ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

THE DOMESTIC RELATIONS ACT (*DRA*)

Phase 1

FAMILY RELATIONSHIPS: OBSOLETE ACTIONS

Report No. 65

March 1993

ISSN 0317-1604
ISBN 0-8886-4183-4

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute 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. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

ACKNOWLEDGEMENTS

This report represents the first of three phases of a project to revise and rationalize the provincial family law statutes in Alberta. It is undertaken as a result of the funding provided by the Alberta Law Foundation under its special projects initiative. The Institute acknowledges with gratitude the assistance of the Foundation in making this project possible.

The Institute was able to secure the services of Professor Julien D. Payne of the Faculty of Law at the University of Ottawa who provided the Institute with a comprehensive research paper in each of the areas under review. Based on that research, the reports, including this one and the ones to come later, have been prepared by Ms. Margaret Shone, Counsel to the Institute.

Table of Contents

PART III — APPENDICES

PART I — SUMMARY OF REPORT

This report covers phase 1 of our project on the reform of the Alberta *Domestic Relations Act*.

The *Domestic Relations Act*, Alberta's principal family law statute, was first enacted in 1927. It was then and continues today to be based on England's *Matrimonial Causes Act* of 1857 as it stood on July 15, 1870. With the changes in attitude toward marriage and family that have occurred over past decades many provisions of the *Domestic Relations Act* have become outmoded.

Deadwood Disposed

In this report, we recommend the abolition of six obsolete matrimonial actions. Although the philosophical foundation for these actions remains relevant in contemporary Alberta society—that is, the preservation and protection of the stability of marriage and the family—the means provided by these actions is inappropriate for the purpose.

The actions are:

1. ***Restitution of conjugal rights.*** A judgment for restitution of conjugal rights requires a spouse who has left the marriage to resume cohabiting with the other spouse. It is intended to restore the rights which married persons have to each other's society and marital intercourse. This remedy, which is rarely sought today, has not been shown to effect reconciliation. It is essentially futile. We recommend its abolition.

2. ***Judicial separation.*** A judgment for judicial separation releases the applicant spouse from the duty of cohabiting with the other spouse. The judgment does not terminate the marriage. The remedy is fault-based, being available against a spouse who has committed a matrimonial offence. It gives the wife independent legal status, excepts the spouses from sharing in the distribution of the other's estate should one of them die intestate, and protects the spouses from liability with respect to any contracts, wrongful acts or omissions of the other spouse.

   Today, divorce proceedings take precedence and judicial separation is sought infrequently. Nearly all of the consequences of judicial separation follow or are available independently of judicial separation. A lone exception is the restraint of domestic violence. We recommend that the

abolition of judicial separation be postponed until independent remedies appropriate to restrain domestic violence have been introduced. In the event that judicial separation is retained, we make several recommendations to modify the remedy.

3. ***Damages in tort for adultery, enticement or harbouring of a spouse.*** The action for damages for adultery permits a spouse to claim damages against a third party who has committed adultery with that person's spouse. It is based on the old English action for criminal conversation. Until 1973 in Alberta, it was available only to the husband against his wife's adulterer. The action is rooted in the notion that one spouse has a property interest in the other. It does not prevent marriage breakdown, is inconsistent with modern knowledge and understanding of human behaviour, is incompatible with modern divorce law, offends modern mores under which spouses are seen to be responsible for their own conduct, and can be used punitively.

   Enticement of a spouse occurs when a person induces one spouse to leave the other. No sexual relationship need be involved. Harbouring occurs where a person shelters one spouse against the will of the other spouse. In both instances, the action for damages in tort evolved at common law from the ancient right of action available to a master for loss of the services of a servant. Until 1973 in Alberta, the action was available only to the husband. Like the action for damages for adultery, these actions are anachronistic remnants of another era.

4. ***Damages in tort for enticement or harbouring of a child.*** Enticement of a child occurs where a person induces a child to leave the parents. Harbouring occurs where a person shelters a child against the will of the parents. The common law of England gave the father as master of the household—or the mother where the child was illegitimate—the right to the services of his children. These common law rights of actions by a parent or master may survive in Alberta. Their continuation in modern times is anachronistic.

   Tortious liability for the seduction of a child—the corollary of adultery with a spouse—was abolished in Alberta in 1985.

5. ***Damages in contract for breach of promise of marriage.*** At common law, damages in contract are recoverable against an engaged person who terminates the engagement. The recovery includes damages for pecuniary losses and for injury to wounded feelings. This action does not reflect, and may even run counter to, contemporary social standards.

6. ***Jactitation of marriage.*** Jactitation of marriage occurs when a person falsely asserts that they are married to another. The person about whom the assertion is made may petition the court for a declaration that the parties are not married and an injunction forbidding the respondent from claiming to be married to the petitioner. The action for jactitation of marriage had fallen into disuse in England by 1820 and is virtually unknown in Canada.

Wrongly Grafted Shoots

We have concluded that further study should be undertaken before any recommendations are formed with respect to another tort action. That is the action for damages for loss of consortium through the tortious injury of a spouse or child, as, for example, in an automobile accident. The right to claim damages in this situation also stems from the common law right of a master—the husband or father—to seek damages from a third party who interfered with a servant—the wife or child—and thereby deprived the master of services. The action does not exist fundamentally to protect the marriage or family because it doesn't serve to deter the tortious conduct in question. It has been abolished in England. Ontario has taken a different approach. The Legislature in that province has broadened the concept of damages for loss of consortium by introducing a statutory right of action for damages for loss of the guidance, care and companionship of a family member resulting from tortious injury inflicted by a third party. This approach warrants examination.

Some Necessary Pruning

In the report, we make recommendations regarding the disposition of gifts made in contemplation of marriage from one engaged person to the other. The common law applies in Alberta. At common law, a gift made by an engaged person is forfeited by the party who refused to honour the engagement. Gifts from third parties are returnable to the donors. Under our recommendation, the ownership of gifts between engaged persons would be determined under the law

that applies to gifts made in ordinary circumstances. The fault of the donor in terminating the engagement would not be considered.

We considered but make no recommendation with respect to declarations of marital or parental status. With respect to declarations of marital status, we think the Alberta law is functioning satisfactorily. With respect to declarations of parental status, the Alberta law was modernized in 1991 by the addition of Part 8 of the *Domestic Relations Act*. Part 8 is based on the detailed recommendations contained in our report on *Status of Children*, revised and issued as Report No. 60 in March 1991. In our view, no further recommendations are required. We also considered, but reject, the enactment of a legislated code to govern declarations in family matters. We see no need for such a code in Alberta.

We have proceeded directly to final report in phase 1 of our project on the *Domestic Relations Act* because our recommendations enjoy wide support.

Two more phases are planned. In phase 2, we will examine the law relating to spousal and child support. In phase 3, we will consider the law of guardianship, custody and access. In each of these phases, we expect to issue reports for discussion before going to final report. Each report for discussion will set out tentative recommendations which will be circulated for comment and consultation before the final recommendations are formed and issued in a final report. Later, we will consider undertaking projects that permit legal recourse prior to marriage breakdown in order to promote family stability.

LIST OF RECOMMENDATIONS

CHAPTER 2 — RESTITUTION OF CONJUGAL RIGHTS

RECOMMENDATION 1: [p. 17]

We recommend that the action for a judgment of restitution of conjugal rights be abolished and that sections 2 to 4 of the *DRA* be repealed.

CHAPTER 3 — JUDICIAL SEPARATION

RECOMMENDATION 2: [p. 28]

We recommend that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed. Implementation of this recommendation should be deferred until appropriate remedies to restrain domestic violence have been introduced.

RECOMMENDATION 3: [p. 35]

We recommend that the following provision be enacted in the *DRA:*

(1) For all purposes of the law of Alberta, including the determination of domicile, a person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

CHAPTER 4 — TORTIOUS LIABILITY FOR INTERFERENCE WITH FAMILY RELATIONSHIP

RECOMMENDATION 4: [p. 43]

We recommend that the action for damages for adultery be abolished and that sections 13 and 14 of the *DRA* be repealed.

RECOMMENDATION 5: [p. 45]

We recommend that the action for damages for the enticement of a spouse be abolished and that section 40 of the *DRA* be repealed.

RECOMMENDATION 6: [p. 47]

We recommend that the action for damages for harbouring a spouse be abolished and that sections 41 and 42 of the *DRA* be repealed.

RECOMMENDATION 7: [p. 58]

We recommend that legislation be enacted to abolish the common law actions by a parent for loss of the services of a child due to enticement, harbouring or seduction.

RECOMMENDATION 8: [p. 61]

We recommend that the action for breach of promise of marriage be abolished by express statutory provision.

RECOMMENDATION 9: [p. 64]

We recommend that the following provision be enacted in Alberta:

Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.

CHAPTER 5 — JACTITATION OF MARRIAGE AND DECLARATIONS OF STATUS

RECOMMENDATION 10: [p. 69]

We recommend that the action for jactitation of marriage be abolished and that section 44 of the *DRA* be repealed.

PART II — REPORT

CHAPTER 1 — INTRODUCTION

A. Institute Project

The Institute has undertaken a project to recommend reform of the *Domestic Relations Act* (*DRA*).[1] This Act protects and regulates family relationships within the constitutional limits placed on the scope of provincial legislative power. The Act embraces the relationships that exist between husband and wife and between parent and child.

B. Background to the *DRA*

The *DRA* was first enacted in Alberta in 1927. It has remained largely unchanged since then. Prior to 1927 in Alberta and before 1905 in territorial days, the applicable law was England's *Matrimonial Causes Act* of 1857,[2] as it stood on July 15, 1870.[3]

Many of the provisions in the *DRA* are modelled on the *Matrimonial Causes Act*. In turn, many of the provisions in that Act can be traced back to the principles established in the ecclesiastical courts of England.

C. Need for Reform

Society has changed dramatically since 1927. Included among the changes have been changes in attitude toward marriage and family. As a result, many of the provisions in the *DRA* do not provide a realistic foundation for the regulation of family relationships in Alberta today.

---

1 R.S.A. 1980, c. D-37.

2 *Divorce and Matrimonial Causes Act*, 1857 (U.K.), c. 85. Pursuant to legislation enacted in England in 1907, this Act was subsequently renamed the *Matrimonial Causes Act*: see *Power on Divorce* (2nd ed.) 1964, Burroughs & Co., at 1, note (a).

3 *Board* v. *Board*, [1919] 2 W.W.R. 940 (P.C.), citing the reasons in *Walker* v. *Walker*, [1919] 2 W.W.R. 935 (Man). July 15, 1870 is the date of reception of English law into prairie Canada.

What is more, the *DRA* is significantly out of step with current family law trends in other Canadian jurisdictions and elsewhere in the common law world. Some of its provisions do not fit comfortably with divorce legislation, which is federal. Other provisions fit awkwardly with provisions found in other Alberta statutes. Confusion occurs. Reform is needed.

D. Scope of Project

Family law has many goals. They include: (1) securing the safety and protection of the marriage partners and the children of the marriage; (2) preventing marriage breakdown and promoting family stability; (3) encouraging reconciliation by separated spouses; and (4) resolving the consequences of marriage breakdown by non-acrimonious means.

In spite of the recognition of these goals, historically, family law statutes in Alberta, as in other Canadian provinces, have tended to focus attention on the circumstances that exist at family breakdown and marriage dissolution. Under the traditional approach, prior to marriage breakdown, the family is generally regarded as a private sphere where law should intervene as little as possible.

We are conscious of the shortcomings of the traditional law and believe that new methods and emphasis should be sought. A more positive approach would involve introducing measures designed to strengthen family relationships, increase family stability and reduce the detrimental human cost of marriage breakdown to family members. In subsequent projects, we intend to consider measures through which the law might better support the family. But that is for the future (see G. Future Projects).

