.

(5) The statement shall be signed by the applicant and shall set out the facts upon which the application is based insofar as the same are known to the applicant, including

(a) the date and place of the marriage;

(b) the marital status of the parties at the time of the application;

(c) whether the parties

(i) are living separate and apart, or

(ii) although not living separate and apart, are experiencing marital discord of such a degree that they cannot reasonably be expected to live together;

(d) the ages of the children of the parties, if any;

(e) the income of the applicant and whether that income is gross or net;

(f) the income of the respondent according to the best information, if any, available to the applicant; and

(g) whether or not there is a subsisting agreement as to support between the parties; and

(6) The applicant shall further cause to be served upon the respondent together with the summons a notice in Form C in the Schedule to the proposed Act.

(7) The notice shall

(a) contain information as to the rights and obligations of the respondent, including notice

(i) of the services available in the Family Court to him,

(ii) that he may file and require financial information where the applicant has not already done so; and

(b) advise him to seek legal advice as soon as possible before the hearing.

Recommendation #30

That the proposed Act provide rules of procedure for applications for variation, suspension or discharge of summary orders of support as follows:

(1) The clerk of the Family Court shall provide the applicant for an order for the variation, suspension or discharge of a summary order of support with a notice in Form D in the Schedule to the proposed Act or in such other form as may be prescribed by the rules.

(2) The notice shall be served upon the respondent personally or in such manner as the court may direct.

(3) If the applicant is a person receiving support under the summary order of support he shall cause to be served upon the person liable a notice in Form E in the said Schedule and a statement in Form F in the said Schedule or, in either case, in such other form as may be prescribed by the rules.

(4) If the applicant is a person liable for support he shall cause to be served upon the person receiving support a statement of financial information.

Recommendation #31

That the proposed Act make the following provisions with regard to the hearing:

(1) At the hearing of an application for a summary order of support, or for variation, discharge of suspension of a summary order of support the court may

(a) make an order under Recommendation #28,

(b) adjourn the matter with or without provision for interim support and costs,

(c) dismiss the application, or

(d) make an order transferring the application to the Supreme Court if in its opinion it may be more conveniently tried in that court.

(2) The court may make an order under this section in the absence of the respondent upon proof that the respondent has been duly served with notice of the hearing.

(3) The court may in its discretion hear in camera an application referred to in subsection (1).

(4) A judge of the Supreme Court may at any time make an order directing that a proceeding transferred to the Supreme Court under sub-paragraph (d) of subsection (1) be transferred back and carried on under the summary procedure.

(ii) Effect of Proceedings for Support in the Supreme Court

The intention of our recommendations is that the summary procedure will provide an inexpensive and expeditious means of dealing with applications for support in which the issues of fact and law can be satisfactorily dealt with under such a procedure. A summary proceeding, and even a summary order of support should not (and, in divorce, could not) preclude proceedings in the Supreme Court dealing with support, where more issues can be dealt with and more interlocutory procedures are available.

On the other hand, the threat of proceedings in the Supreme Court should not preclude summary proceedings. We do not think that as a matter of law it does so now, but we

think that the proposed Act should make that clear. Only the making of an order of support by the Supreme Court should have the effect of vacating the order of the court of summary procedure and depriving it of jurisdiction, and such an order should have only prospective effect. We expect, of course, that a Family Court judge in a proper case would adjourn an application if the making of a Supreme Court order is imminent.

The effect of what we have said would be that an applicant for support who thought a summary order of support too niggardly would be able to commence proceedings in the Supreme Court. In the absence of anything further the spouse liable for support who thought a summary order of support too generous would not have a similar right. That appears to us to be wrong, and we therefore recommend that where a summary order of support has been made, the respondent have the right to apply to the Supreme Court to set a different amount of support payable by him or for a finding that he or she is not liable at all, and that an order of the Supreme Court made on such an application supersede the summary order of support.

Recommendation #32

That the proposed Act provide as follows:

(1) Nothing in this part precludes an application for support to the Supreme Court under the Divorce Act (Canada) or under Part 2 of the Act.

(2) A person liable for support under a summary order of support may apply to the Supreme Court for

(a) an order declaring that he is not liable for the support of a person in whose favour the summary order of support was made, or

(b) an order fixing a different amount of support.

(3) The commencement of proceedings in the Supreme Court is not a bar to an application for a summary order of support unless and until the Supreme Court makes an order granting or denying support or an order under subsection (2).

(4) Notwithstanding subsection (2), a sum due and owing under a summary order for support remains due and owing unless discharged by order of the Supreme Court.

(iii) Rules of Court

We think that rules of court should be made governing the summary procedure. The Lieutenant Governor in Council has power to make rules in other courts and does so on the advice of the Attorney General who acts upon the recommendation of a Rules of Court Advisory Committee consisting of judges and lawyers. We think that a similar provision would be suitable here, but that a special advisory committee should be drawn from judges and lawyers familiar with the summary proceedings for support.

As we have already said, our recommendations about practice and procedure would more appropriately appear in rules of court, but we have provided for some of them in the Schedule to the proposed Act. If rules can be promulgated before legislation is adopted, it would be better to delete the Schedule and promulgate rules. Our recommendations would however make provision for practice and procedure to apply while rules are being prepared.

Recommendation #33

That the proposed Act provide for rules of practice and procedure for the summary proceedings as follows:

(1) The Lieutenant Governor in Council may make rules of practice and procedure for proceedings under this Part, including the matters provided for in the Schedule to the proposed Act, and including costs.

(2) Until rules are made for the matters provided for in the said Schedule, the rules in the said Schedule relating to this Part shall be rules of the court for the purposes of this Part.

Recommendation #34

That the Attorney General appoint a special advisory committee on summary procedure to make recommendations for rules of court providing for an expeditious and inexpensive summary procedure.

(iv) Appeals

An appeal must be provided. We see two practicable possibilities. One is an appeal to a judge of the District Court or a judge of the Supreme Court on the record or by way of trial de novo. The second is an appeal to the Appellate Division.

An appeal to a single judge would be quicker and cheaper. We do not however recommend it. An appeal from one single judge to another single judge is not appropriate.

An appeal to the Appellate Division takes longer and costs more. We think however that that is the form of appeal which should be provided. In practice, few appeals are taken from orders under Part 4 of the Domestic Relations Act, and we think that the broader grounds which we have recommended for variation of orders of support would reduce appeals further, as would the availability of the right to apply to the Supreme Court which we have also recommended. A right of appeal to the Appellate Division will preserve its supervision of this field of law, and will be available

when there is an important question of law or principle. Appeals by way of stated case would occasionally be useful and reduce cost. Rules will have to be made for them.

Recommendation #35

That the proposed Act make the following provisions for appeals from summary orders of support:

(1) An appeal lies to the Appellate Division from an order under this Part in accordance with the rules of the Appellate Division.

(2) Instead of proceeding under subsection (1) a party to a proceeding in which a summary order of support is made may appeal in accordance with the rules of the Appellate Division on the ground that the order is erroneous in point of law or in excess of jurisdiction by applying to the court to state a case setting forth the facts as found by the court and the grounds on which the proceedings are questioned.

4. Effect of resumption of cohabitation on orders of support

We have dealt elsewhere with some of the occasions upon which an order of support may terminate, such as death, remarriage, the making of an order discharging the order of support, and the lapse of a specified time or the occurrence of a specified event. We should mention here one other occasion upon which we think the order should terminate, namely, the reconciliation of the husband and wife. This would apply to an order of support made by the Supreme Court and to a summary order made by the Family Court.

In the usual case, the order of support will have been made when the husband and wife were living apart. It will be based upon the circumstances attending separation, and will not be appropriate to the circumstances attending upon resumed cohabitation. We therefore think that it should not be allowed to continue in existence and to accumulate arrears merely because neither party takes proceedings to terminate

it. We recommend that upon cohabitation being resumed and continued for a period of ninety days, the order terminate.

Recommendation #36

> *That an order of support terminate upon cohabitation having been resumed by the parties and continued for a period of ninety days.*

5. Divorce and Nullity

It may happen that the divorce court does not deal with support in divorce proceedings. It may be that neither party asks for it, or it may be that the court declines to deal with support. In some such cases, there is an existing order of support made under the authority of provincial legislation, and indeed the existence of such an order may be the reason why support is not dealt with in the divorce proceedings. The same circumstances may obtain, at least in theory, in a nullity action. Should the existing order of support continue in effect or should it be automatically terminated by the commencement or by the completion of the divorce or nullity proceedings?

If provincial legislation about support is rendered inoperative after divorce, the question is academic insofar as provincial legislation is concerned. As we have already said in this Report, however, we think that provincial legislation should be framed so that it will apply to all fields which may be ultimately open to it, and we include in that proposition the continuation after divorce of pre-existing orders. For one thing, the parties may have relied upon the existing order and for that reason may have refrained from raising the question of support in the divorce or nullity proceedings. For another, the situation is quite different from one in which a dependent spouse has not

exercised her or his right to support at all.

Recommendation #37

That the proposed Act make the following provision with regard to the effect of the divorce or nullity proceedings upon an existing order of support.

Where a marriage is terminated by a decree absolute of divorce or a declaration or decree absolute of nullity and the question of support is not judicially determined in the divorce or nullity proceedings, an order of support made under the proposed Act before the decree absolute or declaration continues in force according to its terms.

VI

COLLECTION OF PAYMENTS OF SUPPORT

(a) Objectives

We will now discuss the collection of support awards. The objectives of the law should be threefold. The first is efficiency, so as to achieve the greatest collection at the least cost. The second is fairness in fact and in appearance. The third is the avoidance of economic and social injury. It is obvious that the means chosen to achieve one of these objectives may militate against the achievement of another, and that a balance must be struck.

(b) Collection of Supreme Court orders through the Family Court

Sec. 6 of the Family Court Act (Alberta) allows a person entitled to alimony or maintenance under an order or judgment of the Supreme Court to file a copy of the order in the Family Court, with the result that the order becomes

enforceable in the same manner as a summary order for maintenance under Part 4 of the Domestic Relations Act. That procedure has demonstrated its value and should be continued. We think that the provision for it should be made in the proposed Act rather than in the Family Court Act. Under the present court structure we see no way to provide for variation by the Family Court of Supreme Court orders.

Recommendation #38

(1) That the proposed Act contain the following provisions:

(a) A husband, wife or child entitled to support under an order or judgment of the Supreme Court may file a copy of the order or judgment in the Family Court.

(b) An order or judgment filed under sub-section (1) is enforceable in the same manner as an order made under the Part of the proposed Act relating to summary orders of support.

(c) The court may not vary the amount of support ordered to be paid under an order or judgment filed under this section.

(2) That sec. 6 of the Family Court Act be repealed.

(c) S.A. 1977, c. 64

Before turning to a discussion of specific collection procedures we will make a general reference to the innovations in collection procedures provided for in S.A. 1977, c. 64, an amendment to Part 4 of the Domestic Relations Act (Alberta) which was enacted at the 1977 fall session of the Legislature but which has not as yet been proclaimed.

In our Working Paper we made tentative proposals for the continuing attachment of earnings, and these of course

came up for further consideration in the course of our work leading to this Report. At the same time, we asked a Committee on Matrimonial and Child Support to help us to consider ways in which the funding of support for wives and children might be improved, and that Committee gave extensive consideration, among other things, to more efficient methods of collection of support payments under the existing court system. Officials of the Department of Social Services and Community Health, though not members of the Committee and without responsibility for its views or those of the Institute, made important contributions to its work, which is still in progress. The government independently became convinced that improved methods of collection were urgently needed and could not wait for the completion of our work. It accordingly instructed the preparation of draft legislation based upon its own study, for the purposes of which the Institute's work in progress was available, and in due course that draft legislation was accepted by the Legislature and embodied in c. 64.

Under these circumstances, we feel free to make such recommendations as we think appropriate for new legislation to take the place of the Domestic Relations Act as it now stands or as it will be amended upon the proclamation of c. 64. In so doing, we will pay due attention to the fact that c. 64 is a recent expression of the will of the Legislature, but we will also make some proposals which we think will improve the legislation for the long term. In the meantime we think that c. 64 will make useful improvements in the law for the short term. We will now deal with the specific collection methods which are now available and the specific collection methods which we think should be available, and in the course of that discussion will refer to the specific provisions of c. 64.

(d) Specific methods of collection

(i) Registration of support orders against the title to land

Sec. 30.1 of the Domestic Relations Act as enacted by sec. 8 of S.A. 1977, c. 64, will provide for registration of a support order against all the land of a person ordered to pay maintenance or alimony. With two important exceptions of which only one is relevant here, it is similar to sec. 21 of the Act which we have discussed at p. 91 of this Report, and we think that it suffers from some defects. It would confer power on one spouse, at will, to tie up real property in excess of that needed for security and in cases in which it is perfectly apparent that the other spouse can pay and will pay.

The difference between sec. 21 and sec. 30.1 which is important here is that sec. 30.1 allows the respondent to apply to the Supreme Court for an order cancelling the registration. That removes a major difficulty and protects the respondent against the worst effects of sec. 21. However, we do not think that a remedy of this kind should be available until a judge has been persuaded that it is necessary, and we do not think it appropriate for securing payments under a summary order of support. We have at p. 91 made a proposal for security under a Supreme Court order which we think is more appropriate and more flexible.

We appreciate the wish of the Legislature to provide better procedures for collection through registration against land titles, and we do not suggest that the proclamation of c. 64 be delayed. What we do suggest as a short term measure is an amendment to sec. 30.1 which would require a judge's order to register an order for alimony or maintenance.

(ii) Execution

1. In the Supreme Court

If a Supreme Court award is not paid, the spouse claiming support has the remedies of an ordinary judgment creditor. She or he may therefore cause a writ of execution for the unpaid amount to be issued by the clerk of the Court and filed at the sheriff's office and the Land Titles Office. She or he may then direct the seizure and sale of the other spouse's chattels or, after a waiting period of a year and finding no chattels to seize, may cause the other spouse's real property to be sold. The holders of all subsisting writs of execution share pro rata in amounts realized under a writ of execution.

A writ of execution is seldom suitable for collection of support awards. It is cumbersome and expensive for the collection of one periodic payment and it does not attach future pay-cheques or include future support payments. However, it is occasionally effective, particularly for collection of accumulated arrears, and, in the absence of any reason to the contrary, we think it should remain available.

Recommendation #39

That execution continue to be available for collection of support payments under orders of support made by the Supreme Court.

2. In the Family Court

Upon proclamation of S.A. 1977, c. 64, sec. 28.2 of the Domestic Relations Act will empower a provincial judge to make an order permitting the filing of an order for maintenance or alimony with a sheriff of the Supreme Court,

whereupon the order so filed will have the effect of a writ of execution for arrears, with priority over most other writs of execution for three months' payments. We had not intended to make a recommendation of that kind, but accept the section as an expression of the will of the Legislature which should be carried forward into the proposed Act, though in that context it should refer to a judge of the Family Court rather than a provincial judge. In so saying, we proceed on the assumption that c. 64 will be proclaimed in due course.

Recommendation #40

> *That the proposed Act contain a section similar to sec. 28.2 of the Domestic Relations Act as enacted by S.A. 1977, c. 64, with the changes made necessary by the context of the proposed Act.*

(iii) Garnishment

1. In the Supreme Court

Garnishment is another remedy available to an ordinary judgment creditor (and, by leave, to a creditor who has sued and not yet obtained judgment). It is also available to a supported spouse upon default in payment under a support order. The spouse can cause the Clerk of the Court to issue a garnishee summons directed to anyone (the "garnishee") who owes money to the respondent spouse, including money accruing due from an employer for wages or salary. When the garnishee summons is served on the garnishee, the garnishee must pay into court the amount which he owes the respondent spouse, or a sufficient part of it to pay the claim and costs. If there is a subsisting writ of execution in the sheriff's hands, the money must be paid to the

sheriff for distribution among the execution creditors in the same way as money realized under a writ of execution. The most common uses of garnishment are probably the attachment of earnings and the attachment of bank accounts.

Like the writ of execution, the garnishee summons is seldom suitable for collection of support awards, and for similar reasons: it is cumbersome and expensive for collection of periodic payments and it does not cover future paycheques or future support payments. However, we see no reason why it should not remain available for those cases in which it is effective.

Recommendation #41

That garnishment continue to be available for collection of support payments under orders of support made by the Supreme Court.

2. In the Family Court

Upon proclamation of S.A. 1977, c. 64, sec. 28.3 of the Domestic Relations Act will empower a provincial judge to order that all debts, obligations and liabilities of a named debtor to a spouse liable under court order for maintenance or alimony be paid to a clerk of the Family Court, by whom it would be paid out under order of a provincial judge. The order could be granted ex parte, and would be available only for arrears. Here again we had not intended to make a recommendation of that kind, but accept the section on the same basis as we have accepted sec. 28.2 relating to execution.