In this project we maintain the traditional approach. We do so because we have decided to give priority to modernizing the existing law by bringing its provisions more closely into line with the *Divorce Act* and legislation on family law in other provinces. Amendment is long overdue and this approach will keep the scope of the project relatively clear and manageable.

E. Project in Three Phases

We have divided our project into three substantive law phases. In the first phase of the project, we will review the kinds of action permitted by the *DRA* for the purpose of protecting the marital relationship and regulating the incidents

that emanate from it. These include the actions for restitution of conjugal rights, judicial separation, wrongful interference with family relationships, jactitation of marriage, and declarations of marital or child status. In the second phase of the project, we will examine the law and principles governing spousal and child support obligations. In the third phase, we will review the law governing the relationship between parent and child with respect to guardianship, custody and access.

We plan to issue separate reports in each of the three phases of the project. Ultimately, we intend to combine the results of the three phases into one set of recommendations for reform of the *DRA* in its entirety.

This report covers the first phase of the project.

F. Constitutionality of Alberta Legislation

Section 91(26) of the *Constitution Act, 1867*[4] confers exclusive legislative jurisdiction over the substantive law of "marriage and divorce" on the Parliament of Canada. Section 92(13) gives the provincial legislatures exclusive jurisdiction to enact laws in relation to "property and civil rights" in the province.

In practice, several provinces have enacted legislation dealing with matrimonial matters. The Alberta *DRA* is one example. In the absence of the enactment by Parliament of legislation governing "marriage", provincial legislation on marriage is generally accepted to be constitutionally valid.[5] The enactment of legislation by Parliament, in the exercise of its potentially broad legislative power over "marriage", could trigger the doctrine of paramountcy and render conflicting provincial legislation unconstitutional. In any event, we can see no practical objection to the Alberta Legislature repealing the current provisions of the *DRA* which is its own legislation.

---

[4] *Constitution Act, 1982*, s. 53 and Schedule, item 1, enacted by the *Canada Act, 1982* (U.K.), c. 11 (formerly the *British North America Act* (U.K.), 1867). S. 92(13) confers jurisdiction over the solemnization of marriage on the provincial legislatures, but solemnization goes to the form rather than the substance of the law.

[5] *O'Leary* v. *O'Leary* [1923] 1 W.W.R. 501 (Alta. C.A.); *Holmes* v. *Holmes* [1923] 1 D.L.R. 294, at 300 (Sask. C.A.) (Haultain, C.J.S.).

G. Future Projects

As already noted, the traditional approach to family law is changing. Exceptions can now be found to the statement that family law has tended to focus on the consequences of marriage breakdown. For example, provincially-appointed commissions in British Columbia[6] and Newfoundland[7] have identified preparation for marriage and education for family living as vital to the preservation of stable family life. Sections 9 and 10 of the *Divorce Act, 1985* call for attempts to be made at reconciliation, negotiation and mediation between separated spouses.[8] Examples of provisions to encourage reconciliation, negotiation and mediation can be found in provincial statutes in British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Quebec, and Saskatchewan.[9]

In the future we intend to undertake projects that will foster the goal of shifting the focus of family law away from marriage breakdown. We have identified three areas where reform might hold the potential to bring about positive results. The first area—encouraging the mediation of family issues, both before and after family breakdown—involves a response that is primarily procedural. The second area—introducing more effective civil remedies in response to domestic violence—involves a response that has substantive and procedural elements. Family issues in these two areas lie in both the social and legal domains and the utilization of multi-layered resources would be envisaged.

---

6 British Columbia, Royal Commission on Family and Children's Law, *Preparation For Marriage*, Eighth Report, September 1985.

7 Raymond Gushue and David Day, *Family Law in Newfoundland*, Carswell, 1973, c. XI.

8 R.S.C. 1985, c. 3 (2nd Supp.).

9 *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 3 (family court counsellor); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 3 (court-ordered investigation) and s. 12 (reconciliation); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 131 (conciliation); *Children's Law Act*, S. Nfld. 1988, c. 61, s. 37 (mediation); *Family Law Act*, S. Nfld. 1988, c. 60, s. 4 (mediation); *Children's Law Reform Act*, R.S.O. 1980, c. 68, as amended by S.O. 1982, c. 20, s. 31 (mediation); *Family Law Act*, S.O. 1986, c. 4, s. 3 (mediation); *Québec Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 815.2 and 815.3 (reconciliation and conciliation); *Children's Law Act*, S.S. 1990, c. C-8.1, ss 10 and 11 (mediation); and *Family Maintenance Act*, S.S. 1990, c. F-6.1, ss 13 and 14 (mediation).

The third area—civil remedies for interference with family relationships—involves review of the existing remedies with a view to fashioning a new one.

Although legislation, in itself, is unlikely to achieve the goal of preventing marriage breakdown or promoting family stability, further study of these or other areas might lead to useful reform in that direction.

H. Content of Report

This Report is divided into five chapters. The first chapter provides an introduction to the project. The second chapter examines matrimonial relief granted by a judgment for restitution of conjugal rights. The third chapter deals with judicial separation. The fourth chapter explores various actions that assign tortious liability for interference with family relationships. The actions are: damages for adultery; enticement of a spouse; harbouring of a spouse; loss of consortium through physical injury of a spouse; enticement, harbouring, seduction or tortious injury of a child; breach of promise of marriage; and property disputes on the termination of an engagement. The fifth chapter covers jactitation of marriage and declarations of status.

For the convenience of the reader, Parts 1, 2, 3, 5 and 6 of the *DRA* are reproduced in their entirety in Appendix 1 to this report. Parts 3 and 4 will be considered fully in the second phase of the project having to do with spousal and child support. Parts 7 and 8 will be considered in the third phase having to do with the guardianship and custody of children, and access to them.

CHAPTER 2 — RESTITUTION OF CONJUGAL RIGHTS

A. Description

An action for a judgment for restitution of conjugal rights is brought to restore the marital relationship. Conjugal rights are the rights "which both husband and wife have to each other's society and marital intercourse".[10] The relief is premised on the principle that married persons are under a legally enforceable duty to live together unless there is a legally acceptable reason for refusing to do so. The order, if granted, requires the spouse who has abandoned the relationship to resume living with the spouse who brought the action.

B. Origin

The remedy of restitution of conjugal rights was instituted in the ecclesiastical courts of England. Because the ecclesiastical courts did not recognize desertion as a matrimonial offence, they provided no remedy for it. Restitution of conjugal rights was therefore the only form of matrimonial relief available to a deserted spouse. The decree required the "errant spouse to return to cohabitation, and to render in presumably open-hearted fashion the conjugal duties incumbent on him or her."[11] The *Matrimonial Causes Act* of 1857 gave jurisdiction to grant the remedy of restitution of conjugal rights to the secular courts.

In earlier times, non-compliance with a decree for restitution of conjugal rights was punishable by excommunication. In 1813, the *Ecclesiastical Courts Act* substituted imprisonment not exceeding six months as the sanction. The *Matrimonial Causes Act* of 1884 eliminated the sanction of imprisonment. Neither excommunication nor imprisonment has applied in Alberta.

C. Alberta Law

Sections 2 to 4 in Part 1 of the *DRA* (restitution of conjugal rights), sections 5 to 7 in Part 2 (judicial separation), and sections 15 to 17 and 24 to 25 in Part 3 (alimony and maintenance), refer to the remedy of restitution of conjugal rights.

---

10 *Fumerton* v. *Fumerton* (1970), 12 D.L.R. (3d) 504 at 505 (B.C.S.C.).

11 *Ibid.*

The *DRA* provides that if either spouse refuses to cohabit with the other spouse, the Court of Queen's Bench may, in its discretion, issue a judgment for restitution of conjugal rights.[12] Non-compliance with the judgment is not punishable by imprisonment for contempt,[13] but failure to comply with the judgment constitutes statutory desertion and entitles the petitioner to proceed immediately with an action for judicial separation.[14] As in other cases of judicial separation, the innocent spouse may apply for interim or permanent alimony or periodic support payments as well as orders for the custody, maintenance and education of any children of the family. The Court of Queen's Bench also has jurisdiction to grant alimony to either spouse in an action limited to that object if the plaintiff would be entitled to a judgment for restitution of conjugal rights.[15] An application may be made for interim alimony by way of corollary relief in an action for restitution of conjugal rights.[16] When a judgment for restitution of conjugal rights is granted, the court may order a settlement of property or periodic payments out of the profits of trade or earnings of the defendant for the benefit of the plaintiff spouse and for any children of the marriage.[17] Orders for alimony or maintenance are subject to variation in the event of a material change in financial circumstances or where either spouse has been guilty of misconduct or, being divorced, has married again.[18]

D. Law Elsewhere

In Canada, the "antediluvian and archaic"[19] action for a judgment of restitution of conjugal rights has been abolished in British Columbia,[20]

---

12 *DRA*, ss 1, 2.

13 *DRA*, s. 3.

14 *DRA*, ss 4, 6. See Chapter 3—Judicial Separation, *infra* at 18-21.

15 *DRA*, s. 15.

16 *DRA*, s. 10.

17 *DRA*, s. 24.

18 *DRA*, s. 25.

19 Kirke Smith, J., in *Fumerton* v. *Fumerton*, *supra*, note 10.

20 *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75.

Manitoba[21] and Newfoundland.[22] In Ontario, actions for restitution of conjugal rights have never been entertained.[23]

In England, the remedy was abolished by the *Matrimonial Proceedings and Property Act*, 1970[24] pursuant to the recommendation of the Law Commission in 1969.[25] In Scotland, actions for adherence—which are the Scottish equivalent of actions for restitution of conjugal rights—were abolished by section 2(1) of the *Law Reform (Husband and Wife) (Scotland) Act*, 1984[26] pursuant to the recommendation of the Scottish Law Commission in 1983.[27] That Commission concluded that actions of adherence had outlived their usefulness.

E. Retention or Abolition?

The reasons listed below support the abolition of the action for a judgment of restitution of conjugal rights. The reasons are similar to the reasons given in other jurisdictions.[28]

(1) A willingness to resume married life may be demonstrated by more appropriate means than the institution of proceedings for the restitution of conjugal rights.

---

21 *Equality of Status Act*, R.S.M. 1987, c. E140, s. 1(2).

22 *Family Law Act*, S. Nfld. 1988, c. 60, s. 76.3, as am. by S. Nfld. 1989, c. 11, s. 2.

23 *Vamvakidis* v. *Kirkoff*, [1930] 2 D.L.R. 877 (Ont. C.A.); Christine Davies, *Family Law in Canada*, Carswell, 1984, at 152.

24 1970, c. 45, s. 20.

25 Law Commission (England), Law Com. No. 23, *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights*, July 24, 1969, at 5, para. 7.

26 1984, c. 15.

27 Scottish Law Commission, Scot. Law Com. No. 76, *Family Law—Report on Outdated Rules in the Law of Husband and Wife*, May 11, 1983, at 7-8, paras. 3.4 to 3.6.

28 See *e.g.*, Law Commission (England), Law Com. No. 23, *supra*, note 25 at 4-5, paras. 6 and 7; Scottish Law Commission, Scot. Law Com. No. 76, *supra*, note 27 at 7-8, paras. 3.4 to 3.6.

(2) Desertion could be established more suitably by obtaining an order on the ground of desertion in the Provincial Court (Family Division).[29]

(3) If the real purpose of proceedings for restitution of conjugal rights is to obtain financial support, the appropriate remedy should be provided directly by express statutory enactment.

(4) There is no evidence that the institution of proceedings for restitution of conjugal rights promotes reconciliation of the spouses.

(5) A court order directing the spouses to cohabit is an inappropriate method of attempting to effect a reconciliation.

(6) The judgment for restitution of conjugal rights is futile since few, if any, judgments are obeyed and this brings the law in disrepute.[30]

(7) Actions for restitution of conjugal rights are rarely brought and this of itself indicates that the remedy is ineffective.

(8) The retention of an unnecessary and obsolete remedy is undesirable because it complicates the law.

There is no apparent reason to preserve the remedy of restitution of conjugal rights.

F. Recommendation for Abolition

We find the arguments for abolishing the action for a judgment of restitution of conjugal rights extremely persuasive and recommend this course of action to the Legislature of Alberta.

---

29 *DRA*, ss 26 and 27.

30 The absolute futility of a judgment for restitution of conjugal rights is exemplified by *Nanda* v. *Nanda*, [1968] 2 W.L.R. 404, [1967] 3 All E.R. 401. In this case, an English court granted the husband an injunction to restrain his wife from molesting him and entering the residential premises, notwithstanding that she had previously obtained a judgment for restitution of conjugal rights.

RECOMMENDATION 1:

We recommend that the action for a judgment of restitution of conjugal rights be abolished and that sections 2 to 4 of the *Domestic Relations Act* be repealed.

G. Consequential Amendments

Abolition will require the consequential deletion of references to the remedy in other sections of the *DRA* and in the *Judicature Act*. No issue of substance is involved in these deletions.

The sections in other Parts of the *DRA* are:

s. 6(1)(c)(ii) — failure to comply with a judgment for restitution of conjugal rights provides grounds for a judgment of judicial separation

s. 7 — Court jurisdiction to hear an action for restitution of conjugal rights

s. 15 — Court jurisdiction to grant alimony where plaintiff would be entitled to a judgment of restitution of conjugal rights

s. 16(1)(c) — Court jurisdiction to award an interim order for alimony in an action for restitution of conjugal rights

s. 17(2) — Court jurisdiction to award alimony on granting a decree for restitution of conjugal rights

s. 24 — Court jurisdiction to make orders with respect property or profits of trade or earnings on a judgment for restitution of conjugal rights

s. 25 — variation of an order for alimony or maintenance in an action for restitution of conjugal rights

Section 30(1) of the *Judicature Act*[31] places a ban on the publication of civil proceedings relating to marriage.

---

[31] R.S.A. 1980, c. J-1.

CHAPTER 3 — JUDICIAL SEPARATION

A. Description

An action for a judgment of judicial separation is brought to release the applicant from the duty of cohabiting with the other spouse. The judgment does not terminate the marriage. For this reason, a judgment of judicial separation has been characterized broadly as a divorce without the right to remarry.

B. Origin

Like restitution of conjugal rights, judicial separation as a form of matrimonial relief can be traced back to early English law. Prior to 1857, divorce as we know it today was unavailable in England but a judgment for judicial separation—or what was then known as divorce *a mensa et thoro*[32]—could be obtained from the ecclesiastical courts. A divorce *a mensa et thora* released the applicant from the duty of cohabiting with the other spouse and was granted on the ground of adultery, cruelty or unnatural offences. The *Matrimonial Causes Act* of 1857 gave the secular courts in England jurisdiction to issue judgments of divorce and judicial separation.

A judgment of judicial separation has been available in Alberta since territorial days. That is because, as already stated, the *DRA* enacted in Alberta in 1927 was based on the English *Matrimonial Causes Act* of 1857 and that Act, as it stood on July 15, 1970, applied in Alberta prior to 1927 and in the Northwest Territories prior to 1905.

C. Alberta Law

(1) *DRA*

Part 2 of the *DRA* provides for a judgment of judicial separation.

---

[32] *I.e.*, a divorce from bed and board without dissolution of the marriage bond.

(a) Grounds

A judgment of judicial separation may be obtained on any one of four grounds: (i) adultery; (ii) cruelty; (iii) desertion for two years or non-compliance with a judgment for restitution of conjugal rights; or (iv) sodomy or bestiality.[33] An attempt to commit one of an offence also constitutes a ground.

(b) Bars

There are four absolute bars to a judgment of judicial separation.[34] A court cannot grant a judgment of judicial separation if the applicant has:

(i) connived at any adultery for which the judgment is sought;

(ii) condoned any matrimonial offence for which the judgment is sought;

(iii) been guilty of collusion with respect to the offence for which judgment is sought; or

(iv) committed adultery.

In addition, a discretionary bar to judicial separation arises if the claimant's conduct conduced to the adultery complained of in the application for judicial separation.[35]

Connivance signifies consent to or acquiescence in the offence complained of. Condonation signifies forgiveness of the offence as manifested by spousal reconciliation. Collusion "in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose."[36] It arises

---

33 *DRA*, s. 6.

34 *DRA*, s. 8.

35 *DRA*, s. 9.

36 *Jowitt's Dictionary of English Law* (London: Sweet & Maxwell Limited, 1977), vol. 1 at 373.

when spouses seek to subvert the administration of justice, for example, by fabricating or suppressing evidence.[37]

(c) Consequences of judgment

The *DRA* specifies four consequences of a judgment for judicial separation. They are that:

(1) neither spouse is under any duty of cohabitation;[38]

(2) the wife, during the continuance of the separation, is considered a "femme sole"—an unmarried, and therefore independent, person—for all purposes, including the acquisition of a domicile distinct from that of her husband;[39]

(3) if either spouse dies intestate after a judgment for judicial separation, the deceased's estate devolves as if the surviving spouse were dead;[40] and

(4) a judicially separated spouse is not liable with respect to any contracts, wrongful acts or omissions of the other spouse.[41]

(d) Use of remedy

Although we do not have statistics relating to the number of applications made and the number of judgments for judicial separation granted in recent years, it is our impression that actions for judicial separation are rare.

Several reasons support this impression. First, modern divorce law has eliminated much of the need for judicial separation as a remedy. It is no longer possible for a spouse in Alberta legally to tie an unwilling partner to the empty

---

37 *Divorce Act, 1985, supra*, note 8, s. 11(4).

38 *DRA*, s. 10(a).

39 *DRA*, s. 10(b).

40 *DRA*, s. 11.

41 *DRA*, s. 12.

shell of a marriage. If one spouse institutes proceedings for judicial separation, there is nothing to prevent the other spouse from immediately instituting proceedings for divorce, which would take precedence.

Second, for persons who separate but do not divorce, modern provincial laws provide matrimonial relief without the necessity of a judicial separation. A spouse does not need a court order to separate and, as has been seen, a court is unlikely to grant a judgment of restitution of conjugal rights requiring a spouse who has separated to return to the marriage. Today, a married woman has full legal capacity to own property and conduct her own affairs. The wording of our recommendation #3 will ensure that each spouse has a legal personality that is independent, separate and distinct from that of their spouse for the purpose of determining domicile. Spouses ordinarily are not liable for each other's contracts, wrongful acts or omissions by virtue simply of their status as spouses. An exception exists in the common law doctrine of the wife's agency of necessity but the conditions attached to the operation of this doctrine are met rarely, if at all, in modern society.[42] Whether they are separated or living together, spouses can direct the disposition of their property on death by executing a will. Spousal support can be obtained without judicial separation under the protection order provisions in Part 4 of the *DRA*. Family relief legislation provides an effective remedy for dependents of a deceased spouse. Matrimonial property legislation provides a more effective remedy than judicial separation in relation to property. Whereas a judgment of judicial separation was once regarded as the obvious remedy for a spouse who is the victim of domestic violence, restraining orders are now regarded as more appropriate and effective. A judgment of judicial separation has never been necessary in order to obtain custody of or maintenance for a child.

Third, if both spouses are agreed that they should separate without obtaining a divorce, there is no need for a judicial separation. The law can accommodate the wishes of both parties by recognizing the legal validity of a properly executed separation agreement.

---

[42] Davies, *supra*, note 23 at 119. Under this doctrine, a wife who has been deserted by her husband or driven away by his misconduct is entitled to pledge her husband's credit for necessaries such as food, shelter, clothing and medical attention. For the doctrine to operate, the wife must be without means and entitled to be maintained by her husband; the creditor must be able to prove that credit was extended to the wife acting as her husband's agent, not to the wife herself.

(2) *Divorce Act* (Canada)

It is readily apparent from the preceding discussion that the relationship between judicial separation and divorce is central to any consideration of the remedy of judicial separation.

(a) Grounds for divorce

The sole ground for divorce under the *Divorce Act, 1985* is breakdown of the marriage.[43] Proof of marriage breakdown is established if: (i) the spouses have lived separate and apart for one year immediately preceding the divorce judgment; or (ii) the spouse against whom the divorce is sought has committed (a) adultery or (b) cruelty since the celebration of the marriage.[44] Immediately after a divorce petition has been filed, it is open to either or both spouses to seek interim corollary relief by way of spousal support, child support, custody or access.

(b) Bars

The bars to divorce are far less stringent than those that apply to judicial separation in Alberta. There are four bars to divorce: (1) collusion; (b) connivance; (iii) condonation; and (iv) the absence of reasonable child support arrangements.[45] Collusion constitutes an absolute bar to divorce, regardless of the facts relied upon in proof of marriage breakdown.[46] Connivance and condonation are only applicable to divorces that are sought on the basis of the respondent's adultery or cruelty.[47] Connivance and condonation constitute provisional bars to divorce. A court may grant a divorce, notwithstanding the

---

43 *DRA*, s. 8(1).

44 *DRA*, s. 8(2).

45 *Divorce Act, 1985*, R.S.C. 1985, *supra*, note 8, s. 11. For the meaning of collusion, connivance and condonation, see discussion of bars to judicial separation, *supra*, pp. 19-20. S. 21.1, enacted in 1990, allows a court to dismiss an application and strike out pleading filed by a spouse who fails to remove all of the religious barriers to remarriage within that spouse's control when requested to do so by the other spouse: *An Act to Amend the Divorce Act (Barriers to Religious Remarriage)*, S.C. 1990, c. 18.

46 *DRA*, s. 11(1)(a).

47 *DRA*, s. 11(1)(c).

petitioner's connivance or condonation of the offence complained of in the divorce petition, if the court is satisfied that the public interest would be better served by granting the divorce.[48] Regardless of the basis for divorce, a court must not grant a judgment for divorce until the court is satisfied that reasonable arrangements have been made for the support of dependent children.[49]

D. Law Elsewhere

Judicial separation continues to be available in the United Kingdom where the remedy originated. Three commissions in England have examined the remedy over the past eighty years. They are: the Royal Commission on Divorce and Matrimonial Causes 1909-1912 (the "Gorell Commission");[50] the Royal Commission on Marriage and Divorce (England) 1951-55 (the "Morton Commission");[51] and, recently, the Law Commission, in its work on *Family Law—The Ground for Divorce*, 1990.[52] All three commissions have recommended that the remedy of judicial separation be retained as an alternative to divorce.

In contrast, the Scottish Law Commission has concluded that judicial separation has outlived its usefulness and recommended that the remedy be abolished.[53]

Australia abolished the remedy of judicial separation with the enactment of the *Family Law Act 1975* which reformed the divorce law in that country.[54]

---

48 *Ibid.*

49 *DRA*, s. 11(1)(b).

50 *Report of the Royal Commission on Divorce and Matrimonial Causes* (England), 1909-1912, Cmd. 6478 (1912).

51 *Report of the Royal Commission on Marriage and Divorce* (England), 1951-1955, Cmd. 9678 (1956).