Recommendation #42

That the proposed Act or rules made under it contain provisions similar to sec. 28.3 of the Domestic Relations Act as enacted by S.A. 1977, c. 64, with

the changes made necessary by the context of the proposed Act.

(iv) Continuing attachment of earnings

In a very significant proportion of cases, the earnings of the respondent spouse are either the only source of support payments, or the only source which can conveniently be reached. The next question is whether earnings should be subject to a more effective form of attachment and, if so, what the form of attachment should be. We will first refer to the legislation and proposed legislation of some of the provinces.

Under secs.25 and 26 of the Saskatchewan Attachment of Debts Act, R.S.S. 1965, c. 101, an employer served with an order for maintenance must deduct and pay into court enough money to satisfy all instalments of maintenance falling due after service and for 30 days before service. Under sec. 36 of the British Columbia Family Relations Act, S.B.C. 1972, c. 20, an order seizes and attaches all debts becoming payable for three months after the making of an order. The Ontario Law Reform Commission at pages 130-132 of its Report on Family Law, Part VI, Support Obligations and the Ontario Commissioners to the Uniform Law Conference (1976 Proc. 272) have recommended an attachment of earnings by court order after default, with protection to the respondent spouse against being dismissed because of the service of the order upon the employer. Ontario Bill 59, 1977, would give effect to that recommendation except for the protection against dismissal. In England, the Attachment of Earnings Act, 1971, provides a similar machinery where default is due to the wilful refusal or culpable default of the respondent, with provision for the court to fix the "protected earnings" which will be exempt. In 1974 Manitoba enacted S.M. 1974, c. 8 which amended its Garnishment Act to provide for a continuing garnishee summons by order subject to the standard exemptions for maintenance.

There are conceptual and practical difficulties in the legislation we have described. It may be thought harsh to impose such a continuing burden upon the employee. That is particularly so if, as in Saskatchewan, the attachment can be effected upon the volition of the wife at a time when the husband is not in arrears and if no provision is made for the deduction of any exempt amount for the support of the husband and his other dependents. It may be thought that the legislation imposes an unconscionable burden upon an employer who must remember the order and in most cases issue an additional cheque for each pay period. It may be thought that the relationship of the new kind of attachment to other collection remedies will create difficulties of priorities and undue legal complexity, and that it will give rise to undue problems of administration. It may be thought on the other hand that continuing attachment will not accomplish anything because anyone who remains in one job long enough for it to operate is stable enough, and sufficiently aware of his vulnerability to traditional collection methods, to pay without such an extraordinary means of coercion.

We have, however, concluded that a form of continuing attachment should be provided. We perceive a need for a more efficient way of making available what is frequently the only source from which support payments can be provided. Many wage-earners do not make payments when they can. It is likely that more will pay when it becomes apparent that there is an effective way to attach their earnings, and if they do not, the new mechanism will override their refusal. If the husband has access to the courts for variation of the order of support, and if the new mechanism is supervised by the court, we do not think that it will operate harshly upon him; indeed it seems to us less harsh than committing him to jail for refusing to pay, which may be the only other alternative available. From the employer's point of view,

it seems to us that the proposed procedure would be less disruptive than the service of a monthly garnishee, and we are confirmed in that view by a Manitoba lawyer who makes use of the Manitoba procedure. We think that proper design of the procedure will meet much of the objection to it, and that the remaining problems which it will create are outweighed by its advantages.

Sec. 28.1 of the Domestic Relations Act as enacted by S.A. 1977, c. 64 will, upon proclamation provide for continuing attachment of earnings and in so doing will provide for many cases a more satisfactory method of collection than any that now exists. Our proposal as we developed it, however, has some differences from that embodied in the section, and we have some suggestions which will emerge from a discussion of the various questions which arise from a proposal for continuing attachment. We attach sec. 28.1 as Appendix D.

We think that in order to avoid problems of definition the order should attach salary, wages or other remuneration from an employer, and are so far in agreement with sec. 28.1. It appears to us that there is some danger that its further words "or any other person engaging the respondent's services" are broad enough to cover a person who retains the services of an independent contractor and may cause difficulty in the face of claims for wages by the respondent's employees, the consequent filing of liens in some cases, and problems of a like nature. While sympathizing with a desire to cast the net broad enough, we are therefore inclined to suggest the omission of these words.

We are in agreement with the requirement of a judge's order under sec. 28.1. We would extend the power to the Supreme Court as well as to the Family Court. We think that it would be useful to include a specific power to vary or discharge an attaching order.

A question of importance is whether or not an order for attachment should be available if the respondent is not in default when the application is filed. We think it should not: because of its effects on the respondent and the employer we think that it should not be available until the need for its use has been demonstrated. When sec. 28.1 is read in conjunction with sec. 28(1) as amended by c. 64, it gives effect to this view.

Another important question is whether an order for attachment should be available for the collection of arrears, or only for collection of current payments. There are arguments in favour of applying it to arrears. The fact that a payment is past due does not change its character, and a spouse needing support should not be deprived of it because inefficiencies in the collection system allow arrears to accumulate. Its control by the court would be a safeguard against injustice. If it is not used, the only practical remedies will be execution, garnishment and committal to jail; the last is harsher than the continuing attachment and the first two are harsher in some cases and less effective in others. However, we have concluded that the continuing attachment should only cover future support payments and any which have fallen due within the 90 days before the filing of the application, the period of 90 days being chosen to give the dependent spouse or the government a reasonable time to decide to make the application and to get it before the court. We think that the continuing attachment for arrears as well as current payments would be too heavy an imposition upon the respondent and upon his other creditors, who in many cases will have difficulty in finding other sources for payment of their claims. Accordingly, arrears should be left to the traditional means of collection and should rank with other claims under the Execution Creditors Act. Much the same sort of reasoning applies to the attachment of earnings to obtain payment of lump sums, and we think it should not

be available for that purpose. In these respects we would suggest changes in the successor to sec. 28.1.

We do not think that the order should be made without notice to the respondent unless he has absconded or there is reason to think that he is about to abscond. If an ex parte order is made, we think that any money attached should not be paid out of court without notice to the respondent unless there is evidence that the respondent cannot be found. We suggest that the proposed Act make express provision on these points.

Once an order is made, how and upon whom should it be served? Formal service should be made upon the employer or an admission of service obtained. The substance of sub-sections (6) and (7) of sec. 28.1 should apply either by statute or by rules of court. We think that the respondent spouse should receive a copy of the order. If he was given notice of the hearing or appeared at it, the mailing of a copy to him should be sufficient, otherwise he should be formally served unless specific directions are given by the order.

What "employers" should be affected? We think that all persons and corporations which fall within the usual meaning of that word should be included, whether the remuneration paid to the employee is called wages, salary, commission, or some-thing else. We will deal later with the Crown as employer.

What should be done about exemptions? We do not think that in an ordinary case it should be possible to take all the respondent's earnings and leave nothing for him and his other dependents to live on, something which now appears to be possible under the Alberta Rules of Court. A possible answer would be to apply the standard exemptions which the Rules apply to garnishment of wages for other kinds of debts.

There is one difficulty with that which could be dealt with quite easily: as the Rules stand at present a married respondent would be able to claim a married person's exemption even though it is his spouse whose claim is the basis of the attachment. We think for more substantial reasons, however, that instead of applying the standard exemptions the law should leave it to the discretion of the court to specify the exempt amount. For one thing, the cases for which the standard exemption is designed are cases in which there is no adjudication, while the court will necessarily be involved in the making of the orders which we propose. For another, the court will have before it all the circumstances of the spouses and is in much the best position to determine what is fair in the particular case. Finally, there can be exceptional cases in which the exemption should be reduced or done away with, as, for example, the case of the absconding spouse or the spouse with substantial outside income. It may be that the courts in applying sec. 28.1 will provide for exemptions, but we think that the proposed Act should expressly confer the discretion and direct the mind of the court to the question in every case.

How long should the order continue? Unless the employment is terminated we think that the order should have effect until it expires according to its terms, or until an order terminating it is made. Sec. 28.1 so provides. We think that the proposed Act should go on to say that the employer is protected if he acts upon it before he has been served with a terminating or varying order. A terminating or varying order should, of course, be made when the basic order of support is terminated or varied.

How should the order rank with other claims against the respondent? We think that it is clear that it should take priority over assignments or garnishees served after the service of the attaching order. The obligation being enforced is that of the individual to support his family, and we

think that that obligation should have a higher claim against his current earnings than his obligation to other creditors. The law already recognizes that proposition to some extent by protecting some of a married person's earnings, varying with the number of his immediate family, from garnishment for an ordinary debt. It also recognizes that all of his earnings can be attached by garnishment based on a maintenance debt. In view of the fact that the remedy which we propose will be subject to review by the court at any time, we think it appropriate to extend the protection of the family to the extent of giving an attaching order priority over all claims other than statutory deductions. Provincial legislation cannot, of course, affect claims under the federal law.

The next question is: how should the attached earnings be dealt with? Money attached by garnishee summons is required to be paid to the clerk of the court which issued the summons. It may then be paid out by order granted upon the application of a party, or it is paid over to the sheriff for distribution among the holders of subsisting executions. In the case of the attaching order, however, we see different problems.

A payment for the support of spouse or child is likely to be needed as soon as it is made. Despatch is not so important to the Maintenance and Recovery Branch, but administrative simplicity is. For those reasons we do not think that the procedure under the Execution Creditors Act should apply because it involves retention of the funds by the sheriff for 14 days, followed by distribution according to a statement circulated in advance to all creditors. Further, it does not seem to the majority of our Board that it would serve any useful purpose to circulate such a statement to creditors who would not be able to assert any claim to the money; and a prior claim such as one under federal constitutional authority could be perfected by service on

the employer if the claimant wants to preserve his position. Accordingly, we do not think that the money should come under the Execution Creditors Act.

We are inclined to the view that in the usual case all payments should go to the clerk of the court from which the order issues. That will ensure that there is a court record showing what payments have been made for the purposes of future applications (and it will also ensure that each party, and in particular the respondent, will be able to obtain a statement for tax purposes, though that is a benefit extraneous to our consideration). Such a provision will allow the court to retain control and verify that payments are being made and will fit in with our general recommendations concerning collection mechanisms. We realize that there will be some delay caused by the money making an intervening stop in the clerk's office but we trust that administrative arrangements can be made to minimize that problem. The order should direct the clerk immediately upon receipt to pay it to the dependent spouse, to the person looking after the supported child, or to the Maintenance and Recovery Branch, as the case may be. We think however that in the interest of flexibility the court should have power to order that the payments go to another person, such as the dependent spouse.

Sec. 28.1 requires the order to direct that the employer make his payments to a clerk of the Family Court, and our recommendation that the judge have power to make a different direction constitutes a small divergence from the section. Sec. 28.5 requires an order for payment out, and we are not sure that the court will consider itself able to make the order for payment out under it as part of the order for attachment. We think that the proposed Act should make it clear that only one order is needed in the usual case, as the procedure would in most cases be of little value if the money could not be got out without an additional application.

We think that some provision should be made for the rare cases in which two applicants may obtain attaching orders in different courts against the same wages. The Supreme Court should have power to resolve the conflict.

The effect of the proposal on the employer must be taken into account. He should be given explicit information that will leave him in no doubt as to his obligations. If that is done, we do not think that the adverse effect on him will be too great. He will usually be better able to minimize his administrative problems if there is a continuing order than if there is a garnishee summons served late during each pay period, and the continuing attachment will in effect be just one more deduction. He will, however, be an innocent party who becomes involved in the affairs of the husband and wife, and we think that he should be entitled to deduct from each payment the amount of costs he is entitled to deduct from a payment under garnishee summons, which is presently $5.00. That will add to the cost of the procedure, which militates to some extent against the objectives of the collection system, but we think that it is required by fairness, and the cost, while undesirable in itself, may provide some additional inducement to the respondent spouse to suggest and carry out an alternative proposal for payment which will not involve the continuing attachment.

There is some danger, however, that in a particular case an employer may discharge a respondent spouse because of an order for continuing attachment. To guard against that danger we think that the employer should be prohibited from doing so. We made a recommendation to that effect in connection with wage assignments and garnishment in our Report No. 5, Assignment of Wages, and the Alberta Labour Act was amended to prohibit dismissal, laying off, and suspension of an employee "for the sole reason" of garnishment proceedings. The section, however, does not provide any sanction

other than the general one for breach of a statute. Whatever the case with an ordinary garnishee, we think that the protection of the dependent spouse justifies giving the discharged respondent spouse a right to be reinstated, or at least to claim damages. We so recommend, and in so doing would go beyond sec. 28.1 which does not provide for a civil sanction. The prohibition against dismissal, the sanctions that we have suggested, and the deterrent effect of the presence of the court workers of the collection process under recommendations which we will make later in this Report, will provide some protection to the respondent spouse. We have considered going further and recommending a provision that a discharge within a given period from service of the order, such as 90 days, would be presumed to be because of the order, until the contrary is proved. Article 650 of the Quebec Code of Civil Procedure provides such a presumption. We think, however, that to go that far would be to impose too heavy a burden on the employer.

Sec. 28.1(10) provides a fine of not more than $1,000 for the failure of an employer to comply with an order for attachment of earnings. We can see that the more usual sanction, a civil judgment against the person who owes the money which is attached, may not be appropriate to a case in which there is a series of periodic payments to be made and are prepared to accept sec. 28.1(10) as an expression of the will of the Legislature and to carry it forward.

The earnings of a respondent spouse employed by a department, board or commission of the provincial public service should be subject to attachment, and the proposed Act should so provide. We think that it is better to make that legislation applicable than to try to bring the procedure under the Civil Service Garnishee Act. Since sec. 28.4 of c. 64 makes an order under the amended Part 4 of the Domestic Relations Act, binding on the Crown, we assume that any administrative problems

created for the government by such a provision can be overcome. We think that it would be useful for the province to urge the federal government to follow the province's example.

Recommendation #43

(1) That the proposed Act make the following provision for continuing attachment of earnings:

(a) In this section, unless the context otherwise requires, "court" means

(i) the Supreme Court when enforcing an order of support made by the Supreme Court, or

(ii) the court of summary procedure when enforcing an order of support

(A) made by the court, or

(B) made by the Supreme Court and filed in the Family Court.

(b) The court may make an attaching order under this section for the purpose of ensuring the collection of payments due or to become due under an order of support.

(c) By the attaching order the court may direct the employer of the respondent to pay to the clerk of the court or other person named in the order a specified part or amount of the wages, salary or other remuneration which is then due or which may thereafter become due to the respondent.

(d) An attaching order

(i) shall not provide for the recovery of payments of support which became due more than 90 days before the filing of the application for the attaching order,

(ii) may be varied from time to time,

(iii) takes precedence over

(A) a garnishment or attachment, and

(B) an assignment

served on the employer after the service of the attaching order,

(iv) binds the employer from the date of service thereof, and

(v) remains in force until

(A) it is terminated by an order or its own terms, or

(B) the employment is terminated.

(e) An attaching order shall

(i) be made upon notice to the respondent,

(ii) be made only when the respondent is in default under the support order at the time of the filing of the application for the attaching order,

(iii) be served by ordinary mail at his last known address,

(iv) provide for the exemption of such amounts for the support of the respondent and his dependents as the court thinks proper, and

(v) give directions as to the disposition of the amounts attached.

(f) Sub-paragraph (i) of subsection (e)does not apply if the court is satisfied that the respondent has absconded or is about to abscond, but in that event the amounts deducted shall be paid to the clerk of the court which makes the attaching order to be held until further order or until the court is satisfied that it is not practicable to give the respondent notice of its intention to direct payment out.

(g) Upon each deduction of wages, salary or remuneration the employer is entitled to receive such costs as may be permitted to a garnishee under the Alberta Rules of Court from time to time, to be paid by

deduction from the remaining money payable to the respondent or, if there is no such money, from the money paid pursuant to the order.

(h) If more than one attaching order is in effect against the same wages, salary or other remuneration

(i) the Supreme Court may give directions about the disposition thereof, and

(ii) pending such directions the order first served on the employer has priority.

(i) An employer who makes a payment pursuant to an attaching order under this Recommendation is discharged from liability for the amount of the payment.

(j) An employer shall not terminate the employment of the respondent solely because of an attaching order or orders under this section.

(k) An employer who contravenes subsection (j)

(i) is guilty of an offence, and

(ii) may be ordered by the court to pay damages or reinstate the respondent.

(l) A person who is served with an attaching order and who fails to comply with its terms without reasonable justification is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

(2) That the provincial government urge the federal government to recommend to Parliament legislation requiring the Crown in right of Canada to recognize orders made under Recommendation 43(1).

(v) Imprisonment

Under sec. 8 of the Alimony Orders Enforcement Act (Alberta), a judge of the Supreme or District Court may commit a defaulting respondent spouse to jail for not more

than one year, but only if the respondent spouse has given away or concealed property to avoid payment or has "refused or neglected" to pay when able to do so. Under sec. 28 of the Domestic Relations Act (Alberta), a judge of the Family Court may commit the respondent spouse to jail for not more than six months unless he is satisfied that the respondent is unable to pay the sum ordered. Should imprisonment continue to be a sanction?

There are arguments for an answer in the negative. Imprisonment for debt is repugnant to present notions of justice. The present law which we have described provides for imprisonment for refusal to pay when able to do so and not for the debt itself; but it is a feature of the system which makes the system appear punitive and its processes like those of the criminal law. Imprisonment, whether for debt or for refusal to pay, is not available to any other creditor with a money judgment. Whatever the situation might have been in earlier times, the availability of social assistance means that the dependent spouse and family will not be utterly destitute if support payments are not made, so that there is now less reason to apply such a harsh sanction. Judges are reluctant to commit, and the threat is therefore often seen as an empty one. Attachment of earnings is more likely to be a more efficient remedy if the principal financial resource of the respondent is his earnings, and execution and garnishment are available in the case of one who has property and business resources. Finally, if a respondent spouse is in jail he has no way of earning money to pay the arrears. Why then should imprisonment not be abolished?

The practical answer is that there are cases in which imprisonment or the threat of imprisonment does result in payment of arrears and in which no other remedy appears likely to do so. We are told by those involved in the enforcement process that quite often money is forthcoming

in order to avoid imprisonment and that the respondent is thereafter likely to be careful not to provoke the exercise of that power again. Then it should be remembered that there is a practical difference between collection of periodic support award and most other judgment debts, in that legal machinery, being cumbersome and expensive, is not well adapted to the collection of small periodic sums. We hope that the continuing attachment of earnings and the improvement of collection services will alleviate this problem, but we do not expect it to disappear. It appears likely that there will continue to be cases which can be reached by imprisonment or by threat of imprisonment and not by ordinary collection methods.

That raises the philosophical question: is imprisonment justifiable? The duty to support spouse and family is, we think, a higher duty than the ordinary duty of debtor to creditor. Our recommendations for priority of support claims and for a collection service reflect that view. We think that, so long as it is clearly restricted to the case of a respondent spouse who could pay and has not done so, and so long as he has adequate opportunity to have the propriety of the award reviewed, committal should be retained as a means of compelling payment in the face of an intentional failure to pay. We note that Ontario Bill 59, 1977, would give the court power to order imprisonment for three months but the time limit in the Alimony Orders Enforcement Act (Alberta) is one year, and we see no reason to change it in that Act or to deal with it differently in connnection with summary orders of support.

Recommendation #44

That the proposed Act make the following provision:

> *Where a party against whom an order of support is made wilfully defaults in payment of all or any of the money payable under the order,*

the Family Court may, unless the party satisfies it that the failure to pay is due to insufficient means or inability to pay, commit the party to jail for a period of not more than one year.

Recommendation #45

That the Alimony Orders Enforcement Act be made applicable to orders of support made by the Supreme Court under the proposed Act.

(vi) Other specific remedies

We have dealt elsewhere in this Report with a number of other subjects which affect the collection of support awards. These include the powers of the courts to require security, and the power of the Supreme Court to make charging orders and to set aside gifts of property. We will not repeat those discussions here.

(e) Summary of collection remedies

We will for convenience and clarity summarize the legal remedies which would be available to collect payments under orders of support if our recommendations are adopted.

If the order is made by the Supreme Court, the person entitled to payment would continue to have remedies available in that court. The principal remedies at present are garnishment of debts, including wages; seizure and sale under writ of execution; and committal to jail under The Alimony Orders Enforcement Act. Our recommendations would add to that the continuing attachment of earnings.

The person entitled to payment under a Supreme Court order of support would continue to have the right to file the order in the Family Court. The remedies available in the Family Court would then be available. The same Family

Court remedies would be available to the person entitled to payment under a summary order of support made by the Family Court.

The present remedy in Family Court is committal to jail. S.A. 1977, c. 64, and our recommendations would add orders in the nature of writs of execution with three months' priority over ordinary writs of execution; orders for garnishment of debts other than wages and salary for arrears; and the continuing attachment of earnings.

We think that this substantial aggregation of remedies would go as far towards providing the foundation for an adequate collection system as practicality and fairness permit. Unless the remedies are used, however, they will do nothing to solve even those problems which are not rendered insoluble by lack of money, and for lack of money and legal sophistication many people will not be able to use them. We will later in this Report turn to a discussion of a way to see that they are used.

(f) Procedure in Family Court

We have recommended a procedure for an application to the Family Court for a summary order of support. The procedure upon a collection proceeding should be similar, with three exceptions. One is that the applicant should not be required to file a statement of facts. The second is that an applicant who serves a demand for financial information should not have to file a statement herself. The reason for these two exceptions is that the applicant's financial position is not an issue in a collection proceeding. The third exception is that the court should have the power to commit to jail a respondent who does not appear or issue a warrant for his arrest. The reasons for this

exception are that effective collection procedures require information from the respondent and that, without the power, a respondent could avoid committal by not appearing.

Recommendation #46

(1) That the proposed Act provide rules of procedure for applications to the Family Court to enforce collection of support payments as follows:

(a) A clerk of the Family Court shall provide the applicant with a summons in Form G in the Schedule.

(b) The summons shall

(i) require the respondent to appear before a judge of the Family Court at a named time and place for a hearing on the merits of the application,

(ii) give notice of the remedy being sought,

(iii) inform him that he has the right to oppose the application, and

(iv) warn him that if he does not attend the hearing the judge has power to make an order in his absence, including an order of committal to jail.

(c) The summons shall be served upon the respondent personally or in such manner as a judge may direct.

(d) The applicant shall further cause to be served upon the respondent together with the summons a notice in Form H in the Schedule.

(e) The notice shall

(i) contain information as to the rights and obligations of the respondent, including notice of the services available in the Family Court to him, and

(ii) advise him to seek legal advice as soon as possible before the hearing.

(2) That the proposed Act provide as follows:

(a) At the hearing of an application to enforce collection of support payments the court may

(i) make an order granting the relief claimed or part thereof,

(ii) dismiss the application,

(iii) if the respondent does not appear, issue a warrant for his arrest or make an order of committal to jail for a period not exceeding one year, or

(iv) adjourn the application to permit the respondent to apply to vary the order of support under which proceedings are taken.

(g) Effect of order in collection proceedings

We have already said that the earnings of provincial employees should be subject to attachment and that the proposed Act should so provide. We think that any other order made in collection proceedings should also bind the Crown, and we will now make a recommendation accordingly. S.A. 1977, c.64, already so provides. Under the constitution its effect is limited to the Crown in right of Alberta.

The proceeds of an order in collection proceedings should be protected from attachment by others.

Recommendation #47

(1) That an order made in a proceeding under the proposed Act to enforce collection of support payments be binding on the Crown.

(2) That money paid to a clerk of the court under an order in proceedings under the proposed Act not be attachable.

(h) Rules of court

As in the case of the summary procedure for orders of support, we think that the Lieutenant Governor in Council should have power to make rules of practice and procedure for proceedings in the Family Court to enforce collection of support payments. Until that is done, the rules which we have drafted should apply.

Recommendation #48

That the proposed Act provide for rules of practice and procedure for proceedings in the Family Court to enforce collection of payments for support as follows:

(1) The Lieutenant Governor in Council may make rules of practice and procedure for proceedings to enforce collection of payments for support, including rules for the matters provided for in the Schedule to the Act.

(2) Until rules are made for the matters provided for in the Schedule, the rules in the Schedule relating to such proceedings shall be rules of the court for the purposes of this Part.

(i) Collection Service

1. Present Situation

An ordinary creditor who wishes to collect money through legal process obtains a money judgment against the debtor. He then has available to him a number of means of collecting the money, notably the writ of execution and the garnishee summons, and he has the right to examine the debtor in aid of execution. It is for him to take the initiative and to see that proper documents are issued and served. A spouse who obtains a support award is a creditor for the amounts which fall due under the award, but it has been recognized

that she or he is not an ordinary creditor, that the award is not an ordinary money judgment, and that to leave her or him to collect the money by traditional methods is to deny justice. The Family Court therefore provides to creditor spouses services which the court system does not provide to other creditors. It also provides services to the Maintenance and Recovery Branch of the Department of Social Services and Community Health for recouping money paid to a supported spouse by way of social assistance. The services in Family Court are also available to spouses who obtain Supreme Court awards, as Supreme Court orders may be filed in the Family Court for enforcement.

In the Family Court, the clerk of the Court is the official with the formal responsibility for collection. He is the custodian of the court file, and most Family Court orders direct that the money be paid to him. A Family Court Counsellor or Probation Officer may also become involved in the collection process because he has retained interest in a file or because the supported spouse regards him as her contact with the court and informs him of a default in payment.

The practice appears to vary from Family Court to Family Court. In some cases, court officials conceive it to be their duty to take steps to bring non-paying spouses before the courts without waiting for instructions from the claimant spouse or from the Maintenance and Recovery Branch. In other cases, the court officials do not conceive it to be their duty to commence proceedings without instructions, which may not come until the default has continued for several months. Part of the reason for the difference in practice is the division of jurisdiction between the Department of the Solicitor General and the Department of the Attorney General.

The steps that can be taken in Family Court to collect

support awards are limited. Family Court workers can write to a respondent spouse or have a discussion with him. Apart from that the only recourse is to issue a summons to him to appear before the court to show cause why he should not be committed to jail for failing to pay. It takes time to bring him before the court, and when he does appear the court can only commit him or extract payment under threat of imprisonment.

The system does not appear to work as well as it should. Large amounts of money are awarded and either are not collected on time or are not collected at all. Part of the problem arises because some respondents are dissatisfied with the law or its processes or are unwilling to pay for the support of claimant spouses or children. Part of it however arises from particular problems related to the collection process. One of those particular problems is that the only remedy available in Family Court, the "show cause" procedure, is one which the judiciary are understandably reluctant to carry through to the point of committing a respondent to jail, and that it leaves room for evasion and delay.

The more flexible remedies which we have suggested should alleviate the problem and in some cases solve it, but the problem will remain in many other cases. Another particular problem is that in many cases the collection process is not activated for a long period of time with the result that arrears pile up and collection becomes more difficult. That is partly due to the fact that a supported spouse receiving a social allowance has no financial incentive to complain and the fact that many a dependent spouse has a disincentive in that she does not want to alienate further or provoke the respondent. It is partly due to the further fact that the failure to pay is not systematically brought to the attention of enforcement officials in any other way. A further part of

the general problem is that many supported spouses do not think the likelihood of substantial return from the collection process sufficiently great to justify the time and trouble involved in it.

2. Proposals for a collection function

Our first proposal is that there be a collection service in each existing Family Court to collect money due under support orders made by the Family Court or filed there for enforcement. If a unified family court is established the service should be attached to that court.

We think that the first requirement for such a service is that it be under one direction throughout the province. It should work in close cooperation with the other Family Court services and should therefore be directed by the administrative authority which directs all the Family Court services. We repeat here the recommendations made in our Report 26, Family Law Administration: Court Services, that all the Family Court services should be under one government department and, because the Attorney General is necessarily responsible for appointment of judges and the administration of justice, they should be under his department. If all the services attached to a Family Court are to work in a co-ordinated way, and to cooperate where cooperation is appropriate, one administrative authority appears essential. That is as true in the collection process as elsewhere.

The next requirement is that clear and consistent policies be adopted and that those involved in the collection function should clearly understand those policies. That, we think, requires careful written policy statements, and it also requires educational programs involving personnel from the services attached to the different Family Courts. It also, we think, requires careful continuing attention to the problems

encountered by those involved in the process and careful continuing consideration of policy in the light of information as to those problems.

The next requirement is that there be an adequate staff to perform the functions required of it. It seems that in the courts handling large volumes of work there should be provision for staff members engaged full-time in the collection process. In smaller courts, the volume may not justify a full-time staff person.

What should the collection service do? There is a threshold question: should it take positive steps to discover default and take proceedings to rectify it, or should it move only when activated by instructions from the spouse entitled to payment or from the Maintenance & Recovery Branch? The two cases are not necessarily the same, and we will discuss them separately:

1. Where the supported spouse is entitled to receive payment we do not see any reason why the collection service should move without her or his instructions; for one thing she or he is the interested party and for another, if she or he does not give instructions there may be a good reason, such as a reconciliation. However, we think that the supported spouse should be able to give a general authority to the Family Court services to take proceedings upon default, and that that authority should be valid until notice of revocation is given to the Family Court services. She or he should also be able to make specific requests for collection procedures.

2. Where the Maintenance & Recovery Branch is entitled to receive payment the same principle should apply, i.e., that it should be for the Branch to decide in a particular case whether proceedings should be brought. However, it appears that at the present time one of the great problems is that even where the Family Court services take an active role the administrative procedures for the discovery of the default, the notification of the Maintenance & Recovery Branch and the giving of instructions by the Branch to the Family Court services take many weeks, or even months, so that arrears pile up before anything is done. It would seem that the most efficient arrangement would be for the Branch to give a blanket authority to the Family Court services to take proceedings at a given time after default, leaving the Branch free to countermand the authority in a given case either before or after commencement of proceedings.

There is evidence that vigorous collection procedures improve collections. Statistics from Vancouver suggest that the levels of collection through the family court there are higher than in Alberta, and greater collection activity appears to be at least one cause. The Study Paper on Enforcement of Maintenance Obligations prepared for the Law Reform Commission of Canada said at p. 19 that in Ontario, where a programme under which special workers "trace missing payors, make home visits, assist and give moral support to both husbands and wives in re-hearing situations involving variation of orders or reduction of arrears, and devote substantial attention to working out family problems with a view to reconciliation" has been combined with automatic enforcement, compliance with maintenance orders has more than doubled. The Ontario

Commissioners to the Uniform Law Conference also found "ample evidence even at this date that automatic enforcement schemes are effective," though they found that the system had become overloaded and suffered from inadequate staffing. (1976 Proc. 278) It will however be a matter of administrative judgment to determine the number of staff needed.

The collection service should operate as follows:

1. If an order is to be enforced by the service it should provide for payment to the clerk of the Family Court.

2. Provision should be made for the periodic review by the service, preferably monthly, of files relating to all orders to which the procedure applies.

3. Upon a default being discovered a letter should go to the respondent mentioning the default and asking the respondent to telephone or call on the Family Court worker to discuss it, and saying that the usual procedure is that if he does not do so, proceedings will be taken for collection. General information should also be given about the court's procedures and powers, including the power to vary. If the history of the matter suggests that the letter is useless, this step could be dispensed with.

4. The collection service worker should then form an opinion as to what course of action should be followed. In some cases, the worker will decide that there is no reasonable likelihood of collection by any method and will advise accordingly. In others he may decide that more information is

> needed to enable effective measures to be taken, in which case he might serve a demand for financial particulars or apply for an order directing the respondent to attend upon a financial fact-gathering agency and make a statement. He may decide to apply at the same time for an order for continuing attachment of earnings or for committal, or for both remedies. If the supported spouse or the Maintenance and Recovery Branch wants a specific remedy followed, those wishes should govern. We do not think that the Family Court worker should issue execution or a garnishee summons.

The effect of the recommendations we have made with regard to the collection service would be to increase the collection staffs attached to the Family Court, bring them under one administrative direction, and provide for a coherent plan of action. We would not suggest, however, that the government go ahead uncritically to provide extra personnel and facilities without careful consideration of the prospective costs and of the prospective benefits. The costs are the economic cost of the service and the social cost to the respondent and his other dependants which will flow from collection and collection efforts. The benefits are the economic and social benefits to supported spouses and children, the economic benefit to the public funds, and the greater respect for law arising from the effective administration of an important segment of it.

The carrying out of our recommendations, if they are accepted, should accordingly be approached cautiously and under the supervision of a senior official, but in consultation with those presently working in the field, with a view to seeing that the system adopted will be suited to what is wanted of it, without requiring an extensive administrative and staff structure.

Recommendation #49

(1) That there be a Collection Service attached to each Family Court.

(2) That the Collection Service be directed by one administrative authority.

(3) That the administrative authority be the Attorney General.

(4) That a uniform policy statement be adopted and communicated to all personnel, and be kept under frequent review based on consultation with collection service personnel and others involved in the system.

(5) That the Collection Service be extended as needed, but cautiously and with constant attention to costs and benefits.

(6) That the Collection Service act under special or general authority of a supported spouse or the Maintenance and Recovery Branch as follows:

(a) The Service should check each file each month, or as frequently as is found practicable and desirable, to see whether default has been made.

(b) When a payment is missed the Service should try to communicate with the respondent asking him to telephone or call to discuss the matter, and advising him of the court's procedures and powers. If past history suggests that this step would be a waste of time, it could be dispensed with. If informal efforts appear likely to bring the best result they should be continued, but not in such a way as to bring discredit upon the court or the Service.