52 Law Commission (England), Law Com. No. 192, *Family Law—The Ground for Divorce*, October 31, 1990.

53 Scottish Law Commission, Scot. Law Com. No. 135, *Report on Family Law*, January 27, 1992, para. 12.19.

54 Law Commission (England), Law Com. No. 192, *supra*, note 52, referring to *Family Law Act 1975* (Australia), No. 53 of 1975.

E. Retention or Abolition?

In stating the arguments for abolition, or retention with reform, of the remedy of judicial separation in Alberta, we have borrowed liberally from the discussion in the English and Scottish Law Commission reports.

(1) Arguments for Retention

Four arguments can be made in support of retaining the remedy of judicial separation. The first argument hinges on religious, conscientious or other objection to divorce. To borrow from the language of the Law Commission in England:

> [Although] most religions which are opposed to divorce also draw a distinction between civil and religious divorce, to abolish this remedy would mean there was no choice. Couples who neither wanted nor needed to divorce in order to rearrange their lives would be obliged to do so, sometimes against conscience, purely in order to obtain . . . ancillary relief not available [otherwise] . . . This cannot be right.[55]

The second argument is that couples who neither want nor need divorce should not be obliged to obtain a divorce in order to rearrange their lives. For example, again according to the Law Commission, forcing couples to divorce

> . . . would increase the hardship caused to older spouses, especially wives, whose husbands were unable to compensate them for the loss of pension rights or other benefits flowing from marriage or widowhood.[56]

In the opinion of the Law Commission, a "choice must be available, even if only a small proportion of couples choose this remedy."[57]

---

55 *Ibid.*, para. 4.10.

56 *Ibid.*

57 *Ibid.*

The third argument is that judicial separation leaves the door open to reconciliation and that this is desirable because society wishes to preserve rather than terminate marriages.

The fourth argument is that judicial separation acts as a preserve of matrimonial relief for spouses who do not have grounds for divorce, for example, spouses who have been separated for less than one year. This argument has no foundation in Canada. That is because, under our *Divorce Act, 1985*,[58] there is no waiting period for the commencement of divorce proceedings. Where the ground for divorce is marriage breakdown based on a one-year separation of the spouses, it is open to either or both spouses to file a divorce petition on the day following spousal separation and immediately seek interim corollary relief by way of spousal support, child support, custody or access. Although a divorce judgment cannot be granted until one year after the date of the initial separation, a court's jurisdiction to order corollary relief is triggered once the divorce petition has been filed.

(2) Arguments for Abolition

Several arguments can also be made for abolition of the remedy of judicial separation.

One argument is that judicial separation is undesirable because it places the spouses in an unsatisfactory limbo between marriage and divorce. In the words of the Scottish Law Commission:

> It orders the parties to separate but does not terminate the marriage. It creates a divergence between the social position and the legal position. This has been the subject of adverse comment for over a hundred years.[59]

A second argument is that the remedy of judicial separation is unnecessary. For the most part, the reasons that supported the legal need for the remedy in England in 1857 do not exist in Alberta today. With regard to the argument of necessity based on religious objection to divorce, the Scottish Law Commission

---

58 *Supra*, note 8.

59 Scottish Law Commission, Discussion Paper No. 85, *Family Law—Pre-onsolidation Reforms*, March 1990, para. 7.6.

was unable to find any major religious group which does not "permit its adherents to use civil divorce for civil purposes, such as the regulation of property and financial matters, when a marriage has unfortunately broken down irretrievably."[60] We doubt that any such group exists in Alberta either.

With regard to ancillary relief, subject to one exception, we are not aware of any relief ancillary to judicial separation that would cease to be available in Alberta if the action were abolished. Under the existing law, a spouse who would be entitled to a judgment of judicial separation may bring an application in the Court of Queen's Bench for alimony alone.[61] The jurisdiction of a provincial judge to order spousal support is based on desertion, which is defined to include a spouse who is living apart from the other spouse because of cruelty or unjustified failure to provide necessaries.[62] The obligation of parents to support their children does not depend on their marital situation at the time. Matrimonial property can be divided where the spouses have lived apart for one year separation or reconciliation is not possible, or where shareable assets are at risk.[63] Judicial separation is not necessary to resolve issues relating to child guardianship, custody or access.[64]

The only ancillary relief of importance that would cease to be available if judicial separation were abolished is a restraining order to protect a spouse who is the victim of domestic violence but objects to divorce. That is because a restraining order must be tied to a matrimonial action and divorce would be the only matrimonial action left. The law on restraining orders could be reformed by statute. For example, the court has statutory authority to restrain a spouse from entering or coming near the matrimonial home in connection with an application for possession of the matrimonial home made under the *Matrimonial Property*

---

60 *Ibid.*

61 *DRA*, s. 15.

62 *DRA*, s. 27(1).

63 *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 5(1)(c), (d) and (e).

64 See *DRA*, s. 49 (guardianship), s. 55 (custody) and s. 56 (access); *Child Welfare Act*, S.A. 1984, c. C-8.1, ss 49-54 (private guardianship); *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32 (custody or access).

Act.[65] Independent remedies appropriate to restrain violence should be introduced before the action for judicial separation is abolished.

With regard to causing possible hardship to older spouses, we think that any difficulty could be solved by a properly executed separation agreement.

With regard to encouraging reconciliation, the perception that judicial separation facilitates reconciliation is an assumption that is unsubstantiated by empirical data. The grounds for judicial separation in Alberta are not particularly conducive to reconciliation because they are all fault-based. Divorce proceedings, which provide an alternative, do not preclude reconciliation. To the contrary, the *Divorce Act* has provisions to promote reconciliation.

A third argument is that judicial separation causes hardship for the respondent spouse. That is because an applicant spouse can keep a respondent spouse tied to the marriage and at the same time refuse any genuine offer to resume married life. This argument was postulated and rejected by the Law Commission in England. It is sound only if the respondent does not have grounds for divorce. This argument has no foundation in Canada because, under our *Divorce Act*, a one-year separation of the spouses provides a ground for divorce and the divorce petition can be filed and corollary relief obtained immediately. A judgment for judicial separation, therefore, cannot be imposed upon an unwilling spouse for an indefinite period at the option of the spouse who obtained the judgment.

F. Recommendation for Abolition

(1) Recommendation

Unless it can be shown that the retention of judicial separation is justified on the basis of religious or other conscientious objection, or the availability of ancillary relief, we can think of no practical significance of judicial separation in the present day and age. We agree with the Scottish Law Commission that legally, judicial separation has become an unnecessary remedy. We recommend its abolition.

---

[65] *Supra*, note 63, s. 19(1)(c).

RECOMMENDATION 2:

We recommend that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed. Implementation of this recommendation should be deferred until appropriate remedies to restrain domestic violence have been introduced.

(2) Consequential Amendments

If judicial separation is abolished, consequential amendments deleting the reference to judicial separation in other provisions in the *DRA* and in a number of other statutes will be required. No issue of substance is involved in these deletions.

The sections in other Parts of the *DRA* are:

s. 4 — failure to comply with a judgment for restitution of conjugal rights provides grounds for a judgment of judicial separation

s. 15 — Court jurisdiction to grant alimony where plaintiff would be entitled to a judgment of judicial separation

s. 16(1)(c) — Court jurisdiction to award an interim order for alimony in an action for judicial separation

s. 17(1) — Court jurisdiction to award alimony after judgment for judicial separation

s. 21 — settlement of property for the benefit of the innocent spouse and children of the marriage

s. 25 — variation of an order for alimony or maintenance in an action for judicial separation

s. 54(1) — Court jurisdiction to declare parent unfit to have custody of the children of the marriage

The references in other statutes include:

Judicature Act, R.S.A. 1980, c. J-1

s. 30(1) — ban on publication of civil proceedings relating to marriage

Legislative Assembly Act, R.S.A. 1980, c. L-10.1

s. 24(1) — excepted from category of persons directly associated with a Member of the Legislative Assembly

Matrimonial Property Act, R.S.A. 1980, c. M-9

s. 5(1)(b) — conditions precedent to an application to divide matrimonial property

s. 6(1)(a) — time for commencement of an application to divide matrimonial property

s. 7(3)(c) — factors for Court to consider in distributing matrimonial property

Marriage Act, R.S.A. 1980, c. M-18

s. 18(2)(a) — consent of a non-custodial parent to the marriage of a person under 18 years of age is not required

Alberta Income Tax Act, R.S.A. 1980, c. A-31

s. 10(7) — entitlement to renter assistance credits

G. Retention with Modification: An Alternative?

If the remedy of judicial separation is not abolished, how, if at all, should the existing law be reformed? We will address the issues relating to reform under five headings: (a) grounds, (b) bars, (c) commencement of action and ancillary relief, (d) duration, and (e) reconciliation.

(1) Grounds

As has been seen, the existing grounds for judicial separation in Alberta are based on fault in the form of adultery, cruelty, desertion, or sodomy or bestiality. The continued existence of matrimonial relief based on fault is inconsistent with the reformed divorce law which has discarded fault and adopted irretrievable marriage breakdown as the basis for relief.

The traditional purpose of the remedy of judicial separation is the safety and protection of the injured spouse. It is arguable that irretrievable marriage breakdown is not an appropriate test for judicial separation because judicial separation is not concerned with the dissolution of the marriage. In answer to this argument, the Law Commission in England observed that in practice courts treat judicial separation as if it were a final breakdown. The Commission further observed that the retention and use of fault-based grounds would be more likely to deter reconciliation than would the adoption of marriage breakdown as the ground. In its words:

> . . . [a decree of judicial separation] ends the obligation to live together and almost invariably denotes the death of the marriage. In practice, when dealing with the ancillary consequences of a decree, it appears that the courts do treat judicial separation as if it represented a final breakdown. In reality, therefore, adopting the same ground for judicial separation as that for divorce would not act as a deterrent to reconciliation: reconciliations certainly take place after divorce petitions have been filed and even between decree nisi and absolute. It is more likely that retention and use of fault-based grounds would deter reconciliation than would adoption of the breakdown ground. Alternatively, it could be argued that there is no need for any ground at all, the main object is to achieve a re-ordering of the couple's affairs.[66]

If judicial separation is retained, it would be logical to promote some degree of consistency between the grounds for judicial separation, which historically have been broader, and the grounds for divorce. Consistency between the grounds for judicial separation and divorce was favoured by both the Law Commission of England and the Scottish Law Commission.[67] In England, where the same grounds currently exist for judicial separation and divorce, it is tacitly assumed that it would be illogical to permit a court to grant a divorce in circumstances where it lacks the jurisdiction to grant a judicial separation.

---

[66] Law Commission (England), Law Com. No. 192, *supra*, note 52, para. 4.13, citing a statement made by the Law Commission in 1969.

[67] *Ibid.*, paras. 4.6-4.19; Scottish Law Commission, Scot. Law Com. No. 116 para. 4.8.

In our view, irretrievable breakdown of the marriage would be a reasonable ground for judicial separation. Proof of irretrievable breakdown could be established, as it is under the *Divorce Act*, by the separation of the spouses for one year, or by adultery or cruelty since the celebration of the marriage.

We would be prepared to go further, as New Zealand has done. Legislation in that country confers a general discretion upon the court to grant a judgment of judicial separation where:

> . . . it is satisfied that there is a state of disharmony between the spouses to the marriage of such a nature that it is unreasonable to require the parties to continue or, as the case may be, to resume matrimonial cohabitation with each other.[68]

(2) Bars

As already stated, there are four absolute bars to a judgment of judicial separation and one discretionary bar. The absolute bars are: connivance at adultery; condonation of a matrimonial offence; collusion; or adultery. The discretionary bar is conduct conducing to adultery.