(c) The Service should then decide, preferably in consultation with the supported spouse or the Maintenance and Recovery Branch, whether any action is justified, and whether an application should be made for attachment of earnings, committal or other remedy.

(d) The Service should then prepare and arrange for the service of the necessary papers and for the hearing. The Service should be

present at the hearing, if at all, only to provide information; the supported spouse or the Maintenance and Recovery Branch should appear.

(j) Recovery of Social Allowances Paid to Dependent Spouses and Children

If the government pays a social allowance to a spouse or child it is the government which has a financial interest in seeing that the other spouse, or the parent, makes support payments. Present law and practice give some recognition to those facts, and S.A. 1977 c. 43, which will come into effect on May 18, 1978, gives further recognition.

Departmental staff often suggest to a socially assisted wife that she make an application to the Family Court for support. It is not departmental policy to insist upon such an application, but some socially assisted wives appear to think that there is some pressure upon them to apply. Most socially assisted wives sign a document authorizing payment to the government of support payments from their husbands, and Section 13 of the Social Development Act (Alberta) can be interpreted to provide that if she does not do so the amount of an award against her husband can be deducted from her social allowance. Many wives therefore make Family Court applications for support awards the proceeds of which go to the government. If a wife does not want to make such an application a provincial welfare worker can do so on her behalf or on behalf of her child.

A provincial welfare worker can also apply in Family Court on behalf of a socially assisted wife or child for an order requiring the husband or father to appear and show cause why he should not be committed to jail because of his failure to pay the amount of a support award. If the award was

made by the Supreme Court the welfare worker can file it in the Family Court so that the "show cause" application can be made there. The wife's assignment will then allow the support payments to go to the government.

We should mention another statutory provision for recovery by the government of social allowance payments. That is section 56 of the Maintenance and Recovery Act under which a parent may agree to make maintenance payments to the Director of Maintenance and Recovery for a socially assisted child.

We have already said that we think that the government will have to continue to recover what it can by way of support payments to reimburse public funds for social allowances paid to spouses and children. It remains to consider the principles upon which the law in the area should be founded.

It must first be recognized that the underlying situation is necessarily somewhat anomalous. The government is the interested party. However, the amount it is entitled to recover cannot exceed the amount of support which the supported spouse or child is entitled to recover from the other spouse or from the parent, the reason being that it is the support obligation which is being enforced. The government's rights therefore depend upon the relationship between the needs and resources of the supported spouse or child and the needs and resources of the respondent spouse, a relationship which is not necessarily relevant to the amount of the social allowance paid by the government. That anomaly is inherent in a situation in which a third party, the government, in effect discharges the obligation which the respondent should discharge and becomes entitled to recoup itself to the extent of the respondent's obligation.

Once the underlying situation is accepted the next questions are: by whom and in whose name should an application be brought for support or for the collection of support payments? Those questions come down to this: should the application be brought by a socially assisted spouse or child, or should it be brought by a governmental agency?

We think that the law and practice should reflect the facts. The facts are that the dependant has no financial interest in the application and that the government does, and they suggest that an application should be brought by and in the name of the government or a minister. There are other considerations leading to the same conclusion. A dependent spouse may legitimately be fearful of bringing an application which will provoke the ill will and even the violence of the other spouse, or the bringing of an application by the spouse may stand in the way of a possible reconciliation which is in the interests of the family and of the public. The dependent spouse may have no real interest, as she or he has no financial interest, in pursuing the application vigorously. The government on the other hand, does have an interest, and is less likely to provoke bad feeling between the spouses by bringing the application.

There are some difficulties. It may be thought that the court will be less disposed to be generous to the government than to the dependent spouse or child, and we have already referred to the anomalous situation which will be disclosed by a governmental application. However, we would not be prepared to recommend a system the efficient operation of which would depend upon the true facts being kept from the court, even if we thought that that could be done, nor would we recommend a system which would not be generally acceptable if its nature was known. We think that the difficulties we have mentioned, if they are difficulties, must be accepted.

However, the power of the government to bring proceedings in its own name for support should be restricted to summary proceedings in the Family Court. It is probably impossible constitutionally to inject the government into the support aspect of a divorce proceeding, and it would be extremely awkward, even if constitutionally possible, to inject it into the support aspect of any proceeding involving other rights and remedies of the parties, whether divorce, nullity, or judicial separation. In the Supreme Court, that leaves only independent proceedings for alimony, and these would almost never be needed by the government and do not justify setting up elaborate provision for Supreme Court proceedings by it.

What if there is a divorce proceeding on foot, and the supported spouse does not wish to pursue an application for support? In McCutcheon v. McCutcheon (1977) 2 Alta. L.R. (2d) 121 the Appellate Division held that where the right to apply for support is reserved in a divorce decree nisi, the jurisdiction of the Family Court is ousted. The court did, however, indicate that the province had a right to proceed in its own name for support for socially assisted children whether or not their parents are divorced. Our proposal would provide for such a right and may reasonably be expected to be held constitutionally effective so far as children are concerned unless there is an actual overriding Supreme Court order providing for support of a child. The obligation of support independent of marriage and divorce is not present between spouses and the constitutional validity of our proposal would accordingly be more open to question if a divorce proceeding is on foot, but the fact that the government would be asserting a right to recover the social allowance may provide a sufficient constitutional foundation.

We turn to proceedings for collection of a support order already made. Again we think that the government should be able to bring proceedings in its own name or that of a minister

only in Family Court. It should continue to be able to file Supreme Court support orders in the Family Court, and that power will enable it to bring applications in its own name in Family Court to enforce payment of Supreme Court orders. We think that the gain from enabling it to do so in the Supreme Court would be slight, and that the resulting complexity of procedure would not be justified. Garnishee and execution other than under an order of the Family Court are not likely to be needed in the great bulk of socially assisted cases, and some tinkering would be necessary in order to allow them to be used by someone other than the judgment creditor. It appears to us that the remedies proposed for the Family Court are better suited to these cases.

S.A. 1977, c. 92 enacted the following as a section of the Social Development Act:

> 12.1(1) Where a social allowance is paid to or on behalf of a person who has a right to maintenance or alimony for himself or his dependent children or both under an Act, order of a court or agreement, the Government is subrogated to all of the rights to maintenance or alimony of that person under the Act, order or agreement.
>
> (2) The subrogation under this section applies to a right to maintenance or alimony payable in a period during which a social allowance is paid whether the period occurs before or after the commencement of this section.
>
> (3) Where the Government is subrogated to any right pursuant to this section it may bring an action or make an application in its own name or the name of the person to whose rights the Government is subrogated.
>
> (4) Notwithstanding subsection (1), if any amount is paid as maintenance or alimony to the person entitled to receive it under the Act, order or agreement within the time specified by the Act, order or agreement, the Government is not subrogated to the right to receive payment of that amount.

We do not suggest that the implementation of this section

be delayed, but we do have some suggestions for legislation for the longer term which we think should be considered as part of the general plan of our recommendations as set forth in this Report.

Subrogation is a compendious way of describing the conferring upon the government of the substance of the rights which we have suggested above, and is satisfactory. We are inclined to the view, however, that the final statutory provision should spell out more clearly the relationship between the government, the socially assisted spouse, and the spouse responsible for support. For one thing, the word "subrogation" does not distinguish between the right to apply in the Supreme Court where for the reasons we have given we think such a right inappropriate and in the case of divorce unconstitutional, and the right to apply in the Family Court. For another there are a number of complexities in the relationship between the husband, the wife, and the government which we think require special attention and some policy matters which we think should be resolved somewhat differently.

We think the government should be able to recover only periodic payments covering the period for which social allowance is paid. Lump sums are usually for special purposes, and periodic payments for earlier periods were for that period and may well be needed to defray costs then incurred; we think that they should, if collected, be the property of the dependant rather than the government, and that they should not automatically be available to repay a social allowance incurred at another time. We think also that it should be recognized that the dependant may in some cases have an interest in the order arising from arrears under it, from a possible (though unlikely) excess of the amount of the payments under the order over the amount of the social allowance, or from the possibility that the order will

continue after the social allowance stops, and that she or he should therefore receive notice of the exercise of the government's right and of all proceedings relating to her or his support and should have some right to bring proceedings herself upon notice to the government. We think that provision should be made for the adjustment of rights between the dependant and the government upon termination of the social allowance, and for the transfer to her or him of the benefit of any existing orders of support or collection orders. We will accordingly set out our detailed proposals (in which we will accept the use of the term "government" since it appears in sec. 12.1).

Recommendation #50

That the following section be included in the Social Development Act in place of section 12.1:

(1) In this section, "child" means a child for whose support an order is or can be made under the Matrimonial Support Act or the Divorce Act (Canada).

(2) This section applies when

(a) the dependent spouse, former spouse or child of a person responsible for his support receives a social allowance, and

(b) it is the duty of the responsible person to provide financial support for the dependant.

(3) The government may

(a) give notice to the responsible person requiring him to make to the government all periodic payments which are then due or which subsequently accrue due under an order of support or agreement as to support in favour of the dependant and before or upon so doing shall notify the person entitled to receive the payments,

(b) if the support order has been made by another court in Alberta, file such order in the Family Court for enforcement.

(c) if there is no existing order, apply in its own name to the Family Court for an order requiring the responsible person to make periodic payments to the government for the support of the dependant,

(d) retain from any money received on account of periodic payments an amount equal to the social allowance or its value paid or to be paid for the period to which the periodic payments relate, and

(e) agree to accept a lesser sum in full satisfaction of any sum which it is entitled to retain under sub-paragraph (d).

(4) Save as provided in subsection (10) the following rights vest exclusively in the government upon the service of a notice under sub-paragraph (a) of subsection (3) or upon the making of an order under sub-paragraph (c) of subsection (3):

(a) the right to receive all support payments which are due or thereafter become due under an order or agreement referred to in sub-paragraph (a) of subsection (3), and

(b) the right to apply for orders for enforcement of an order referred to in subsection (3).

(5) When applying for variation of a support order referred to in sub-paragraph (a) of subsection (3) the government shall:

(a) if the order was made under the legislative jurisdiction of the province, apply in its own name, or

(b) in other cases, apply in the name of the party at whose instance the order was made.

(6) Nothing in this section empowers the court to make an order in favour of the government unless in the absence of this section a court of competent jurisdiction would have granted a similar order upon application by or on behalf of the dependant.

(7) The government shall pay to or retain for the benefit of the dependant any money received by it under this part which it is not entitled to retain under sub-paragraph (d) of subsection (3).

(8) A payment made to the government pursuant to a notice or order under subsection (3) discharges from liability for that payment

(a) the person who makes the payment, and

(b) the responsible person if the payment is made from his earnings or property or on his account.

(9) The dependant or the person to whom payments are ordered to be made on behalf of the dependant shall be named as a respondent in and be given notice of any application by the minister under this section.

(10) Notwithstanding sub-section (4), the dependant or any person entitled to act on behalf of the dependant may make an application in respect of the financial support of the dependant.

(11) The government shall be named as a respondent to any such application and shall be given notice thereof.

(12) The spouse or former spouse of the responsible person is a competent and compellable witness in proceedings under this section.

(13) When the social allowance ceases to be payable to the government, the government shall apply for directions and consequential orders.

(a) to enable it to collect any money to which it is entitled, and

(b) to make available for the dependant the benefit of any orders outstanding in favour of the government.

(14) If a support order or agreement is in favour of the dependant the government, instead of applying under subsection (13), may give notice to the responsible person that payments should thenceforth be made to the dependant or other person named in the order and the exclusive right to receive such payment thereupon vests in the dependant or other person.

(15) The Family Court has jurisdiction

(a) to make the orders referred to in this Part,

(b) to determine the distribution of payments received by the government among

(i) those amounts which the government is entitled to retain and those which the government is not entitled to retain, and

(ii) the amounts to which different dependants are entitled,

(c) to direct that notice of an application be given to persons whose rights may be affected by it,

(d) to make an order transferring the benefit of an existing order from one party to another,

(e) upon the cessation of a social allowance to make orders allowing the recovery of arrears by the goverment and other sums by or on behalf of the dependant, including orders designating the government, the clerk of the court or other person to receive payments from the responsible person and giving directions as to the distribution of the payments to be received, and

(f) to make all orders necessary to determine disputes and proceedings under this section and to settle the rights of parties involved.

VII

GIFTS AND TRANSFERS FOR INADEQUATE CONSIDERATION

A spouse might strip himself of property in order to defeat the other spouse's claim for support. He could do so by giving his property to his family or a successor spouse or by transferring it to them at a gross undervalue. If the proposed Act does nothing to protect the other spouse against that possibility, we think that it will have failed to protect the integrity of the legal relationship between the spouses or ex-spouses which it is designed to establish. The cases in which a spouse is willing to strip himself of property are probably not frequent, but the effect on the deprived spouse will be disastrous if nothing can be done to protect her.

In our Report 18, Matrimonial Property, we made recommendations designed to prevent such stripping or to mitigate its consequences. These differed somewhat between our majority proposal (deferred sharing) and our minority proposal (discretionary division). Alberta Bill 102, 1977, included a provision under which the Supreme Court could issue an injunction against a prospective stripping but it did not include a provision under which the property could be traced or the donee required to make a payment to the spouse whose claim has been affected. We regard the question as having sufficient importance, however, to justify a recommendation along the lines of Report 18. While we do not at the time of preparation of this Report know what the Legislature will do about Bill 102, we will model our recommendation on the recommendation included in the minority proposal in Report 18 since that is the proposal which is substantially embodied in the original Bill 102 and since the rather less stringent provisions appear appropriate in the context of Matrimonial Support.

Recommendation #51

That the proposed Act make the following provision with regard to transfers of property by a spouse by way of gift or for inadequate consideration:

(1) Upon being satisfied that a party to a marriage in order to prevent the other party from obtaining or enforcing an order of support is about to make any substantial gift or transfer of property for insufficient consideration the court may make such order as it thinks fit restraining the first party from so doing and otherwise protecting the claim of the other spouse.

(2) Upon being satisfied that within one year preceding an application for an order of support a party to a marriage has made a substantial gift or transfer of property for insufficient consideration in order to prevent the other spouse from obtaining or enforcing an order of support the court in its discretion may

(i) order the donee or transferee to pay or transfer all or part of the property to the other spouse, or

(ii) order the donee or transferee to pay to the applicant spouse for his support an amount or amounts not exceeding in total the amount by which the value of the property transferred exceeded the value of the consideration given by the donee or transferee therefor.

(3) It shall be presumed until the contrary is proven that a substantial gift or transfer of property for insufficient consideration which has the effect of preventing the other spouse from obtaining or enforcing an order of support was made in order to achieve that effect.

VIII

WIFE'S RIGHT TO PLEDGE HER HUSBAND'S CREDIT

The law presumes that a wife who lives with her husband and manages the household is entitled to pledge

his credit for the household necessaries required by their style of life. The husband may, by consent or by ratifying her actions, find himself liable for other things as well. The presumption extends to other relationships under which a woman attends to the domestic management of a household. There are various circumstances under which the supplier cannot rely on the presumption. For example, the husband may be able to show that the supplier relied on the wife's credit; that the husband had warned the supplier not to grant credit to the wife; or that the wife had had a sufficient supply of money to pay for the goods. It is not entirely clear whether the husband can deny liability on the grounds that without the supplier's knowledge he forbade the wife to pledge his credit. Although our Working Paper expressed the tentative opinion that the presumption should be abolished, we have since concluded that it is not harmful and might as well continue.

A wife who is living apart from her husband for just cause and who has no way of obtaining the necessaries of life may pledge her husband's credit to obtain them either directly or by borrowing for that purpose. She is said to be an agent of necessity. The husband may escape liability if the supplier relied on the wife's credit, or if the husband has allowed her adequate maintenance, or if she has other means, or if she has forfeited her right to support. Section 13 of the Domestic Relations Act (Alberta) provided until 1973 that a husband was not liable for his wife's contracts after judicial separation unless he defauled in payment of alimony, in which case he was liable for necessaries supplied for her use. Section 19 provided that where there was a subsisting alimony order and the husband was not in arrears he was not liable for necessaries supplied to his wife; the agency of necessity presumably applied if he was in arrears. In 1973 the sections were amended to apply equally to a wife's support of her husband.

We think that the law should be changed so as to eliminate the right to pledge the husband's credit for necessaries. We are not aware that suppliers of necessaries rely on such an imperfect remedy, and a wife has access to the courts for an order for support on short notice, so that we do not see a useful function for the right. Sections 13 and 19 of the Domestic Relations Act now appear unnecessary.

Recommendation #52

That the proposed Act abolish the wife's agency of necessity while not affecting any presumption of agency during cohabitation.

IX

TRANSITIONAL PROVISIONS

In view of the differences in substantive law and procedures which the proposed Act will make, we think that the proceedings commenced under Parts 3 and 4 of the Domestic Relations Act (Alberta) could not readily be carried on under the proposed Act and should be continued under the legislation under which they are commenced. On the other hand, we think that all applications commenced after the new Act comes into force should be made under it and that all applications for variation should be made under it whether the orders were made under it or under the repealed legislation. These recommendations are not entirely consistent with the Interpretation Act (Alberta), and we think that they should be set out in the proposed Act.

Recommendation #53

That the proposed Act make the following transitional provisions:

(1) A proceeding commenced before the commencement of this Act shall be continued under the

provisions of the Act under which it was commenced.

(2) Until it is varied or discharged under this Act an order for alimony or maintenance made under the Domestic Relations Act

(a) continues in force pursuant to the Act under which it was made,

(b) is an order of support within the meaning of Part 2 of the proposed Act if made under Part 3 of the Domestic Relations Act, and

(c) is a summary order of support within the meaning of Part 3 of the proposed Act if made under Part 4 of the Domestic Relations Act.

(3) This section applies notwithstanding sub-paragraph (c) of subsection (2) of section 23 of the Interpretation Act.

X

ADDITIONAL CONSEQUENTIAL AMENDMENTS

We have already in this Report made some recommendations involving the amendment of legislation. We will now make some additional consequential recommendations.

1. Domestic Relations Act

The proposed Act would replace Parts 3 and 4 of the Domestic Relations Act which should therefore be repealed.

2. Maintenance Order Act

We think that the law of support between husband and wife should appear in the proposed Matrimonial Support Act. The Maintenance Order Act should therefore be amended so that it will not refer to husbands and wives. It should be noted that that would have the effect of removing one obligation which we have not discussed, that is, the obligation under section 7 to remove a spouse from a hospital on notice from the hospital board.

3. Family Court Act

Section 12 of the Family Court Act incorporates the appeal procedure under section 27 of the Domestic Relations Act which under our recommendations would be repealed. Some other provision will have to be made in section 12, as to the nature of which we have no recommendation to make.

Recommendation #54

(1) That subject to Recommendation #53 Parts 3 and 4 of the Domestic Relations Act be repealed.

(2) That the Maintenance Order Act be amended

(a) by deleting the words "husband, wife" from subsection 3(1), and

(b) by deleting subsection 4(1).

(3) That the Family Court Act be amended to provide for appeals from the Family Court in proceedings other than those for which an appeal would be provided by the proposed Act.

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BY: _____
CHAIRMAN

_____
DIRECTOR

March, 1978

CROSS REFERENCE BETWEEN RECOMMENDATIONS AND PROPOSED ACT AND OTHER APPENDICES

(References to section and rule numbers are to the draft Act and Schedule in Appendix A)

Recommendation No.	Page No.	Subject	Reference in Appendix
1	17	Void and polygamous marriages	Sec. 1(c), 3
2	20	Duty of Support	Sec. 4(1) to 4(3)
3	23	Duty of self-sufficiency	Sec. 4(4)
4	27	Conduct	Sec. 6, 9
5	30	Criteria for support	Sec. 8
6	33	When support may be ordered	Sec. 5
7	35	Limitation period	Sec. 7
8	37	Death	Sec. 13(1) and (2)
9	38	Remarriage	Sec. 12
10(1)	61	Information about location	Sec. 44
10(2) and (3)	61	Information about location	App. C
11	65	Service of process	App. C
12(1) and (2)	69	Financial information from party	Sec. 46, Rule 7
12(3) and (4)	69	Financial information from party	App. C
13(1)	74	Information-gathering agency	Sec. 47
13(2)	75	Information-gathering agency	App. C
14(1)	76	Information from employer	Sec. 45

Recommendation No.	Page No.	Subject	Reference in Appendix
14(2)	77	Information from federal government	App. C
15	78	Order of support	Sec. 1(b)
16	79	Supreme Court proceedings for support	Sec. 14-16.
17	82	Powers of Supreme Court	Sec. 17(1)(a) and (b), 17(2)
18	84	Powers of Supreme Court	Sec. 17(1)(c) and (d), 17(3)
19	87	Interim Relief	Sec. 18
20	89	Final orders	Sec. 22
21	91	Security	Sec. 20
22	98	Agreements as to support	Sec. 19, 1(a)
23	104	Variation	Sec. 21
24	105	Enforceability of amounts due	Sec. 33
25	105	Enforceability on death	Sec. 13(3) and (4)
26	108	Summary orders of support	Sec. 24, 26, 52(a)
27	110	Law applicable to Summary Proceedings	Sec. 25
28	113	Powers in Summary Proceedings	Sec. 27
29	117	Procedure in Summary Proceedings	Sec. 30(2) Rule 2
30	119	Procedure in Summary Proceedings	Sec. 30(2) Rule 3
31	119	Powers at hearing	Sec. 28
32	121	Proceedings in Supreme Court	Sec. 29

Recommendation No.	Page No.	Subject	Reference in Appendix
33	122	Rules of Court	Sec. 30
34	123	Advisory Committee	App. C
35	124	Appeals	Sec. 31
36	125	Resumption of co-habitation	Sec. 10
37	126	Continuance of order	Sec. 11
38	127	Filing of Supreme Court order	Sec. 34, 52(b)
39	130	Execution	Sec. 33
40	131	Execution by Summary Procedure Court	Sec. 35
41	132	Garnishee	Sec. 33
42	132	Garnishee by Summary Procedure Court	Sec. 36, 48, Rule 5
43	143	Continuing attachment of earnings	Sec. 37, App. C
44	147	Committal	Sec. 38
45	148	Committal	Sec. 51
46(1)	150	Procedure for collection applications	Sec. 40, Rule 4
46(2)	151	Powers at hearing	Sec. 39
47(1)	151	Crown	Sec. 42
47(2)	151	Attachment of money	Sec. 41
48	152	Rules of court	Sec. 40
49	160	Collection service	App. C
50	167	Socially assisted dependents	App. B
51	172	Gifts	Sec. 23
52	174	Pledging of credit	Sec. 4(5)

Recommendation No.	Page No.	Subject	Reference in Appendix
53	174	Transitional	Sec. 49
54	176	Consequential amendments	Sec. 50-53 App. C

APPENDIX A

MATRIMONIAL SUPPORT ACT

PART 1

General

1. In this Act, unless the context otherwise requires,

   (a) "agreement as to support" includes any agreement between the parties to a marriage which provides for support or affects the duty of support under this Act;

   (b) "order of support" means an order which fixes the obligation of support by granting or denying it, whether originally, or by varying a previous order of support, or by giving effect to or varying the terms of an agreement as to support, and except in Part 2 includes a summary order of support;

   (c) "husband," "wife," "spouse" and "party to a marriage" include a party to a former marriage and a party to a marriage referred to in section 3.

   (d) "support" means the provision of money or property for support and includes alimony and maintenance.

2. In this Part, unless the context otherwise requires "court" includes the Supreme Court of Alberta and the Family Court of Alberta.

3. (1) This Act applies to the parties to a marriage notwithstanding that the marriage

      (a) is void,

      (b) is voidable, or

      (c) was entered into under a law which permitted polygamy, whether or not either party to it has, or at the time of the marriage or thereafter had, a spouse other than the other party.

   (2) Notwithstanding subsection (1), the court

shall not grant support in favour of a party to a void marriage if the party knew or had reason to believe the marriage was void.

4. (1) The parties to a marriage are mutually liable to support each other.

(2) The liability under subsection (1) is enforceable as provided in this Act.

(3) The liability under subsection (1) is subject to a liability of either party to support a child.

(4) Notwithstanding the liability imposed by subsection (1), where the parties to the marriage are living separate and apart, each has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation unless (having regard to the welfare of a child or children of a marriage and other circumstances) it is unreasonable or impracticable for him to do so.

(5) This section does not affect any rule of common law by which a spouse during cohabitation may render the other spouse liable to a third party for necessaries of life but otherwise applies in place of any common law rule by which one spouse may pledge the credit of the other.

5. The court may make an order of support

(a) where the parties are living separate and apart, or

(b) where, although the parties are not living separate and apart, they are in the opinion of the court experiencing marital discord of such a degree that they cannot reasonably be expected to live together.

6. No absolute or discretionary bar to another form of matrimonial relief applies to an application for an order of support.

7. (1) Except with the leave of the court given by reason of exceptional circumstances, an application for support shall be brought before or within two years after the date of the final dissolution of the marriage.

(2) Insofar as this Act relates to support after divorce it is subject to the Divorce Act (Canada).

8. In deciding whether to make an order granting or denying support, and the amount and conditions of the order where support is granted, it is the duty of the court to have regard to all of the circumstances of the case relating to the financial positions of the parties, including:

(a) the care and custody of a child or children of the parties;

(b) the duration of the marriage and the effect of the way of life of the parties on the earning capacity of each;

(c) the income, property and other financial resources or benefits which each of the parties has or is reasonably likely to have in the foreseeable future, and any entitlement under the Matrimonial Property Act or the Matrimonial Home Possession Act;

(d) the extent to which the payment of support to the applicant would increase his earning capacity by enabling him to undertake a course of education, training or retraining or to establish himself in a business or occupation or otherwise to achieve financial self-sufficiency;

(e) the earning capacity, including the potential earning capacity, of each party;

(f) the financial needs of each party, having regard to the past and present standard of living of the family;

(g) the age and health of each party;

(h) a legal or moral obligation of either party for the support of any other person;

(i) the provisions of any order of support between the parties made by another court;

(j) an agreement, oral, written or implied by conduct, including an arrangement under which one party manages the home or cares for the children or both.

9. (1) Subject to subsection (2), the conduct of the parties is not relevant to a decision as to whether or not to make an order for support, or to a decision as to the amount of support.

(2) If the court finds that the party seeking support has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, it may reduce the amount of support granted or deny it altogether.

10. An order of support under this Act terminates upon cohabitation being resumed by the parties and continuing for a period of ninety days.

11. Where a marriage is terminated by a decree absolute of divorce or a declaration or decree absolute of nullity and the question of support is not judicially determined in the divorce or nullity proceedings, an order of support made under this Act before the decree absolute or declaration continues in force according to its terms.

12. (1) The liability of one party to a marriage for the support of the other party terminates upon the remarriage of the other party.

(2) An order of support in favour of a party to a marriage terminates upon the remarriage of the party but not so as to affect liability for amounts which fall due before the remarriage.

13. (1) The liability of a party to a marriage for the support of the other under this Act terminates upon the death of either.

(2) Subject to subsections (3) and (4), an order of support under this Act terminates upon the death of either party to the marriage.

(3) Upon the death of the party liable under an order of support

(a) an unpaid amount which became due not more than one year before death is a debt of the estate of the deceased party, and

(b) upon the application of the other party, the court may order that the whole or any part of an unpaid amount which became due

more than twelve months before death is a debt of the estate of the deceased.

(4) Payment of an unpaid amount which is due to a party under an order of support at the date of his death may be enforced by the personal representative of his estate.

PART 2

Supreme Court Orders of Support

14. In this Part, unless the context otherwise requires, "court" means the Supreme Court of Alberta.

15. Part 1 applies to a proceeding under this Part.

16. A party to a marriage may apply to the court for an order of support

(a) in a proceeding limited to that object, or

(b) in a matrimonial proceeding.

17. (1) Upon an application under section 16 the court may make any one or more of the following orders:

(a) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other commencing at or after the date of the filing of the application and continuing for an indefinite or limited period or until the happening of a specified event,

(b) an order requiring one party to the marriage to make a lump sum payment to or for the benefit of the other either at one time or by instalments,

(c) an order requiring one party to the marriage to convey or transfer property or an interest in property (including a beneficial interest in trust property) to or for the benefit of the other party, and

(d) an order varying, suspending or terminating an ante-nuptial or post-nuptial settlement made on the parties to the marriage, but not so as to affect adversely the interest of a third party benefitted by the settlement.

(2) An order for periodic payments under subsection (1)(a) may provide for a specified change in

the amount of the payments at a specified time or upon the happening of a specified event.

(3) An order requiring a party to convey or transfer property may authorize another person to execute the conveyance or transfer on behalf of the party.

18. Where an application is made for an order of support the court may when it thinks it fit and just to do so make either or both of the following orders:

(a) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other party until the application or an appeal is disposed of, and

(b) an order requiring one party to the marriage to make a payment or payments to or for the benefit of the other party on account of necessary disbursements of and incidental to the proceeding in which the application is made.

19. (1) The court may make an order of support whether or not the parties have made an agreement as to support and notwithstanding any term of the agreement.

(2) By an order of support under subsection (1) the court may do any one or more of the following:

(a) vary, discharge, or temporarily suspend and again revive the agreement as to support or any of its terms which relate to support, including the deletion of any requirement that a party remain chaste as a condition of receiving support, and

(b) relieve the party liable under the agreement from liability for the payment of part or all of the arrears or any interest due thereon.

(3) An order under this section shall

(a) identify the terms of the agreement which relate to support,

(b) specify those of such terms which are to be varied, discharged or suspended and the effect of the variation or suspension, and

(c) incorporate those of such terms which are not to be varied, discharged or suspended.

(4) An order which complies with subsection (3) supersedes the terms of the agreement which are identified under sub-paragraph (a) thereof.

20. (1) Upon or after making an order of support the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following:

(a) charge specified property or a specified interest in property with the payments,

(b) order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security instrument charging specified property or a specified interest in property with the payments,

(c) order the party liable under the order or other person on his behalf to convey specified property or a specified interest in property to a trustee upon specified trusts, and

(d) suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it.

(2) Upon default in payment of an amount charged on property under paragraph (a) of subsection (1), the court may

(a) appoint a receiver of rents, profits or other money receivable from the property or interest, or

(b) order sale of the property or interest upon notice to all persons having an interest in it,

and in either event, it may direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.

(3) An order or instrument under subsection (1)

(a) is registrable in the same way as a mortgage of the property described in it, and

(b) does not affect an interest in the property acquired in good faith and for value without notice before such registration.

(4) Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter.

21. (1) Where it is satisfied that, since the making of an order of support,

(a) there has been a material change in the circumstances of either party, or

(b) material evidence is available which was not previously before the court,

the court may, on the application of either party,

(c) vary, discharge or temporarily suspend and again revive the order or any of its terms,

(d) relieve the person against whom the order was made from the payment of part or all of the arrears or any interest due thereon, and

(e) make such other order permitted by sections 17 to 20 inclusive and section 22 as the court considers appropriate in the circumstances.

(2) In deciding the application, the court shall have regard to all the circumstances relating to the financial positions of the parties, including those factors listed in sub-paragraphs (a) to (j) of section 8.

(3) This section is subject to section 22.

22. (1) This section applies if an application for an order of support is made in proceedings in which a declaration of nullity or decree absolute of nullity is granted.

(2) In addition to its other powers the court may

(a) in allowing the application declare the order of support to be final and not capable of variation, and

(b) in dismissing the application declare that the liability of the parties to support each other under this Act is terminated.

(3) If a party ordered to make payments or settle or transfer property for support by an order under subparagraph (a) of subsection (2) does not comply strictly with the order of support, the order is subject to variation under this Act.

(4) When

(a) an order under sub-paragraph (a) of sub-section 2 is fully complied with, or

(b) an order is made under sub-paragraph (b) of subsection 2 the liability of the parties to support each other under this Act is terminated.

23. (1) Upon being satisfied that a party to a marriage in order to prevent the other party from obtaining or enforcing an order of support is about to make any substantial gift or transfer of property for insufficient consideration the court may make such order as it thinks fit restraining the first party from so doing and otherwise protecting the claim of the other party.

(2) Upon being satisfied that within one year preceding an application for an order of support a party to a marriage has made a substantial gift or transfer of property for insufficient consideration in order to prevent the other party from obtaining or enforcing an order of support the court in its discretion may

(a) order the donee or transferee of the property to pay or transfer all or part of the property to the other party, or

(b) order the donee or transferee to pay to the other party for his support an amount or amounts not exceeding in total the amount by which the value of the property transferred exceeded the value of the consideration given by the donee or transferee therefor.

(3) It shall be presumed until the contrary is proven that a substantial gift or transfer of property for insufficient consideration which has the effect of preventing the other spouse from obtaining or enforcing an order of support was made in order to achieve that effect.

PART 3

Summary Orders of Support

24. In this Part, unless the context otherwise requires, "court" means

(a) a judge of the Family Court of Alberta upon whom the Lieutenant Governor in Council under section 4 of the Family Court Act confers or has conferred jurisdiction under this Act, or

(b) if a judge described in sub-paragraph (a) is not available, a judge of the Provincial Court of Alberta sitting as a judge of the Family Court of Alberta for the purpose of the proceedings.

25. (1) Part 1 applies to an application for a summary order of support in favour of a party to a marriage.