If the retention of judicial separation is perceived as necessary for the protection of spouses and children, it becomes difficult, if not impossible, to justify any bars to relief.[69] We can see no good reason why the bars to judicial separation should be more prohibitive than the bars to divorce. At the very least, section 8 of the *DRA* should be amended to correspond to section 11 of the *Divorce Act, 1985*.

If a general discretion to grant judicial separation is introduced, we would not fetter it by imposing statutory bars of any kind, either absolute or provisional.

(3) Commencement of Action and Ancillary Relief

If judicial separation is retained, the procedure for commencing an action for a judgment of judicial separation should be analogous to the procedure for

---

[68] *Family Proceedings Act* (New Zealand), 1980, s. 22.

[69] Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), paras. 313, 314 and 316.

commencing divorce proceedings and the same ancillary relief should be available.

(4) Duration

If judicial separation is retained, it would be desirable to clarify the law by providing for termination of the judgment. One event that should terminate the judgment is dissolution of the marriage.[70] Another event that should terminate it is the reconciliation of the spouses.[71] A further statutory provision could declare, as does legislation in New Zealand, that a judgment of judicial separation shall continue in effect until the court discharges the judgment, on the application of either or both spouses, by reason of a material change of circumstances.[72]

We would support the enactment of legislation that expressly provides for termination in these three circumstances.

(5) Reconciliation

We are of the opinion that the law should support opportunities to achieve reconciliation. According to case law, the resumption of cohabitation terminates a judgment of judicial separation.[73] If the action for a judgment of judicial separation is retained, opportunities to attempt reconciliation by resuming cohabitation could be encouraged by express legislative provision. Legislation could provide, for example, that any resumption of cohabitation that does not exceed 90 days in duration might be disregarded in determining whether the

---

70 *Wens* v. *Wens*, [1939] 3 W.W.R. 606, at 610 (Man.). Compare *Family Proceedings Act* (New Zealand), 1980, s. 25(2).

71 Compare *Family Proceedings Act* (New Zealand), 1980, s. 24.

72 *Ibid*, s. 25.

73 According to Smith, J. in *Hadden* v. *Hadden* (1887), 18 Q.B.D. 778 at 782:

> The reason is that the resumption of cohabitation puts an end to the cause for which the judicial separation was granted; and after such resumption of cohabitation, if proceedings are to be taken at all, they must be taken by a fresh suit.

judicial separation is terminated.[74] Alternatively, legislation could provide that a judgment of judicial separation shall be suspended, rather than terminated, during any period of attempted reconciliation but that it revive upon any subsequent cessation of cohabitation.[75]

(6) Intestate Succession (*DRA* — Section 11)

In our 1978 *Report on Family Relief*,[76] we recommended that a judicially separated spouse should continue to be eligible to apply for support out of the estate of a deceased spouse pursuant to the *Family Relief Act*.[77] We made this recommendation even though section 11 of the *DRA* provides that a judicially separated spouse does not enjoy intestate succession rights on the death of his or her spouse. Our position is not incompatible. Intestate succession law is based, at least in part, on what the deceased might have done had they put their mind to the question. Support law, on the other hand, is based on obligation and operates irrespective of the wishes of the deceased.

As for the law elsewhere, in New Zealand, a judicially separated spouse is excluded from the disposition of property on intestacy but may obtain an order for support out of the estate of the deceased spouse. In contrast, in Scotland, the Scottish Law Commission recommended the repeal of a statutory provision that somewhat resembles section 11 of the Alberta *DRA*.[78]

In our view, different considerations apply to support and intestate succession. We think that if judicial separation is retained, section 11 of the *DRA* should also be retained.

---

74 *E.g.*, *Divorce Act, 1985, supra*, note 8, ss 8(3)(b)(ii) and 11(3) and *Matrimonial Property Act, supra*, note 62, ss 5(4) and 6(4).

75 *E.g.*, *Family Proceedings Act* (New Zealand), 1980, s. 40.

76 Alberta Law Reform Institute, Report No. 29, *Family Relief* (June, 1978), at 48.

77 R.S.A. 1980, c. F-2.

78 Scottish Law Commission, Scot. Law Com. No. 124, *Report on Succession*, 1990, para. 7.33, cited in Scottish Law Commission, Scot. Law Com. No. 135, *supra*, note 53, para. 12.3.

(7) Liability for Spouse's Actions (*DRA* — Section 12)

Section 12 frees a judicially separated spouse from liability with respect to the acts, debts or obligations of the other spouse. Sections 6 and 7 of the *Married Women's Act*[79] now supersede the more limited provision of section 12. Under sections 6 and 7, spouses in Alberta are treated as independent legal persons for purposes of both contract and tort, regardless of the existence of any judgment for judicial separation. Accordingly, in our opinion, section 12 of the *DRA* no longer serves any useful purpose and should be repealed even though judicial separation is retained.

H. Married Woman Status (*DRA* — Section 10(b))

Section 10(b) provides that a separated wife shall be considered an independent person for all purposes. It should be repealed even if judicial separation is retained because it states what today is true anyway. In an age when sexual equality is guarantee by the *Canadian Charter of Rights and Freedoms*, the legal status of married women in Alberta must be recognized as equal to that of single adults or married men, regardless of the presence or absence of a judgment of judicial separation.

To avoid any doubt about the legal capacity of a married person, we recommend that the *DRA* be amended to include a statutory provision similar to section 64 of the Ontario *Family Law Act*.[80] The effect of section 64 is to provide that a married woman is in no way restricted in her actions because of her status as a married woman. The Ontario section is wider in scope than the provisions of the *Married Women's Act*[81] as amended by the *Gratuitous Passengers and Interspousal Tort Immunity Statutes Amendment Act*[82] which abolished the former common law doctrine of inter-spousal tort immunity. We make this recommendation regardless of whether judicial separation is retained or abolished.

---

79 R.S.A. 1980, c. M-7.

80 S.O. 1986, c. 4.

81 *Supra*, note 79.

82 S.A. 1990, c. 22, s. 2.

RECOMMENDATION 3:

We recommend that the following provision be enacted in the *DRA*:

(1) For all purposes of the law of Alberta, including the determination of domicile, a person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

CHAPTER 4 — TORTIOUS LIABILITY FOR INTERFERENCE WITH FAMILY RELATIONSHIPS

A. Introduction

The principal subject of this chapter is actions against third parties for damages in tort for wrongful interference with family relationships—both spousal and child. Later in the chapter, we will look at damages in contract for breach of promise of marriage. We will also examine the effect of the termination of an engagement on gifts between engaged persons made in contemplation of marriage, and on gifts made from third parties to the engaged couple.

The tort actions that allow a spouse to claim damages for wrongful interference with marriage are:

(1) adultery (criminal conversation);

(2) enticement of spouse;

(3) harbouring of spouse; and

(4) loss of consortium through physical injury of a spouse.

These actions allow a spouse to bring a claim against a third party who wrongfully interferes with the marital relationship. The claim is for damages for loss of the "consortium" of the other spouse. Consortium consists of the right of one person to the company, assistance, affection and fellowship of another. The elements comprised in the "consortium" of a spouse include the spouses's companionship, love, affection, comfort, mutual services, and sexual intercourse.[83]

Tort actions for the enticement, harbouring or seduction of a child are similar. They protect against wrongful interference, by a third party, with the relationship between parent and child.

---

[83] *Best* v. *Samuel Fox and Co. Ltd.*, [1951] 2 All E.R. 116 at 124-26, aff'd [1952] A.C. 716 (H.L.).

B. Historical Overview

Like the action for a judgment of restitution of conjugal rights, or for a judgment of judicial separation, the tort actions that have evolved to compensate family members for wrongful interference by third parties with family relationships have a long history in English law. They originated in the jurisdiction of the ecclesiastical courts and in the early common law.

Actions for damages for interference with family relationships through adultery, enticement, harbouring or loss of consortium, in the case of a spouse, and enticement, harbouring or seduction, in the case of a child, were originally available only to husbands or fathers. Not until the second half of the 20th century was legislation enacted to equate the legal position of husbands and wives. The married woman's right to sue a third party for damages by reason of adultery, enticement, harbouring or loss of consortium was legislated in Alberta in 1973.[84]

Prior to 1962 in Canada, views differed about whether an action for alienation of affections could be brought independently of an action for damages for adultery, enticement or harbouring of a spouse. In that year, the Supreme Court of Canada established that there is no separate action in Canada for alienation of affections. A husband is not entitled to damages for loss of the affection of his wife unless the conduct of a third party would ground an action for criminal conversation, enticement or harbouring, or is otherwise tortious.[85]

Until recently in Alberta, the parent-child relationship was statutorily regulated by the *Seduction Act*.[86] This Act was repealed in 1985.[87] Alberta statutes today are silent with respect to liability for interference with the parent-child relationship.

---

84 *DRA*, ss 13-15 and 40-43, as amended previously by *Attorney-General Statutes Amendment Act*, 1973 (No. 2), S.A. 1973, c. 61.

85 *Kungl* v. *Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278, varying [1961] O.R. 1, 25 D.L.R. (2d) 344.

86 R.S.A. 1980, c. S-7.

87 *Charter Omnibus Act*, S.A. 1985, c. 15, s. 43(1).

Sections 13 to 15 in Part 2 of the *DRA* (on alimony and maintenance) and sections 40-43 in Part 5 (on loss of consortium) currently regulate wrongful interference with the marital relationship, or "marital consortium". This Alberta legislation is out of step with contemporary legislation in other jurisdictions where the trend is towards abolition of third party liability for unjustifiable interference with family relationships. Law commissions have recommended the legislative abolition of actions for damages for adultery, the enticement or harbouring of a spouse, or the seduction of a child and this has been the preferred course of action in the majority of Canadian provinces as well as in England, Australia, New Zealand, and many American states.[88]

In the following pages of this chapter we will consider, one by one, the pros and cons of the diverse rights of action in tort that purportedly exist to protect the stability of marriage and the family.

C. Damages for Adultery (Criminal Conversation)

(1) Description

Damages for adultery are available to a married person against someone who has committed adultery with that person's spouse. The damages are available in an action either for judicial separation or for damages alone.

(2) Origin

An action for damages for adultery was known in England, prior to 1857, as an action for criminal conversation. In 1857, the *Matrimonial Causes Act* abolished the action for criminal conversation[89] and substituted, in section 33, a statutory right of action. The statutory right entitled a husband to claim damages against his wife's adulterer in a petition for divorce or judicial separation or in an action that was confined to damages alone. The same criteria as had applied to the action for criminal conversation governed the statutory claim for damages. The principal effect of the 1857 enactment was that "defences and discretionary

---

88 Peter B. Kutner, "Law Reform in Tort: Abolition of Liability for 'Intentional' Interference with Family Relationships" (1987) 6 *Can. J. Fam. Law* 287.

89 20 & 21 Vict., c. 85, s. 59.

bars to the grant of a divorce on the ground of adultery would now defeat a claim for damages."[90]

(3) Alberta Law

In Alberta today, sections 13 and 14 of the *DRA* regulate actions for damages for adultery. The provisions, which apply equally to husbands and wives, are modelled on criteria established by the English *Matrimonial Causes Act* of 1857. They reflect the contents of section 33 of that Act, and the bars to divorce that existed under sections 30 and 31. Not surprisingly, the grounds for and bars to divorce in England in 1857 bear little resemblance to the ground for and bars to divorce in Canada today.

(4) Law Elsewhere

During the past twenty years, actions for damages for adultery have fallen into disfavour. Law reform commissions in England, Scotland, Australia, New Zealand and in several Canadian provinces have recommended the abolition of actions for intentional interference with marital consortium, including actions for damages for adultery. These recommendations generally have been implemented by legislation. Only the Irish Law Commission has favoured the retention of liability, albeit in an altered form,[91] and this recommendation was rejected by the Irish Parliament which abolished actions for damages for adultery in 1981.[92]

(5) Retention or Abolition?