(2) The amount awarded for the support of a child under this Part shall be such amount as the court considers reasonable having regard to the means of the respondent.

26. Either party to a marriage may apply for a summary order of support on behalf of a child of the parties, on behalf of herself or himself, or both.

27. (1) In proceedings under this Part the court may

(a) order a party to a marriage to make periodic payments for support to or for the benefit of the other party or of a child of the parties, commencing on or after the date of the filing of the application and continuing for an indefinite or limited period or until the happening of a specified event,

(b) exercise with respect to a summary order of support the same powers for the variation, discharge or suspension thereof as the Supreme Court may exercise with respect to

an order of that court under sub-paragraphs (a), (b), (c) and (d) of subsection (1) of section 21,

(c) order a party to pay such costs, including solicitors' fees, as the rules prescribe,

(d) when granting an adjournment of an application make either or both of the following orders:

(i) an order requiring one party to the marriage to make periodic payments to or for the benefit of the other party until the application or an appeal is disposed of, and

(ii) an order requiring one party to the marriage to make a payment or payments to or for the benefit of the other party on account of necessary disbursements of and incidental to the proceeding in which the application is made.

(2) The court may make a summary order of support whether or not the parties have made an agreement as to support and notwithstanding any term of the agreement.

28. (1) At the hearing of an application for a summary order of support, or for variation, discharge of suspension of a summary order of support the court may

(a) make an order under section 27,

(b) adjourn the matter with or without provision for interim support and costs,

(c) dismiss the application, or

(d) make an order transferring the application to the Supreme Court if in its opinion it may be more conveniently tried in that court.

(2) The court may make an order under this section in the absence of the respondent upon proof that the respondent has been duly served with notice of the hearing.

(3) The court may in its discretion hear in camera an application referred to in subsection (1).

(4) A judge of the Supreme Court may at any time make an order directing that a proceeding transferred to the Supreme Court under subparagraph (d) of subsection (1) be transferred back and carried on under this Part.

29. (1) Nothing in this Part precludes an application for support to the Supreme Court under the Divorce Act (Canada) or under Part 2 of this Act.

(2) A person liable for support under a summary order of support may apply to the Supreme Court

(a) for an order declaring that he is not liable for the support of a person in whose favour the summary order of support was made, or

(b) an order fixing a different amount of support.

(3) The commencement of proceedings in the Supreme Court is not a bar to an application under this Part unless and until the Supreme Court makes an order granting or denying support or an order under subsection (2).

(4) Notwithstanding subsection (2), a sum due and owing under a summary order for support remains due and owing unless discharged by order of the Supreme Court.

30. (1) The Lieutenant Governor in Council may make rules of practice and procedure for proceedings under this Part, including the matters provided for in the Schedule to this Act and including costs.

(2) Until rules are made for the matters provided for in the said Schedule the rules in the said Schedule relating to this Part shall be rules of the court for the purposes of this Part.

31. (1) An appeal lies to the Appellate Division from an order under this Part in accordance with the rules of the Appellate Division.

(2) Instead of proceeding under subsection (1) a party to a proceeding in which a summary order of support is made may appeal in accordance with the rules of the Appellate Division on the ground that the order is erroneous in point of law or in excess of jurisdiction by applying to the court to state a case setting forth the facts as found by the court and the grounds on which the proceedings are questioned.

PART 4

Collection of Support Payments

32. In this Part, unless the context otherwise requires, "court" has the same meaning as in Part 3.

33. (1) Payment of an amount due and unpaid under an order of support may be enforced in the same manner as payment of an amount due and unpaid under a judgment of the court which made the order of support.

(2) Except with leave of the court referred to in subsection (1), a party is not entitled to enforce the payment of an amount due under an order of support which became due more than twelve months prior to the commencement of the enforcement proceeding or step.

(3) Leave shall not be granted ex parte under subsection (2) unless the court is satisfied that the party liable under the order of support is likely to attempt to remove himself or his property from the province.

(4) On an application for the leave required under subsection (2), the court may

(a) refuse leave,

(b) grant leave subject to such restrictions and conditions as the court thinks proper, or

(c) discharge the arrears in whole or in part.

(5) Where leave to enforce is granted ex parte, no money paid into court or received by a sheriff in respect of any period more than twelve months prior to the bringing of the enforcement proceeding shall be paid out until the other party has been given notice and afforded an opportunity to be heard on the merits of the enforcement.

34. (1) A husband, wife or child entitled to support under an order or judgment of the Supreme Court may file a copy of the order or judgment in the Family Court.

(2) An order or judgment filed under subsection (1) is enforceable in the same manner as an order made under Part 3.

(3) The court may not vary the amount of support ordered to be paid under an order or judgment filed under this section.

35. (1) The court may make an order permitting a spouse or former spouse in whose favour an order of support has been made to file the order of support with a sheriff of the Supreme Court.

(2) Where an order is filed with a sheriff under subsection (1), the order is deemed to be a writ of execution for the amount that the payment ordered is in arrears from time to time.

(3) A certificate of a clerk of the Family Court stating the amount that the payment ordered is in arrears shall be filed at the same time as an order under subsection (1).

(4) A further certificate of a clerk of the Family Court stating the amount that the payment ordered is in arrears may be filed from time to time and when filed the order filed under subsection (1) is deemed to be for the total amount of arrears certified.

(5) A certificate of a clerk of the Family Court is deemed to be a renewal of the writ of execution for all purposes.

(6) Notwithstanding any other Act, an order of support filed under this section takes priority over any other writ of execution for an amount equal to the total support payable for the

latest three-month period pursuant to the order.

(7) Notwithstanding subsection (6), this section does not affect a claim under section 16 of The Execution Creditors Act or under section 48 of The Alberta Labour Act, 1973.

(8) Where an order of support filed under this section is varied pursuant to this or any other Act, the variation order may be filed with the sheriff of the Supreme Court and any subsequent certificate filed under subsection (4) shall be in accordance with the amount in arrears under the order as varied.

36. (1) In this section "debtor" means a person who is indebted to or liable to pay money to a spouse or former spouse who is required to pay support by order of a court or judge.

(2) Upon the application of a person in whose favour an order of support has been made, the court may order that all debts, obligations and liabilities (other than wages or salary) payable or accruing due from a named debtor be paid by the debtor to a clerk of the Family Court at a place specified in the order.

(3) An order made under this section shall relate only to the amount of arrears of support for which the respondent is liable.

(4) Before the court makes an order under subsection (2) it shall be satisfied

(a) that the person ordered to pay support to the applicant has not made the payments required to be made under the order,

(b) that there is a debtor in Alberta, and

(c) that there is a reasonable possibility that the applicant will be unable to collect all or part of his claim or be subjected to unreasonable delay in the collection of his claim unless an order is granted under this section.

(5) If a debtor

(a) does not pay the clerk of the Family Court,

(b) files an answer

(i) disputing his liability to the person ordered to pay support, or

(ii) that the debt attached belongs or may belong to some third person whose name so far as known to the debtor shall be stated, or

(c) does not pay the clerk of the Family Court and does not file an answer under sub-paragraph (b),

the applicant may apply by notice of motion to the Supreme Court in the judicial district in which the Family Court is located for an order under subsection (8).

(6) The notice of motion shall be served on the clerk of the Family Court that issued the original attachment order, the respondent, the debtor and any other person claiming to be interested in the money attached not less than 15 days before the date on which the application is to be heard.

(7) Upon being served with the notice of motion under subsection (6) the clerk of the Family Court shall forthwith forward to the clerk of the Supreme Court

(a) the order made under subsection (2),

(b) the answer, if any,

(c) all depositions and transcripts of the evidence taken at the hearing, and

(d) all documents and exhibits filed at the hearing.

(8) Upon hearing the motion the Supreme Court may

(a) summarily determine any question arising in the attachment proceedings,

(b) direct the trial of an issue to determine any question arising in the attachment proceedings, or

(c) make such other order as may be just.

(9) Where payment is made to the clerk of the Supreme Court pursuant to an order made under subsection (8) the clerk shall forthwith pay the money to the clerk of the Family Court that issued the original attachment order.

(10) Payment by the debtor to the clerk of the Family Court is a valid discharge to him against the respondent to the extent of the payment.

37. (1) In this section, unless the context otherwise requires, "court" means

(a) the Supreme Court when enforcing an order of support made by the Supreme Court, or

(b) the court referred to in Part 3 when enforcing an order of support

(i) made by that court, or

(ii) made by the Supreme Court and filed in the Family Court.

(2) The court may make an attaching order under this section for the purpose of ensuring the collection of payments due or to become due under an order of support.

(3) By the attaching order the court may direct the employer of the respondent to pay to the clerk of the court or other person named in the order a specified part or amount of the wages, salary or other remuneration which is then due or which may thereafter become due to the respondent.

(4) An attaching order

(a) shall not provide for the recovery of payments of support which become due more than 90 days before the filing of the application for the order,

(b) may be varied from time to time,

(c) takes precedence over

(i) a garnishment or attachment, and

(ii) an assignment

served on the employer after the service of the attaching order,

(d) binds the employer from the date of service thereof, and

(e) remains in force until

(i) it is terminated by an order or its own terms, or

(ii) the employment is terminated.

(5) An attaching order shall

(a) be made upon notice to the respondent,

(b) be made only when the respondent is in default under the support order at the time of the filing of the application for the attaching order,

(c) be served by ordinary mail at his last known address,

(d) provide for the exemption of such amounts for the support of the respondent and his dependents as the court thinks proper, and

(e) give directions as to the disposition of the amounts attached.

(6) Sub-paragraph (a) of subsection (5) does not apply if the court is satisfied that the respondent has absconded or is about to abscond, but in that event the amounts deducted shall be paid to the clerk of the court which makes the attaching order to be held until further order or until the court is satisfied that it is not practicable to give the respondent notice of its intention to direct payment out.

(7) Upon each deduction of wages, salary or remuneration the employer is entitled to receive such costs as may be permitted to a garnishee under the Alberta Rules of Court from time to time, to be paid by deduction from the remaining money payable to the respondent or, if there is no such money, from the money paid pursuant to the order.

(8) If more than one attaching order is in effect against the same wages, salary or remuneration:

(a) the Supreme Court may give directions about the disposition thereof, and

(b) pending such directions the order first served on the employer has priority.

(9) An employer who makes a payment pursuant to an attaching order under this section is discharged from liability for the amount of the payment.

(10) An employer shall not terminate the employment of the respondent solely because of an attaching order or orders under this section.

(11) An employer who contravenes subsection (10)

(a) is guilty of an offence, and

(b) may be ordered by the court to pay damages or reinstate the respondent.

(12) A person who is served with an attaching order and who fails to comply with its terms without reasonable justification is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

38. Where a party against whom an order of support is made wilfully defaults in payment of all or any of the money payable under the order, the court may, unless the party satisfies him that the failure to pay is due to insufficient means or inability to pay, commit the party to jail for a period of not more than one year.

39. At the hearing of an application under this Part other than an application under subsection (5) of section 36 the court may

(a) make an order granting the relief claimed or part thereof,

(b) dismiss the application,

(c) if the party liable for support does not appear, issue a warrant for his arrest or make an order of committal to jail for a period not exceeding one year, or

(d) adjourn the application to permit the party liable for support to apply to vary the order of support under which proceedings are taken.

40. (1) The Lieutenant Governor in Council may make rules of practice and procedure for proceedings under this Part, including rules for the matters provided for in the Schedule to this Act.

(2) Until rules are made for the matters provided for in the said Schedule, the rules in the said Schedule relating to this Part shall be rules of the court for the purposes of this Part.

(3) This section does not apply to proceedings in the Supreme Court.

41. Money paid to a clerk of a court under this Part is not attachable.

42. An order made under this Part is binding on the Crown.

PART 5

Information for proceedings relating to support

43. In this Part, unless the context otherwise requires, "court" means the court in which a proceeding under this Act is carried on.

44. (1) A clerk of the court is entitled:

(a) to obtain from the Alberta Health Care Insurance Commission such particulars as the Commission's records may contain of the address and employer's name of a person against whom proceedings for matrimonial or child support, or for collection of money owing under an order of support, have been commenced or are contemplated, and

(b) to obtain from the employer of such a person such information about the address and location of the person as the employer may have.

(2) The court may by order

(a) require the Alberta Health Care Insurance Commission or an employer to provide the information referred to in subsection (1), and

(b) upon being satisfied that the address of the person has not been ascertained

after reasonable efforts and that there is reason to think that the person has left the province, require the Alberta Health Care Insurance Commission to provide the social insurance number of the person if the same is in its records.

(3) Secrecy of the information provided under subsections (1) and (2) shall be preserved except as required for the purpose of the proceedings.

(4) A person who communicates information to a clerk or under order in accordance with subsections (1) and (2) is protected from legal liability for doing so.

(5) This provision applies notwithstanding anything to the contrary in the Alberta Health Care Insurance Act.

45. (1) The court may order the employer of a party to proceedings in which support or collection of money under an order of support is sought to furnish a written statement of the party's wages, salary or other remuneration and deductions therefrom for the period or periods specified in the order.

(2) In contemplation of a hearing in such a proceeding the clerk of the court may request from the employer a written statement of the party's wages, salary or other remuneration and deductions therefrom for such period or periods as he may consider relevant but has no power to compel the employer to provide the statement.

(3) A statement given pursuant to subsection (1) or subsection (2) is admissible as evidence of the statements made in it.

(4) An employer who in good faith provides information under subsection (1) or subsection (2) is not subject to liability for so doing.

(5) This section is binding on the Crown.

46. (1) A party to a proceeding in which support or collection of money under an order of support is claimed may at any time

(a) give notice to another party to the

proceeding, or

(b) apply to the court for an order,

requiring the other party to file a statement of financial information in the form and containing the information prescribed by the rules.

(2) A party who gives a notice or obtains an order under subsection (1) shall file a statement of financial information.

(3) This section applies with necessary changes to an application brought by the government under the Social Development Act, but a statement of financial information filed by the government shall relate to the socially assisted spouse whose rights have vested in the government.

47. (1) The court may order a party to a proceeding in which support or collection of money under an order of support is sought

(a) to attend upon a person or agency named in the order or in the rules,

(b) to answer the question of the person or agency concerning his financial needs and resources, and

(c) to produce documents requested by the person or agency relevant thereto.

(2) The person or agency shall

(a) interview the party about his financial needs and resources and examine the documents produced by him,

(b) take such steps to verify the information as the person or agency thinks proper, and

(c) file a report with the court.

(3) A person or agency acting under subsection (2) has power to make inquiries from another person but not to compel an answer.

(4) A party to the proceeding

(a) is entitled to examine a report filed under subsection (2), and

(b) upon giving such notice of his intention to do so as is reasonable in the circumstances, is entitled to cross-examine the person who prepares the report.

(5) A report filed under subsection (2) is admissible as evidence of the statements made in it.

48. (1) The Lieutenant Governor in Council may make rules of practice and procedure for proceedings under this Part, including the matters provided for in the Schedule to this Act.

(2) Until rules are made for the matters provided for in the Schedule the rules in the Schedule relating to this Part shall be rules of the court for the purposes of this Part.

PART 6

Transitional

49. (1) A proceeding commenced before the commencement of this Act shall be continued under the provisions of the Act under which it was commenced.

(2) Until it is varied or discharged under this Act an order for alimony or maintenance made under the Domestic Relations Act

(a) continues in force pursuant to the Act under thich it was made,

(b) is an order of support within the meaning of Part 2 of the Act if made under Part 3 of the Domestic Relations Act, and

(c) is a summary order of support within the meaning of Part 3 of this Act if made under part 4 of the Domestic Relations Act.

(3) This section applies notwithstanding subparagraph (c) of subsection (2) of section 23 of the Interpretation Act.

PART 7

Consequential amendments

50. Subject to section 49, Parts 3 and 4 of the Domestic Relations Act are repealed.

51. The Alimony Orders Enforcement Act is amended

(a) by deleting sub-paragraph (a) of section 2 and adding a new sub-paragraph (e) as follows:

(e) "support" includes

(i) alimony,

(ii) a sum made payable where a decree of divorce or nullity of marriage or judgment of judicial separation has been made to a spouse or former spouse for her maintenance,

(iii) a sum so made payable for the maintenance of a child, and

(iv) a sum made payable by an order of support under The Matrimonial Support Act, and

(b) by deleting the word "alimony" where it appears in subsection (1) of section 3 thereof and substituting the word "support."

52. That the Family Court Act be amended

(a) by adding the following words at the end of subsection (1) of section 4:

(a) and applications under Parts 3, 4 and 5 of the Matrimonial Support Act, and

(b) by deleting section 6.

53. That the Maintenance Order Act is amended

(a) by deleting the words "husband, wife" from subsection 3(1), and

(b) by deleting subsection 4(1).

SCHEDULE

RULES

PART 1

General

1. In these rules, unless the context otherwise requires, "Act" means The Matrimonial Support Act.

PART 2

Rules relating to Part 3 of The Matrimonial Support Act

2. (1) The clerk of the Family Court shall provide the applicant for a summary order of support with a summons in Form A or such form as may be prescribed by the rules,

(2) The summons shall

(a) require the respondent to appear before the court at a named time and place for a hearing on the merits of the application for an order of summary relief,

(b) give notice of the claim being made,

(c) inform him that he has the right to dispute the claim, and

(d) warn him that if he does not attend the hearing the court has power to make a summary order of support in his absence.

(3) The summons shall be served upon the respondent personally or in such manner as the court may direct.

(4) A statement of facts in Form B or in such form as may be prescribed by the rules shall be served with the summons or at such other time as the court may direct.

(5) The statement shall be signed by the applicant and shall set out the facts upon which the application is based insofar as the same are known to the applicant, including

(a) the date and place of the marriage,

(b) the marital status of the parties at the time of the application,

(c) whether the parties

(i) are living separate and apart, or

(ii) although not living separate and apart, are experiencing marital discord of such a degree that they cannot reasonably be expected to live together,

(d) the ages of the children of the parties, if any,

(e) the income of the applicant and whether that income is gross or net,

(f) the income of the respondent according to the best information, if any, available to the applicant, and

(g) whether or not there is a subsisting agreement as to support between the parties, and

(6) The applicant shall further cause to be served upon the respondent together with the summons a notice in Form C.

(7) The notice shall

(a) contain information as to the rights and obligations of the respondent, including notice

(i) of the services available in the Family Court to him,

(ii) that he may file and require financial information where the applicant has not already done so, and

(b) advise him to seek legal advice as soon as possible before the hearing.

3. (1) The clerk of the Family Court shall provide the applicant for an order for the variation, suspension or discharge of a summary order of support with a notice in Form D or in such other form as may be prescribed by the rules.

(2) The notice shall be served upon the respondent personally or in such manner as the court may direct.

(3) If the applicant is a person receiving support under the summary order of support he shall cause to be served upon the person liable a notice in Form E and a statement in Form F.

(4) If the applicant is a person liable for support he shall cause to be served upon the person receiving support a statement of financial information described in rule 7.

PART 3

Rules relating to Part 4 of the Matrimonial Support Act

4. (1) The clerk of the Family Court shall provide an applicant for relief under Part 4 of the Act with a summons in Form G.

(2) The summons shall

(a) require the respondent to appear before the court at a named time and place for a hearing on the merits of the application,

(b) give notice of the remedy being sought,

(c) inform him that he has the right to oppose the application, and

(d) warn him that if he does not attend the hearing the court has power to make an order in his absence, including an order of committal to jail.

(3) The summons shall be served upon the respondent personally or in such manner as the court may direct.

(4) The applicant shall further cause to be served upon the respondent together with the summons a notice in Form H or such other form as may be prescribed by the rules.

(5) The notice shall

(a) contain information as to the rights and obligations of the respondent, including

(i) information about the services available in the Family Court to him, and

(ii) advice to seek legal advice as soon as possible before the hearing.

5. (1) An application under section 36 of the Act may be made ex parte.

(2) An order made under subsection (2) of section 36 shall be served on the debtor named in the order and service of the order binds the debt due or accruing due from the debtor or so much thereof as is necessary to satisfy the claim of the applicant and any costs fixed in the order by the judge.

(3) A copy of the order shall be served on the respondent not later than 20 days after payment by the debtor to the clerk of the Family Court.

(4) If the debtor has more than one office and it appears that money alleged to be due to the person ordered to pay maintenance or alimony is or may be payable through some other office of the debtor than that at which the order is served, the person in charge of the office at which the order is served shall forthwith notify the person in charge of the office at which money is or may be payable and that money is deemed to be attached and the order is deemed to be served as of the time the notice of the order is actually received at the office through which that money is payable or within 48 hours after the actual service of the order, whichever is the shorter period.

(5) Debts owing by a partnership carrying on business in Alberta may be attached under section 36 although one or more members of the partnership are resident out of Alberta, if the order is served in Alberta on any person having the control or management of the partnership or any partner.

(6) An answer disputing liability in the name of the partnership is sufficient to identify the partnership.

(7) Within 10 days after service of the order on the debtor, the debtor shall either

(a) pay to the clerk of the Family Court the lesser of

(i) the money due from him to the person ordered to pay support, and

(ii) an amount sufficient to satisfy the the order and any costs fixed in the order by the judge,

(b) file an answer in the office of the clerk of the Family Court stating that the money is accruing due but is not yet payable and that it is to be payable at a specified future date or upon the happening of a specified event,

(c) file an answer in the office of the clerk of the Family Court disputing his liability to the person ordered to pay support; or

(d) file an answer in the office of the clerk of the Family Court that the debt attached belongs or may belong to some third person whose name and address so far as is known to the debtor shall be stated.

(8) Where the debtor files an answer under subsection (7)(b) of this Rule then, upon the specified future date or the happening of the specified future event, the debtor shall pay to the clerk of the Family Court the money accrued due at the time of service of the order from him to the person ordered to pay support or an amount sufficient to satisfy the order and any costs fixed by the judge, whichever is the lesser sum.

(9) Where the debtor files an answer under subsection (7)(c) of this Rule, the debtor shall state the grounds upon which the liability is disputed.

(10) Where the debtor files an answer under subsection (7)(d) of this Rule then, unless the judge otherwise orders, the debtor shall pay to the clerk of the Family Court with the answer the debt attached or as much of the debt as is required to satisfy the order and any costs fixed by the judge, whichever is the lesser sum, and shall state the circumstances and grounds so far as they are within his knowledge.

(11) Upon payment to the clerk of the Family Court by the debtor, the clerk shall forthwith notify the applicant and the respondent of the amount of the payment.

6. Money paid to a clerk of the Family Court under sections 35 and 36 of the Act may be paid to the person entitled to the money by order of the court on an application made ex parte or on such notice as may be directed.

PART 4

Rules relating to Part 5 of the Matrimonial Support Act

7. (1) A demand for a statement of financial information shall be in Form J or such other form as the court or a judge may direct.

(2) A statement of financial information under section 47 of the Act shall be

(a) in Form I or other prescribed form, or

(b) in a form submitted in support of an application for social allowance, or

(c) in such other form as the court or a judge may direct.

(3) Unless otherwise ordered a party who is required to file a statement of financial information under section 46 of the Act shall do so within 10 days of service of the notice under sub-paragraph (a) or the order under sub-paragraph (b) of subsection (1) thereof.

(4) A statement of financial information shall provide such information

(a) about the affairs of the party, and

(b) so far as known to the party, about the affairs of the children of or supported by the party and the affairs of a person with whom the party is cohabiting,

as is necessary to enable the court to ascertain the financial needs and resources, other than social assistance, of the party or child to whom it relates.

(4) A filed statement of financial information shall be kept confidential except to the parties of the proceeding and for the purposes of the proceeding.

(5) A statement of financial information is admissible as evidence of the statements made by it.

(6) If a party does not file a statement of financial information as required by section 46 the court may:

(a) draw inferences adverse to the party in default, and

(b) make an order of support if the party is a respondent, or

(c) dismiss the application if the party is an applicant.

FORM A

(Rule 2)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

APPLICATION FOR A SUMMARY ORDER OF SUPPORT

- SUMMONS -

TO_____(name of respondent husband or wife):

YOU ARE REQUIRED to attend a hearing before a judge of The Family Court of Alberta at

_____

_____

_____(give address of court)

on _____, the _____day of _____, 19 ___.
(day of week)

The purpose of the hearing will be to consider the merits of the application made by your (wife)(husband) for an order requiring you to make payments for the support of your (wife)(husband)

_____(give name)

and/or

for the support of your (child)(children)

_____(give name or names)

_____

_____

Further information relevant to the claim is set out in the attached APPLICANT'S STATEMENT OF FACTS submitted by your (wife)(husband) in support of (her)(his) application.

YOU HAVE THE RIGHT to disagree with the facts as stated by your (wife)(husband) and to give evidence of the facts as you know them to be. The attached NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS provides additional information about your position.

BE ADVISED THAT if you do not attend the hearing at the time and place shown above, the judge has power to grant an order against you in an amount to be decided by the judge on the basis of the evidence given by your (wife)(husband).

You can obtain further directions to the courtroom by inquiring at the reception desk at the Family Court or by telephoning _____.

Dated at _____, Alberta, _____,19____.

_____

Clerk of the Family Court

FORM B

(Rule 2)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

APPLICANT'S STATEMENT OF FACTS

(On initial application for a summary order of support)

1. Where were you married? _____

   On what date? _____

2. What is the marital status of you and your (wife) (husband) at the time of this application(state date of separation, divorce, or nullity decree, if any): _____

   _____

3. If you are still living with your (wife)(husband), give details of the marital discord upon which your application is based. _____

   _____

   _____

   _____

4. Have you and your (wife)(husband) made any agreement respecting the pavment of support? If yes, give details.

   _____

   _____

   _____

5. Children of yourself and your (wife)(husband):

Name	Date of Birth	Age Now
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. What is your monthly income? (state whether the figure you give indicates net or gross income) _____

7. What do you estimate to be your (wife's) (husband's) monthly income? (state whether the figure you give indicates (her)(his) net or gross income _____

_____

Signature of Applicant

FORM C

(Rule 2)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS

(On initial application for an order of support)

Under the law of Alberta, a husband and wife are mutually liable to support each other. This liability is subject to the liability of either or both of them to support a child. The liability is enforceable in accordance with the provisions of The Matrimonial Support Act, and a copy of the relevant sections of that Act is attached for your information. The extent to which one party may be ordered to support the other depends on all the circumstances of the case, including the particular application of those factors listed in section 8 to each case.

The Intake Service of the Family Court provides counsellors who are assigned to assist responding parties such as yourself. These counsellors are available to give you general information about the procedures of the Family Court, and to discuss any aspect of your (wife's) (husband's) application for an order of support with you informally, although they cannot give you legal advice.

The same counsellors are available to assit you to find a lawyer should you wish to consult one. This you are advised to do as soon as possible before the hearing.

These counsellors will also help you to complete and file a STATEMENT OF FINANCIAL INFORMATION if one has been demanded by your (wife)(husband). If a STATEMENT OF FINANCIAL INFORMATION has not been demanded, YOU HAVE THE RIGHT to file one voluntarily and to demand one from your (wife)(husband), and, if you wish, a counsellor will assist you in this respect.

The telephone number of the Intake Service is _____, and if you wish assistance in respect of any of the above matters, you should ask for _____ or

(name of counsellor

or _____.

(name of counsellor)

A Conciliation Service is also attached to the Family Court. The counsellors working for this service are available to give counselling on a confidential basis for the purpose of assisting you to reach agreement on any problems involving yourself and your (wife)(husband). If you wish to take advantage of this service you should telephone _____ and ask for

_____ or _____.

(name of counsellor) (name of counsellor)

_____

Clerk of the Family Court

FORM D

(Rule 3)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

APPLICATION TO VARY A SUMMARY ORDER OF SUPPORT

-NOTICE-

TO_____(name of respondent husband or wife):

TAKE NOTICE THAT your (wife)(husband) has made application to (vary) (suspend)(discharge) the terms of the summary order of support now existbetween you. A hearing into the merits of (her)(his) application will be held before a judge of the Family Court of Alberta at

_____

_____

_____ (give address of court)

on _____, the _____day of _____, 19___.
(day of week)

Further information about the claim is set out in the attached APPLICANT'S STATEMENT OF FACTS submitted by your (wife)(husband) in support of (her)(his) application.

YOU HAVE THE RIGHT to disagree with the facts as stated by your (wife)(husband) and to give evidence of the facts as you know them to be. The attached NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS provides additional information about your position.

BE ADVISED THAT if you do not attend the hearing at the time and place shown above, the judge has power to vary the existing order in your absence on the basis of the evidence given by your (wife)(husband).

You can obtain further directions to the courtroom by inquiring at the reception desk at the Family Court or by telephoning _____.

Dated at _____, Alberta, _____, 19___.
(date)

_____
Clerk of the Family Court

FORM E

(Rule 3)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

APPLICANT'S STATEMENT OF FACTS

(On application to vary an existing summary order of support)

1. Where were you married? _____

   On what date? _____

2. What is the marital status of you and your (wife) (husband) at the time of this application(state date of separation, divorce, or nullity decree, if any): _____

   _____

3. If you are still living with your (wife)(husband), give details of the marital discord upon which your application is based. _____

   _____

   _____

   _____

4. Have you and your (wife)(husband) made any agreement respecting the payment of support? If yes, give details.

   _____

   _____

   _____

5. Children of yourself and your (wife)(husband):

Name	Date of Birth	Age Now
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. Give date of the original summary order of support and of any previous variation of that order: _____

_____

_____

7. What are your reasons for applying to vary the existing order?

_____

_____

_____

8. What is your monthly income? (state whether the figure you give indicates net or gross income) _____

9. What do you estimate to be your (wife's) (husband's) monthly income? (state whether the figure you give indicates (her)(his) net or gross income _____

_____

Signature of Applicant

FORM F

(Rule 3)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS

(On application to vary an existing summary order of support)

The Matrimonial Support Act provides for the variation suspension or discharge of a summary order of support in proper circumstances upon the application of either party to the order. A copy of the relevant sections of that Act is attached for your information. As was true of the initial order of support, the extent to which one spouse may be ordered to support the other depends on all the circumstances of the case, including the particular application of those factors listed in section 8 to the case.

As you may know, the Intake Service of the Family Court provides counsellors who are assigned to assist responding parties such as yourself. These counsellors are available to give you general information about the procedures of the Family Court, and to discuss any aspect of your (wife's) (husband's) application for an order of support with you formally, although they cannot give you legal advice.

The same counsellors are available to assist you to find a lawyer should you wish to consult one. This you are advised to do as soon as possible before the hearing. If you do not obtain legal advise, a duty counsel will be on hand for you to talk to on the day of the hearing.

These counsellors will also help you to complete and file a STATEMENT OF FINANCIAL INFORMATION if one has been demanded by your (wife)(husband). If a STATEMENT OF FINANCIAL INFORMATION has not been demanded, you have the right to file one voluntarily and to demand one from your(wife)(husband) and, if you wish, a counsellor will assist you to do so.

The telephone number of the Intake Service is _____, and if you wish assistance in respect to any of the above matters, you should ask for _____
(name of counsellor)
or _____.
(name of counsellor)

You may also be aware that a Conciliation Service is attached to the Family Court. The counsellors working for this service are available to give counselling on a confidential basis for the purpose of assisting you to reach agreement on any problems involving yourself and your (wife)(husband). If you wish to take advantage of this service you should telephone _____ and ask for _____ or _____.
(name of counsellor) (name of counsellor)

_____
Signature of the Clerk of the Family Court

FORM G

(Rule 4)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF

PROCEEDINGS FOR SUPPORT

BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

APPLICATION FOR AN ORDER TO ENFORCE COLLECTION OF SUPPORT PAYMENTS

- SUMMONS -

TO_____(name of respondent husband or wife)

YOU ARE REQUIRED to attend a hearing before a judge of The Family Court of Alberta at

_____

_____

_____ (give address or court)

on_____, the _____day of _____, 19___.
(day of week)

The purpose of the hearing will be consider the merits of the application made by your (wife)(husband) for an order which would (permit your goods and lands to be seized)(permit debts owing to you to be garnished)(permit your wages or salary or other remuneration to be attached on a continuing basis)(commit you to jail for not more than one year) for failure to make payments for support of your (wife)(husband).

_____(give name)

and/or
for the support of your (child)(children)

_____(give name or names)

_____

_____

under order of support made against you by the _____Court of Alberta dated_____.

YOU HAVE THE RIGHT to oppose the application and to give evidence of the facts as you know them to be. The attached NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS provides additional information about your position.

BE ADVISED THAT if you do not attend the hearing at the time and place shown above, the judge has power to grant the order applied for against you or to issue a warrant for your arrest, and to make an order committing you to jail for not more than a year because of your failure to attend.

You can obtain further directions to the courtroom by inquiring at the receiption desk at the Family Court or by telephoning_____.

Dated at _____, Alberta, _____ 19___.

_____
Clerk of the Family Court

FORM H

(Rule 4)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF

PROCEEDINGS FOR SUPPORT

BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

NOTICE OF RESPONDENT'S RIGHTS AND OBLIGATIONS

(On application for an order to enforce collection of support payments)

Under the law of Alberta, a husband or wife is obliged to make payments for the support of the other party and their children if ordered to do so by the Supreme Court or the Family Court. If payment is not made, the party entitled to receive payment is entitled to apply for an order permitting the responsible party's goods and lands to be seized or debts or wages owing to the responsible party to be garnished or to commit the responsible party to jail for a period not exceeding a year if he or she has wilfully refused to pay. A copy of the relevant sections of the Matrimonial Support Act is attached for your information. The responsible party is entitled to oppose the application.