We will set out the the arguments made elsewhere for retaining, re-constituting or abolishing actions for damages against adulterers. These arguments have not been substantiated by empirical data. Instead, they represent opinions or convictions that purport to reflect the social milieu in which they have been presented.

---

90 Kutner, *supra*, note 88 at 295.

91 Law Reform Commission of Ireland, Report No. 1, *First Report on Family Law*, 1981.

92 *Family Law Act* (Ireland) 1981, No. 22, s. 1.

(a) Arguments for retention

The following arguments have been presented in support of retaining liability in damages for adultery:

(1) The complainant spouse should be financially compensated for the loss of benefits that accrued from the marriage.

(2) Damages for adultery can be applied for the benefit of children of the marriage whose lives have been disrupted.

(3) Actions for damages constitute a deterrent to adultery and thereby reinforce the stability of marriage and the family.

(4) Actions based on adultery provide a legitimate outlet for a spouse who might otherwise seek vengeance by way of physical retaliation.

(5) Although the origin of actions for damages for adultery may reflect anachronistic notions of male supremacy that treated wives and children as chattels, retention of the remedy serves a contemporary and noble function, namely the protection of family relationships and of stable married life.

(6) It is proper for the State to stigmatize adultery as unacceptable behaviour by attaching pecuniary sanctions for the benefit of the aggrieved spouse and children.

(b) Arguments for abolition

The following objections have been raised against the preservation of liability for damages in actions based on adultery:

(1) The action is based on the anachronistic and offensive notion that a spouse has a property interest in his or her spouse's body.

(2) The action reflects the outmoded view that adultery is the cause, rather than a consequence, of marriage breakdown.

(3) Pecuniary liability for adultery does not reflect contemporary mores concerning sexual activity, spousal autonomy and personal freedom.

(4) The spouse with whom the adultery has been committed may have been the perpetrator rather than the victim of seduction.

(5) The complainant spouse may have contributed to the adultery or marriage breakdown that triggered the commission of that offence.

(6) The imposition of pecuniary liability for adultery is inconsistent with contemporary divorce laws based on no-fault criteria.

(7) The stability of marriage and the family must be achieved by the joint conscientious efforts of both spouses. It cannot be achieved by the imposition of pecuniary liability on third parties.

(8) The prosecution of claims for damages against a third party will necessitate evidence being adduced that may hamper or preclude any possibility of spousal reconciliation.

(9) Actions for damages may be motivated by revenge or mercenary considerations that have little or nothing to do with any real economic loss. Decent people do not institute legal proceedings that will accentuate the family disgrace or add to the distress, embarrassment or bitterness suffered by the entire family.

(10) Actions for damages are so rare that there is no apparent need for such a right of action.

(11) The threat of exposure to the publicity of the courtroom coerces unconscionable settlements.

(12) Spouses can act in collusion to present unwarranted claims. Conversely, both parties to the adultery may collude to avoid or reduce liability.

(13) Although the law stipulates that damages are compensatory, not punitive, this is belied by reality. Damages reflect the complainant's

wounded pride rather than actual economic losses flowing from the adultery complained of.

(14) No preventive purpose is solved by actions for damages because adultery is rarely the product of a deliberate plan. Furthermore, the commission of adultery often reflects that the marriage has already irretrievably broken down so that the complainant spouse cannot truthfully assert any loss.

(c) Recommendation for abolition

Should the law protect the marital relationship from injury by providing actions for damages against third parties who interfere with it? The predominant view is that actions for damages are an ineffective and inappropriate means of redressing interference with marital relationships in contemporary society. We share this opinion.

In our view, although society may disapprove of adultery or other sexual activity between spouses and third parties, its disapproval does not justify an award of damages against the third party for such transgressions. Issues of causation are far too complex to justify the conclusion that the third party should be held exclusively responsible. We recognize that many spouses experience mental anguish when they discover that they have been "betrayed" by an adulterous spouse. It does not follow that such anguish will or should be assuaged by a judgment for substantial damages against the adulterer, while the guilty spouse escapes responsibility and may even share the financial benefits of the judgment if the marriage survives. Moreover, damages against an adulterer may be purchased at too high a price if the family's past is exposed to the courts and the media. If the marriage does not survive the adultery, the economic consequences of the marriage breakdown cannot be effectively redressed by actions for damages against third parties.

An Alberta commentator[93] found one essential difference between those who support the retention of such actions against third parties who interfere with the marital relationship and those who support abolition:

---

[93] Stella J. Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta" (1979), 17 Alta. L. Rev. 513 at 528-29.

> [The abolitionists state] that the only real protection that a marriage can have will be found in each party to the marriage acting responsibly to the other. The non-abolitionists, on the other hand, answer the question in the affirmative, believing that the responsibility for protection of marriage and the family lies with the State and not with the parties to the marriage contract themselves. . . .

We agree with the conclusion that:

> . . . a marriage will endure when both parties to it make a conscious effort to make it a lasting relationship. It is the parties to the marriage themselves and not the possible sanction of the law that must discourage third parties from interfering with the marital relationship.

The action for damages for adultery should be abolished. To achieve this, sections 13 and 14 of the *DRA* should be repealed.

RECOMMENDATION 4:

We recommend that the action for damages for adultery be abolished and that sections 13 and 14 of the *DRA* be repealed.

D. Enticement of Spouse

(1) Description

The tort of enticement is committed by a person who induces one spouse to leave the other spouse, thereby depriving the other spouse of the first spouse's consortium. Unlike criminal conversation, the tort of enticement is not based on the commission of adultery or the existence of a sexual relationship between the enticed spouse and the third party. Although sexual liaisons in enticement cases have been common, the action may also be brought against family members, such

as a wife's parents or siblings,[94] or even against religious groups who have brought matrimonial cohabitation to an end.[95]

(2) Origin

The tort of enticement has its historical roots in the ancient right of a master to sue for damages for the loss of the services of a servant whom a third party has induced to leave the master's employment. In his legal capacity as head of the household, a husband and father had a legal right to the services of his wife and minor legitimate children. He could claim damages against a third party who wrongfully interfered with that legal right. No corresponding right was available to wives and children.

(3) Alberta Law

In Alberta, section 40 of the *DRA* governs an action for damages for interference with the marital relationship by the enticement of a spouse. The action has been available to both husbands and wives since 1973.

Judicial opinion in Canada has been divided on the question whether a total loss of consortium is required or whether a lesser degree of impairment will suffice. In Alberta, partial impairment of matrimonial consortium has been deemed sufficient to ground liability under section 43 of the *DRA* where physical injury has been inflicted on a spouse.[96] By analogy, partial impairment of matrimonial consortium may ground liability under section 40.

(4) Law Elsewhere

In recent years, the action for damages for enticement has been rejected as obsolete by the judiciary, law reform bodies and legislators alike. In England, Lord Denning concluded, as long ago as 1957, that the action for enticement was outmoded as a means of preserving family stability and resolving marital

---

94 *Webb* v. *Bulloch* (1971), 13 O.W.N. 343; *Smith* v. *Kaye* (1904), 20 T.L.R. 261.

95 *Brizard* v. *Heynen* (1914), 27 W.L.R. 308 (Eng. C.A.) (parish priest held not liable).

96 *Woelk* v. *Halvorson*, [1980] 2 S.C.R. 430.

disharmony.[97] Arguments for and against actions for enticement are analogous to those presented with respect to actions for damages for adultery.[98] They have been documented in a variety of law reform commission reports and working papers.

(5) Retention or Abolition?

We accept the reasons given for abolishing damages for adultery. The same logic applies with respect to damages for enticement.

RECOMMENDATION 5:

We recommend that the action for damages for the enticement of a spouse be abolished and that section 40 of the *DRA* be repealed.

E. Harbouring of Spouse

(1) Description

The tort of harbouring renders a third party liable in damages for sheltering a person against the will of that person's spouse. It is similar in origin and purpose to the tort of enticement. However, whereas enticement applies to a third party who initiates a cessation of matrimonial cohabitation, harbouring occurs where a third party interferes after the spouses have separated.

(2) Origin

Like the action for enticement, the action for harbouring a spouse evolved at common law from the ancient right of action available to a master for loss of the services of a servant. This action was available historically to a husband and father in his legal capacity as head of the household. A husband and father was legally perceived as having the right to the services of his wife and children.

---

97 *Gottlieb* v. *Gleiser* [1957] 3 All E.R. 715.

98 See discussion under heading "C. Damages for Adultery (Criminal Conversation)", *supra*, p. 38.

Only husbands could sue for damages in an action for the harbouring of a spouse at common law; no corresponding remedy was available to wives. A third party could negate liability by proving that harbouring the spouse was attributable to humanitarian motives, such as protection against spousal cruelty or ill-treatment. It was also a defence for the third party to prove an honest belief in the existence of humanitarian reasons, even if that belief was mistaken.

(3) Alberta Law

In Alberta today, sections 41 and 42 of the *DRA* embody the old-established principles of the common law with the exception that, since 1973, actions by both wives and husbands are accommodated.

(4) Law Elsewhere

Law reform commissions have consistently recommended the abolition of this tort and many jurisdictions in Canada and the British Commonwealth have now legislatively abrogated this form of action.

(5) Retention or Abolition?

The action for damages for harbouring a spouse is now regarded as anachronistic. The anachronistic character of this tort is demonstrated in the observations made in 1958 by an English judge, Devlin, J., in the case of *Winchester* v. *Fleming*.[99] He stated:

> . . . The reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it. This is no longer an accepted method of effecting a matrimonial reconciliation. Parliament recognised that such methods were obsolete when by the Matrimonial Causes Act, 1884, sec. 2, it abolished the process by which spouses who refused to obey a decree for restitution of conjugal rights were imprisoned until they did. Society would not today tolerate a vindictive husband who hounded his wife, however grievously she might have erred, from house to house

---

[99] [1958] 1 Q.B. 259.

> through the ranks of her friends and relations in order to recapture her, as one might a fugitive slave. What if she was driven to seek public assistance? Would the Crown or some local authority then be liable for harbouring? In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the state, the bottom has dropped out of the action for harbouring.[100]

The efficacy of the tort of harbouring in promoting spousal reconciliation has always been doubtful. The remedy is outmoded and unworthy of retention on Alberta's current statute books. We recommend its abolition.

RECOMMENDATION 6:

We recommend that the action for damages for harbouring a spouse be abolished and that sections 41 and 42 of the *DRA* be repealed.

F. Loss of Consortium Through Physical Injury of a Spouse

(1) Description

An award of damages for loss of consortium can be made in two situations where facts to ground liability in damages for adultery, enticement or harbouring are absent.[101]

First, a person may sustain a loss of consortium as a result of tortious conduct directed specifically against that person. For example, if a third party defames a married man, his wife may leave him in consequence of the defamation. In these circumstances, the man has not only suffered a loss of reputation; he has also suffered a loss of consortium. Similarly, a man injured by the negligence of a third party, for example, in an automobile accident, may be

---

100 *Ibid.* at 265.

101 The concept of consortium was explained *supra*, p. 36. The elements of the consortium of a spouse include the spouse's companionship, love, affection, comfort, mutual services and sexual intercourse: *Best* v. *Samuel Fox and Co. Ltd.*, *supra*, note 83.

hospitalized and thereby deprived of his wife's consortium. In both of these examples, supplemental damages would be available for the loss of consortium attributable to the tortious conduct of the third party.