The Intake Service of the Family Court provides counsellors who are assigned to assist responding parties such as yourself. These counsellors are available to give you general information about the procedures of the Family Court, and to discuss any

aspect of your (wife's)(husband's) application, although they cannot give you legal advice.

The same counsellors are available to assist you to find a lawyer should you wish to consult one. This you are advised to do as soon as possible before the hearing.

These counsellors will also help you to complete and file a STATEMENT OF FINANCIAL INFORMATION if one has been demanded by your (wife)(husband).

The telephone number of the Intake Service is_____, and if you wish assistance in respect of any of the above matters, you should ask for _____or
(name of counsellor)

_____
(name of counsellor)

A Conciliation Service is also attached to the Family Court. The counsellors working for this service are available to give counselling on a confidential basis for the purpose of assisting you to reach agreement on any problems involving yourself and your (wife)(husband). If you wish to take advantage of this service you should telephone_____and ask for

_____ or _____
(name of counsellor) (name of counsellor

_____
Clerk of the Family Court

STATEMENT OF FINANCIAL INFORMATION

FORM I
(Rule 7)

Personal Information

Name: _____

Address: _____

_____

Occupation: _____

Employer: _____

_____

_____

Name of Spouse: _____

Address: _____

_____

Occupation: _____

Employer: _____

_____

DEPENDENTS

Age	Number
0-5 yrs.	
6-10yrs.	
11-15yrs.	
16-20yrs.	
other -	

The address of the dependents is same as my _____ / my spouse address.
(circle the applicable)

SUMMARY OF FINANCIAL POSITION

Net monthly income.
Monthly living expenses.

Total assets -
Total liabilities -
Net worth -

OWNED AND POSSESSED

Description	Purchase price	Balance owing	Current value	Equity
Home	$_____	$_____	$_____	$_____
Automobile	_____	_____	_____	_____
Furnishings	_____	_____	_____	_____
Other:				
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

LIABILITIES

(Starred items are included in the "Balance owing" above.)

Creditor	Nature of debt (type, security held, etc.)	Contractual Monthly payment	Balance owed.
... Bank			
... Finance Co.			
... Store			
Other:			

MONTHLY INCOME

Gross employment income	$	Net employment income	
DEDUCTIONS: Canada Pension Unemployment Ins. Income Tax Other:		Self-employed net income Family allowance Unemployment insurance Other:	
Net employment income.		Net Monthly Income	

MONTHLY EXPENSES

(These EXCLUDE any contractual payments shown above.)

Item	Amount	Item	Amount
Food		Transportation, gasoline, oil, etc. Bus, Taxi fare	
Rent		Insurance (car, life,etc.)	
Mortgage (including taxes)		Child Care	
Utilities (heat, light, phone)		Hairdresser or Barber	
Clothing & footwear		Drycleaning & laundry	
Medical, Dental, Drugs		Incidental other:	
Meals (other than at home)			
Household needs (soap, wax, polish, etc.)			

TOTAL

FORM J

(Rule 7)

THE FAMILY COURT OF ALBERTA

Phone No. of Court Address of Court

IN THE MATTER OF
PROCEEDINGS FOR SUPPORT
BETWEEN

_____(Name of Husband)

AND

_____(Name of Wife)

DEMAND FOR STATEMENT OF FINANCIAL INFORMATION

YOU ARE REQUIRED to complete the attached form of STATEMENT OF FINANCIAL INFORMATION so as to give a full and accurate account of your financial position, and to submit it for filing to the Clerk of the Family Court at _____

(address of the court)

_____

(address of the court)

on or before the _____day of _____,19____.

Should you fail to comply with this demand, the judge may draw inferences adverse to your position, and
decide the application on the basis of the information provided by your (wife)(husband)(where the non-complying party is the respondent)
or
dismiss your application (where the non-complying party is the applicant)

(Strike out the inappropriate clause)

If you have good reason why you should not be required to file this STATEMENT OF FINANCIAL INFORMATION, you may apply to a judge of the Family Court for an order excusing you from doing so.

Counsellors attached to the Intake Service of the Family Court are available to help you complete the statement. The telephone number is _____ and you should ask for

_____ or _____.
(name of counsellor) (name of counsellor)

Once filed, your STATEMENT OF FINANCIAL INFORMATION will be available to your (wife)(husband). Otherwise, it will be kept confidential. It is, however, admissible in evidence and you may be examined as to its contents in Court.

Your (wife)(husband) has already completed and filed a statement recording his financial position, and you may obtain a copy of that statement by requesting it from the Clerk of the Court at the above address, telephone _____.

_____
Signature of(Applicant)(Respondent)

APPENDIX B

THE SOCIAL DEVELOPMENT ACT

1. The Social Development Act is amended by deleting section 12.1 and substituting the following:

12.1 (1) In this section, "child" means a child for whose support an order is or can be made under the Matrimonial Support Act or the Divorce Act (Canada).

(2) This section applies when

(a) the dependant spouse, former spouse or child of a person responsible for his support receives a social allowance, and

(b) it is the duty of the responsible person to provide financial support for the dependant.

(3) The government may

(a) give notice to the responsible person requiring him to make to the government all periodic payments which are then due or which subsequently accrue due under an order of support or agreement as to support in favour of the dependant and before or upon so doing shall notify the person entitled to receive the payments,

(b) if the support order has been made by another court in Alberta, file such order in the Family Court for enforcement.

(c) if there is no existing order, apply in its own name to the Family Court for an order requiring the responsible person to make periodic payments to the government for the support of the dependant,

(d) retain from any money received on account of periodic payments an amount equal to the social allowance or its value paid or to be paid for the period to which the periodic payments relate, and

(e) agree to accept a lesser sum in full satisfaction of any sum which it is entitled to retain under subparagraph (d).

(4) Save as provided in subsection (10) the following rights vest exclusively in the government upon the service of a notice under subparagraph (a) of subsection (3) or upon the making of an order under subparagraph (c) of subsection (3):

(a) the right to receive all support payments which are due or thereafter become due under an order or agreement referred to in subparagraph (a) of subsection (3), and

(b) the right to apply for orders for enforcement of an order referred to in subsection (3).

(5) When applying for variation of a support order referred to in subparagraph (a) of subsection (3) the government shall:

(a) if the order was made under the legislative jurisdiction of the province, apply in its own name, or

(b) in other cases, apply in the name of the party at whose instance the order was made.

(6) Nothing in this section empowers the court to make an order in favour of the government unless in the absence of this section a court of competent jurisdiction would have granted a similar order upon application by or on behalf of the dependant.

(7) The government shall pay to or retain for the benefit of the dependant any money received by it under this part which it is not entitled to retain under subparagraph (d) of subsection (3).

(8) A payment made to the government pursuant to a notice or order under subsection (3) discharges from liability for that payment

(a) the person who makes the payment, and

(b) the responsible person if the payment is made from his earnings or property or on his account.

(9) The dependant or the person to whom payments are ordered to be made on behalf of the dependant shall be named as a respondent in and be given notice of any application by the minister under this section.

(10) Notwithstanding subsection (4), the dependant or any person entitled to act on behalf of the dependant may make an application in respect of the financial support of the dependant.

(11) The government shall be named as a respondent to any such application and shall be given notice thereof.

(12) The spouse or former spouse of the responsible person is a competent and compellable witness in proceedings under this section.

(13) When the social allowance ceases to be payable to the government, the government shall apply for directions and consequential orders

(a) to enable it to collect any money to which it is entitled, and

(b) to make available for the dependant the benefit of any orders outstanding in favour of the government.

(14) If a support order or agreement is in favour of the dependant the government, instead of applying under subsection (13), may give notice to the responsible person that payments should thenceforth be made to the dependant or other person named in the order and the exclusive right to receive such payment thereupon vests in the dependant or other person.

(15) The Family Court has jurisdiction

(a) to make the orders referred to in this Part,

(b) to determine the distribution of payments received by the government among

(i) those amounts which the government is entitled to retain and those which the government is not entitled to retain, and

(ii) the amounts to which different dependants are entitled,

(c) to direct that notice of an application be given to persons whose rights may be affected by it,

(d) to make an order transferring the benefit of an existing order from one party to another,

(e) upon the cessation of a social allowance to make orders allowing the recovery of arrears by the government and other sums by or on behalf of the dependant, including orders designating the government, the clerk of the court or other person to receive payments from the responsible person and giving directions as to the distribution of the payments to be received, and

(f) to make all orders necessary to determine disputes and proceedings under this section and to settle the rights of parties involved.

APPENDIX C

RECOMMENDATIONS NOT EMBODIED IN DRAFT LEGISLATION

Recommendation #10

(2) That the following administrative arrangements be made:

(a) An administrative arrangement with the police forces under which they would, unless they consider disclosure to be undesirable, disclose such particulars as are in their records about the name and address of a person against whom proceedings for matrimonial or child support, or for collection under an order of support, have been commenced or are contemplated, and

(b) If found practicable, an administrative arrangement that the Motor Vehicles Branch maintain a record of the province which issues a driver's license upon surrender of an Alberta driver's license so that the province where the surrender takes place can be identified.

(3) That the provincial government recommend to the federal government that Parliament be requested to enact legislation requiring that information from the records of the Unemployment Insurance Commission and the Canada Pension Plan about the address of a person against whom support or collection proceedings have been commenced or contemplated, be made available upon order of a Supreme Court judge or a Family Court judge who has satisfied himself that reasonable attempts to locate the employee have failed.

Recommendation #11

That the following administrative arrangements be made:

(1) That the Family Court services provide assistance in serving initiating process for spouses claiming support in the Supreme Court and the Family Court and for spouses bringing collection proceedings in the Family Court.

(2) That the police be asked to serve process only if other services are unavailable or if there is danger of breach of the peace.

(3) That the use of the sheriff's office at Edmonton for the service of process be continued, and that arrangements be made with sheriffs' offices elsewhere for the service of initiating process.

(4) That if the use of the sheriffs' offices does not, after it has been given adequate trial, meet the exigencies of the court, consideration be given to service of process by Family Court staff retained for that purpose.

(5) That the Family Court services be authorized to experiment with the use of private services to locate respondents who cannot otherwise be found, taking care that the private services use methods which will not discredit the Family Court or the Family Court services.

(6) That experiments be conducted with service of process by mail on the basis that service would not be legally valid unless the respondent appears or admits service, the experiment to be assessed and put on a permanent basis if it improves the efficiency of the court system and discontinued if it does not.

Recommendation #12

(3) That the Alberta Rules of Court be amended to make provision for statements of financial information similar to Recommendation #12(1).

(4) That the Family Court services provide information and advice to a party in the preparation of a statement of financial information.

Recommendation #13

(2) That the government in consultation with the Chief Justice of the Trial Division and the Chief Judge of the Provincial Court make arrangements

(a) for the Family Financial Counselling Service of the Department of Consumer and Corporate Affairs to be available to be named as an agency referred to in subsection (1), and

(b) for other persons or agencies to supply the service where it is not practicable or not desirable that the Family Financial Counselling Service do so.

Recommendation #14

(2) That the federal government be requested to make legislative or administrative provision for the furnishing of statements similar to those referred to in Recommendation 14(1) with regard to employees of the federal government and federal government agencies.

Recommendation #34

That the Attorney General appoint a special advisory committee on summary procedure to make recommendations for rules of court providing for an expeditious and inexpensive summary procedure.

Recommendaton #43

(2) That the provincial government urge the federal government to recommend to Parliament legislation requiring the Crown in right of Canada to recognize orders made under Recommendation 43(1).

Recommendation #49

(1) That there be a Collection Service attached to each Family Court.

(2) That the Collection Service be directed by one administrative authority.

(3) That the administrative authority be the Attorney General.

(4) That a uniform policy statement be adopted and communicated to all personnel, and be kept under frequent review based on consultation with collection service personnel and others involved in the system.

(5) That the Collection Service be extended as needed, but cautiously and with constant atttention to costs and benefits.

(6) That the Collection Service act under special or general authority of a supported spouse or the Maintenance and Recovery Branch as follows:

(a) The Service should check each file each month, or as frequently as is found practicable and desirable, to see whether default has been made.

(b) When a payment is missed the Service should try to communicate with the respondent asking him to telephone or call to discuss the matter, and advising him of the court's procedures and powers. If past history suggests that this step would be a waste of time, it could be dispensed with. If informal efforts appear likely to bring the best result they should be continued, but not in such a way as to bring discredit upon the court or the service.

(c) The Service should then decide, preferably in consultation with the supported spouse or the Maintenance and Recovery Branch, whether any action is justified, and whether an application should be made for attachment of earnings, committal or other remedy.

(d) The Service should then prepare and arrange for the service of the necessary papers and for the hearing. The Service should be present at the hearing, if at all, only to provide information; the supported spouse or the Maintenance and Recovery Branch should appear.

Recommendation #54

(3) That the Family Court Act be amended to provide for appeals in proceedings other than those for which an appeal would be provided by the proposed Act.

Attachment of salary

28.1(1) Where a respondent is in receipt of or is entitled to receive a salary, wages or other remuneration from an employer or any other person engaging the respondent's services, the judge may make an order directing the payment to a clerk of the Family Court at a place specified in the order of that part of the salary, wages or other remuneration specified in the order.

(2) The part of the salary, wages or other remuneration specified in an order made under subsection (1) may include an amount to be applied to reduce any arrears fixed by the judge under section 28(4)(b) or (c).

(3) An order under subsection (1) shall be directed to the respondent and the employer or other person engaging the respondent's services and shall be expressed to continue for such time as the judge may fix or until further order by a provincial judge.

(4) An order under subsection (1) shall be served on the employer or person engaging the respondent's services and when served is binding on him.

(5) The employer or other person engaging the respondent's services shall on being served with the order notify the respondent forthwith.

(6) If the employer or the person engaging the respondent's services has more than one office and it appears that the salary, wages or other remuneration is or may be payable through some other office than that at which the order is served, the person in charge of the office at which the order is served shall forthwith notify the person in charge of the office at which the money is or may be payable and that money is deemed to be attached and the order is deemed to be served as of the time the notice of the order is actually received at the office through which the money is payable or within 48 hours after the actual service of the order, whichever is the shorter period.

(7) Service of the order on any member of a partnership, at its usual place of business in Alberta or on an authorized agent of the partnership, is sufficient for the purposes of this Part.

(8) An employer or person engaging a respondent's services shall not terminate the respondent's employment or services by reason only that the employer or person engaging the respondent's services has been served with an order under this Part.

(9) No employer or person engaging a respondent's services shall be compelled to pay salary, wages or other remuneration or any part thereof otherwise than in accordance with the terms of the hiring.

(10) A person who is served with an order under this section and who fails to comply with the terms of the order without reasonable justification is guilty of an offence and liable on summary conviction to a fine of not more than $1000.

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After our Working Paper was issued, Dr. Willard F. Allen, Associate Vice-President (Academic) of the University of Alberta, initiated the idea of a television programme to give information about the issues to the public and to obtain reaction from them. Through his good offices, the co-ordinating and administrative help of the Faculty of Extension, and the professional skills of the Alberta Educational Communications Corporation, the programme was duly prepared and broadcast and a substantial number of copies of a carefully prepared memorandum were circulated to the public and completed and returned to us. This was all very valuable to us in our work.

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(1) Walter Coombs (Chairman), Executive Director, Canadian Mental Health Association in Alberta;

(2) Rheal LeBlanc, Deputy Solicitor General, Province of Alberta;

(3) David Stolee, Deputy Minister, Alberta Social Services and Community Health, Province of Alberta;

(4) Margaret Donnelly, Director, Legal Research and Analysis, Department of the Attorney General, Province of Alberta;

(5) Professor Gayle James, Faculty of Social Welfare, University of Calgary, in Edmonton;

(6) Professor Richard Ramsay, Faculty of Social Welfare, University of Calgary;

(7) James Robb, then Director, Student Legal Services, Faculty of Law, University of Alberta;

(8) William Pepler, then of the legal staff, Institute of Law Research and Reform, University of Alberta.

The members of the Committee on Matrimonial and Child Support are:

(1) Professor Karol Krotki, Department of Sociology, University of Alberta;

(2) Professor Gayle James, Faculty of Social Welfare, University of Calgary, in Edmonton;

(3) J. M. Shaver, Director of Research and Systems, Alberta Health Care Insurance Commission;

(4) Professor Andrew Armitage, formerly of the Faculty of Social Welfare, University of Calgary;

(5) Professor Iwan Saunders, Faculty of Law, University of Calgary;

(6) Vijay Bhardwaj, of the legal staff of the Institute of Law Research and Reform;

(7) Gordon Bale, Associate Director, Institute of Law Research and Reform.

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We appreciate also the time and trouble taken by those who made written submissions to us and whose names appear in the following list.

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