Second, a person might suffer loss of consortium as a result of injuries intentionally or negligently inflicted on a spouse of the claimant. If, for example, a married woman suffered severe physical injuries as a result of an assault, or the negligence of a third party in an automobile accident, not only could she recover damages in tort for her personal injuries, but also her husband could institute a claim for loss of her consortium.

As stated previously, no separate action for damages for alienation of affections exists in Canada.[102]

It is loss of consortium in the second situation that is under discussion in this section.

(2) Origin

As in the case of damages for enticement or harbouring, a husband's right to damages in tort for the loss of the consortium of his wife originated with the common law right of a master to seek damages from a third party who interfered with a servant and thereby deprived the master of the servant's services. The common law regarded the wife as a servant and gave the husband an action for damages for the loss of her services.

(3) Alberta Law

In Alberta today, section 43 of the *DRA* gives an action for damages for loss of consortium against a person who has intentionally or negligently injured the claimant's spouse.[103] As stated previously,[104] section 43 has been held to

---

102 *Kungl* v. *Schiefer*, *supra*, note 84.

103 Regarding the right of a husband to sue in respect of a tort done to his wife, note that s. 4 of the *Married Women's Act*, *supra*, note 78, as am. by S.A. 1990, c. 22, s. 2, currently provides:

> **4.** A husband has no right to sue in respect of a tort done to his wife except where and in so far as he

(continued...)

apply where there is a partial impairment of consortium, such as loss of ability to engage in sexual intercourse, or a total loss of consortium. Since the 1973 amendment eliminating sexual discrimination, actions can be brought by either spouse.

(4) Law Elsewhere

England abolished actions by a husband for deprivation of the services or society of his wife in 1982.[105] The abolition encompasses actions for loss of consortium arising from injury to a spouse as a result of the tortious conduct of a third party.

In contrast, Ontario, in 1986, broadened the concept of compensation for tortious interference with a family relationship.[106] Sections 61 to 63 of the Ontario *Family Law Act* give family members a statutory right of action to recover damages for loss of the guidance, care and companionship of a family member resulting from injury caused by the wrongful conduct of a third person. As such, they are more sweeping in scope than section 43 of the Alberta *DRA* with respect to the persons who are entitled to claim and the extent of the liability owed to these persons. In addition to these differences, section 61(3) expressly provides for an apportionment of damages by reason of the contributory negligence or fault of the injured or deceased spouse. section 61(4) imposes a special limitation period of two years, within which an action must be commenced.

Sections 61 to 63 of the Ontario *Family Law Act* stem from recommendations made by the Ontario Law Reform Commission in 1969 in its *Report on Family Law, Part I—Torts.* The recommendations were to place the law

---

[103](...continued)

has sustained any separate damage or injury thereby.

It would appear that this section deals with matters other than a husband's right to sue a third party for damages for loss of consortium under s. 43 of the *DRA*.

[104] *Supra*, p. 44.

[105] *Administration of Justice Act* (England), 1982, s. 2.

[106] *Family Law Act*, S.O. 1986, c. 4, which abolished the actions for criminal conversation, enticement, harbouring and seduction.

relating to non-fatal injuries on a similar basis to the law relating to fatal injuries provided for under the *Fatal Accidents Act*.

(5) Retention or Abolition?

Should Alberta continue to provide a statutory right of action for loss of consortium caused by the conduct of a third party who has injured the spouse of the claimant either intentionally or through negligence? Asked in another way, should section 43 of the *DRA* be retained or repealed? We will set out the arguments each way.

(a) Arguments for retention

The main argument for retention of the action for loss of consortium caused by injury to the spouse is based on the "relational interest" that spouses have in the security and comfort of the marriage.[107] Relational interests are "interests in relations with other persons."[108] They are "distinct interests." They extend "beyond the personality and are not symbolized by any tangible thing that can legitimately be called property." The argument is that injured relational interests have as much claim to compensation as injured property interests. They deserve a place alongside property interests. The interest in "marital consortium" is a relational interest that has value today. Injury to this relational interest should therefore be compensable.

Allowing recovery in damages for the loss of consortium caused by injury necessarily involves assessing non-pecuniary loss, but arriving at an appropriate amount should be no more difficult for courts than assessing general damages in other cases.[109]

It can be reasoned that it is not inconsistent to retain the action for loss of consortium through the tortious injury of a spouse while abolishing the actions for loss of consortium through adultery, enticement or harbouring.[110] In the actions based on adultery, enticement or harbouring, one spouse has failed in

---

107 Bailey, *supra*, note 93 at 530-31.

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

their responsibility to the marriage partner in that it is within the power of the partners to the marriage to protect it from the invasions of third parties. In the action based on tortious injury, prevention of the injury is outside the control of the injured person.

(b) Arguments for abolition

The strongest agrument against retention of the action for loss of consortium through the physical injury of a spouse is that the action is not accurately characterized as a matrimonial offence. The tortious conduct is not directed at the marriage. The action does not protect the marriage unless the existence of this head of liability can be said to curtail tortious conduct.

Problems are also associated with the award of large judgments in loss of consortium actions. In its judgment in the case of *Woelk* v. *Halverson*, the Alberta Court of Appeal identified four problems.[111] They are that:

(1) the courts are pricing the priceless;

(2) there is a potential in *every* injury case for the uninjured spouse to claim loss of consortium;

(3) compensation dollars are being given to the wrong party, possibly reducing what is left for the injured party; and

(4) the Act says that it is compensating for the "deprivation" of comfort and society which implies a total loss, rather than a reduction in the quality of the society.

On the appeal in this case, the Supreme Court of Canada rejected these objections, overturned the judgment of the Alberta Court of Appeal and restored the trial judgment.[112] It held that the Act must be taken seriously, that it has created a new statutory cause of action, and that trivial awards should not be given.

---

111 [1980] 1 W.W.R. 609 (Alta. C.A.), *per* Moir, J.A. In this case, the husband who had been injured in a motor vehicle accident was left physically intact, but mentally depressed. The trial judge held that in order to claim for a loss of consortium a partial reduction in the quality of the consortium sufficed, and that there need not be a total deprivation. The Court of Appeal reduced the trial judge's award to the wife for loss of consortium from $10,000 to $100.

112 *Woelk* v. *Halverson*, *supra*, note 96.

(c) Conclusion

We are of the opinion that the action for damages for loss of consortium through the tortious injury of a spouse by a third party should be removed from the *DRA* because of the inappopriate underlying premise for the action. We have decided that it would be premature to make any recommendation. More study is required, particularly of the Ontario reform, to answer the question whether a tortious remedy should be made available by some other means.

G. Enticement, Harbouring, Seduction or Tortious Injury of Child

(1) Description

Actions for the enticement, harbouring or tortious injury of a child parallel those for the enticement, harbouring or tortious injury of a spouse. The action for seduction is analogous to the action for criminal conversation or adultery in that both involve sexual intercourse. All four actions permit a parent to claim damages from a third party for loss of the services of a child.

(2) Origin

For more than three centuries, the common law of England recognized the right of a parent, as head of the household, to the services of a child.[113] Customarily, this right vested in the father of the child, but a mother could institute legal proceedings if she was a widow or the child was illegitimate.[114] Intentional interference by a third party with a parent's right to the services of a child could ground liability in enticement, harbouring or seduction.[115] Unintentional interference was also remediable in an action for damages for loss of services.[116] No corresponding rights of action were available to a child whose

---

113 Kutner, *supra*, note 88 at 311, citing *Winfield on Tort*, 8th ed., Sweet and Maxwell, 1967 at 528-29.

114 G.H.L. Fridman, *The Law of Torts in Canada*, Carswell, 1990, vol. 2, at 118; Kutner, *supra*, note 87 at 312.

115 Lewis N. Klar *et al.*, *Remedies in Tort*, Carswell, 1987, vol. 1, at 11-8, para. 4.

116 *Ibid.*

relationship with a parent had been undermined by the conduct of a third party whose conduct brought the marriage of the child's parents to an end.[117]

Like the right of action of a spouse, the right of action of a parent evolved from the common law right of a master to seek damages from a third party who interfered with a servant and thereby deprived the master of their services.[118] Although the action by a husband for damages for the loss of services of his wife broadened into recognition of a right to damages for loss of consortium,[119] actions for damages in relation to children remained anchored in the loss of the child's services.[120]

Actions for damages by a parent against a third party for the enticement of a child ensued where a third party wrongfully induced a child to leave home. Actions for harbouring had an origin and purpose similar to actions for enticement.[121] Liability for harbouring a child resulted from an unlawful detention of a child who had already left home.[122]

In addition to these two forms of action, a parent could claim damages against a third party who seduced a female child and thereby caused the parent to lose the benefit of her services.[123] Such loss of services would usually be established by proof of the child's pregnancy but damages, though theoretically for loss of services, were in reality compensation for loss of family honour.[124] The common law right of action for seduction was superseded in Alberta by a statutory right of action. Under the *Seduction Act*, proof of loss of services was no longer required.[125] In 1985, this statutory right of action in Alberta was

---

117 *Ibid.*, para. 5.

118 Kutner, *supra*, note 88 at 311.

119 *Best* v. *Samuel Fox and Co. Ltd.*, *supra*, note 83.

120 Fridman, *supra*, note 114 at 118-19.

121 *Ibid.* at 315.

122 *Ibid.*

123 Kutner, *supra*, note 88 at 317-23.

124 Fridman, *supra*, note 114 at 119.

125 *Seduction Act*, R.S.A. 1970, c. S-7, s. 2(1).

abolished in consequence of section 15 of the *Canadian Charter of Rights and Freedoms* which precludes discrimination between female and male children.[126]

In addition to actions for the enticement, harbouring or seduction of a child, a parent was entitled at common law to claim damages from a third party who injured a child by tortious conduct and thereby deprived the parent of the services of the child.[127]

(3) Alberta Law

Except for seduction, no statutory provision relating to the recovery of compensation by a parent for loss of the services of a child has existed in Alberta. The common law rights of action by a parent or master may therefore survive.

(4) Law Elsewhere

Most law reform commissions have recommended outright abolition of the actions for the loss of the services of a child because they are anachronistic, anomalous and dysfunctional.[128]

The actions for the enticement, harbouring or seduction of a child were abolished in England, the country of their birthplace, in 1970.[129] The Law Commission of Ireland, on the other hand, recommended that the action for enticement be reformulated and retained as a basis for providing compensation for emotional distress and disruption of the family relationship.[130] The Irish Law Reform Commission would free the action from the requirement of a service relationship between the parent and the child:

> It would be made a remedy for emotional distress and harm to family relationships rather than one for loss of services. Expenses and financial losses sustained as a result of enticement would also be recoverable. In

---

126 *Charter Omnibus Act*, S.A. 1985, c. 15, s. 40.

127 Klar, *supra*, note 115 at 11-8, para. 4.

128 Kutner, *supra*, note 88 at 312-15.

129 *Law Reform (Miscellaneous Provisions) Act (England)*, 1970, c. 33, ss 4 and 5.

130 Law Reform Commission of Ireland, Report No. 1, *supra*, note 91.

> assessing damages, the court would have regard to the extent, if any, to which the welfare of the child had been affected by the [third party interference].[131]

A few American states have reformulated the basis of liability in damages for loss of the services of a child through judicial law making.[132]

The right of a parent to sue for deprivation of the services of a child through tortious injury was abolished in England in 1982.[133] Like the action for loss of the services of a spouse, this action had evolved from a master's right of action for loss of the services of an employee. As stated in the discussion of loss of consortium through the tortious injury of a spouse, Ontario has broadened the approach and enacted legislation that allows recovery for the injury of a family member.[134]

(5) Retention or Abolition?

(a) Enticement

(i) Arguments for retention

Professor Peter B. Kutner asserts that:

> The only important compensatory functions that liability for enticement could serve in a modern society are to provide damages for loss of the non-material benefits to a parent of the parent-child relationship—the companionship, affection, comfort and joy a child provides—and for the emotional distress and embarrassment caused by the defendant's conduct and its consequences.[135]

---

131 Kutner, *supra*, note 88 at 312-15.

132 Susan Ellison, "Parent and Child—Loss of Consortium—Negligent Entrustment—Tort Law: North Dakota Allows Recovery for Loss of Filial Consortium and Extends Doctrine of Negligent Entrustment to Include Gun Retailer" (1989), 65 *No. Dakota L. Rev.* 219 at 232-33.

133 *Administration of Justice Act* (England), 1982, s. 2.

134 *Family Law Act*, S.O. 1986, discussed *supra*, p. 49.

135 Kutner, *supra*, note 87 at 312-15.

He goes on to point out that "it is not clear that the enticement action actually affords recovery of such damages," and "they could not in any event be recovered when the loss of service requirement is not satisfied." Enticement liability may be a deterrent when a claim for damages is threatened during the course of an intra-family dispute over custody of the child.[136]

(ii) Arguments for abolition

Professor Kutner makes several arguments for the abolition of the action for damages for the enticement of a child. He says:[137]

> (1) The action for damages for the enticement of a child is obscure, rooted in the past and rarely litigated. It no longer reflects the child's place in the contemporary family.
>
> (2) There is no evidence that the action has the effect of deterring interference with the relationship between a child and its family. Its survival would not prevent children from being attracted away from their families by a personal relationship, religious establishment, commune or employment that is not in the child's best interests. Neither would it accomplish the return of children to their families. The remedies available in custody, guardianship or wardship proceedings and applications for *habeas corpus*—an order to produce the child—are more effective for these purposes:
>
> > These proceedings are intended to establish and give effect to a parent's right to custody rather than to compensate for violation of a right to custody. However, a right of enforcement by order may be considered adequate and preferable to a remedy in damages.
>
> (3) An enticement action may disserve the child's interests by further alienating the child from its family.
>
> (4) There is no need to have an enticement action available as a weapon to be used by custody disputants. Other mechanisms for the enforcement

---

136 *Ibid.*

137 *Ibid.*

of custody rights and the protection of children are available to parents and the courts. Parents should not be encouraged by the prospect of a monetary award and the absence of consideration of the child's interests and desires to bypass these mechanisms and instead commence an enticement action.

(5) Granting a parent money as solace for distress or loss of the child's society is unjustified, even though the companionship of a child—even one whose relationship with the parent is not so strong as to resist persuasion to leave the parent—is of considerable value and even though that enticement can cause a parent much distress.

(6) There is no economic interest that requires a parent to be compensated today. In this day and age, the costs of raising children far exceed the value of their economic contributions to the family. The value of children no longer lies in their historic contribution to the economic welfare of the family; it lies in the emotional and psychological needs that they fulfill as family members.

(7) There is even less justification for the "family action" proposed by the Irish Law Reform Commission, which would enable all members of the family, including the enticed child, to claim damages and thus involve them all in the dispute.

We are persuaded by the arguments for abolition of the action for the enticement of a child.

(b) Harbouring

We can see no justification for differentiating between the legal consequences of harbouring and enticement. These two actions have a similar origin and purpose, and the arguments in favour of retaining, reformulating or abolishing them are similar.

(c) Seduction

As already stated, actions for the seduction of a child were abolished in Alberta in 1973. We do not recommend their resurrection.

(d) Tortious injury of child

The common law rights of action by a parent or master against a third party who injured a child by tortious conduct may survive at common law in the province of Alberta. As in the case of recovery for the tortious injury of a spouse,[138] we now think that the issue of recovery for the tortious injury of a child requires further study.

(6) Recommendation

In our opinion, the actions by parents against third parties for the enticement, harbouring or seduction of a child should not be sustainable under Alberta law. To remove any doubt that the actions may be brought, we recommend that they be legislatively abolished. As in the case of recovery for the tortious injury of a spouse, we think that the issue of recovery for the tortious injury of a child requires further study.

RECOMMENDATION 7:

We recommend that legislation be enacted to abolish the common law actions by a parent for loss of the services of a child due to enticement, harbouring or seduction.

H. Engagements; Breach of Promise of Marriage

(1) Description

An engagement or exchange of promises to marry is an obligation enforceable at common law by an action for damages. Actions for breach of promise of marriage are subject to the general principles of the law of

---

[138] See *supra*, p. 52.

contract.[139] Damages are recoverable both for pecuniary losses and for injury to the wounded feelings of the aggrieved party.[140]

(2) Alberta Law

Both the *DRA* and the *Marriage Act*[141] of Alberta are silent on the subject of such contractual liability. Therefore, the common law applies. Actions for breach of promise of marriage are rare, although one succeeded in Alberta in 1992.[142]

(3) Law Elsewhere

Many of the jurisdictions that have abolished actions for damages in tort for interference with family relationships have also abolished actions for damages in contract based on breach of promise of marriage. Both the Ontario Law Reform Commission[143] and the Law Commission (England) have recommended the abolition of actions for breach of promise of marriage. Actions for breach of promise of marriage have been abolished in England,[144] Scotland,[145]

---

139 Ontario Law Reform Commission, *Report on Family Law, Part II—Marriage*, 1970, at 7-16; Gushue and Day, *supra*, note 7 at 11-18 and 44.

140 P.M. Bromley, *Family Law*, 3rd ed., Butterworths, 1966, at 23; Gushue and Day, *supra*, note 7 at 15.

141 R.S.A. 1980, c. M-6.

142 *Keat* v. *Ciezki*, decided by Foster, J., Alta. Q.B., Action No. 9004-15865 (March 27, 1992).

143 Ontario Law Reform Commission, *Report on Family Law, Part II—Marriage*, *supra*, note 139 at 16.

144 *Law Reform (Miscellaneous Provisions) Act* (England), 1970, s. 1(1).

145 *Law Reform (Husband and Wife) (Scotland) Act*, 1984, c. 15, s. 1.

Australia,[146] New Zealand[147] and in several American states[148] and Canadian provinces, including British Columbia, Manitoba and Ontario.[149]

(4) Retention or Abolition?

The action for damages for breach of promise of marriage is generally regarded as an anachronism that does not reflect contemporary social standards.[150] It is not in the public interest to induce marriage by the threat of legal sanctions.[151] In fact, in contemporary society, many people might be inclined to view engagements as providing an opportunity for the couple to test their relationship before making a lifelong commitment. In the words of one commentator:

> The professional sociologists tell us that the breaching of an engagement is thoroughly justified by the discovery that the parties to it are ill-suited and that even when there is persistent uncertainty in the mind of either the man or the woman about the ultimate success of the marriage, the engagement should be broken in order that each may be free to remain single or enter a more promising union.[152]

In our view, no useful purpose is served by retaining the action for breach of promise of marriage. We therefore recommend that the action for breach of promise of marriage should be abolished by express statutory provision.

---

146 *Marriage Amendment Act* (Australia), 1976, s. 21.

147 *Domestic Relations Act* (New Zealand), 1975, s. 5(1).

148 Harry D. Krause, *Family Law: Cases and Materials*, West Publishing Co., 1976, at 116-18.

149 *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75(2)(c), as am. by *Family Law Reform Amendments Act*, S.B.C. 1985, c. 72, s. 36; *Marriage Act*, R.S.O. 1980, c. 256, s. 32; *Equality of Status Act*, R.S.M. 1987, c. E130, s. 4.

150 Ontario Law Reform Commission, *Report on Family Law, Part II—Marriage*, *supra*, note 139 at 12, para. 4.

151 Law Commission (England), Law Com. No. 26, *Breach of Promise of Marriage*, 1969, para. 17; Scottish Law Commission, Scot. Law Com. No. 76, *supra*, note 27, paras. 2.4 to 2.7.

152 W.J. Brockelbank, "The Nature of the Promise to Marry—A Study in Comparative Law" (1946-47), 41 Ill. L. Rev. 1, 199.

RECOMMENDATION 8:

We recommend that the action for breach of promise of marriage be abolished by express statutory provision.

I. Property Disputes on Termination of Engagement

The statutory abolition of actions for breach of promise of marriage will not affect recourse to the remedies that are legally available to resolve property disputes arising on the termination of an engagement. These remedies are discussed in this section.

(1) Description

Gifts between engaged persons made in contemplation of their marriage to each other are subject to forfeiture at common law by the party who refused to honour the engagement. The principles, as they apply to an engagement ring, were defined in *Cohen* v. *Sellar*,[153] which held that:

> If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So on the other hand, I think that if the man, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring.[154]

Different principles apply with respect to other property. For example, an engaged couple may acquire property for their future married life together, either from individual or joint efforts. If, in these circumstances, the engagement is subsequently broken off, either party may be entitled to invoke established legal doctrines, including resulting and constructive trusts, and pursue appropriate legal actions for restitution, quantum meruit or for detinue or conversion. The reason for terminating the engagement would be irrelevant to any such claims.[155]

---

153 [1926] 1 K.B. 536.

154 *Ibid.*, at 547.

155 P.M. Bromley, *Family Law*, 7th ed., Butterworths, 1987, at 20.

Gifts from third parties made in contemplation of marriage, such as wedding presents, are returnable to the donors in the event that the marriage fails to take place for any reason.[156]

(2) Origin

The principles governing the remedies legally available to resolve property disputes that may arise on the termination of an engagement originated in the common law.

(3) Alberta Law

The common law applies to the resolution of property disputes that arise on the termination of an engagement in Alberta.

(4) Law Elsewhere

(a) Gifts between engaged persons

Both England and Ontario have statutory provisions to govern the recovery of gifts made between engaged persons. In Ontario, the fault of the donor in terminating the engagement is excluded from consideration in determining the right of the donor to recover a gift made in contemplation of or conditional upon marriage. Section 33 of the Ontario *Marriage Act*,[157] says:

> Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.

The effect of section 33 is to throw the parties back on the usual law of gifts which may be conditional or unconditional. Section 33 is somewhat similar, but not identical, to section 3(1) of the *Law Reform (Miscellaneous Provisions) Act* (England) 1970 which "does not prevent" the donor from recovering the gift "by reason only of his having terminated the agreement." In both jurisdictions, it is

---

156 *Jeffreys* v. *Luck* (1922), 153 L.T.J. 139.

157 R.S.O. 1980, c. 256.

a question of fact whether a gift is conditional or made in contemplation of marriage.[158] Birthday presents, for example, would not be regarded as conditional gifts if the marriage fails to take place.

The Scottish Law Commission concluded that "the existing law on unjust enrichment provided adequate remedies" and "it would be unjustifiable and anomalous to enact a special set of rules for property disputes between formerly engaged couples."[159] In reaching this conclusion, the Scottish Commissioners identified the dearth of litigation respecting gifts between engaged couples as a factor indicating the absence of any significant problems in this context.

(b) Engagement ring

In England, the engagement ring is specifically dealt with by the statute. There, section 3(2) of the *Law Reform (Miscellaneous Provisions) Act*, 1970 raises a presumption that an engagement ring is an absolute gift. The presumption may be rebutted "by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason." Professor Peter Bromley has criticized the presumption for being the wrong way round:

> One would have thought that by current social convention an engagement ring was still regarded as a pledge and that the presumption ought to have been the other way. As it is, the ring is likely to be recoverable only in the most exceptional circumstances, for example if it can be shown that it was an heirloom in the man's family.[160]

The Scottish Law Commission concluded that "no special statutory rule on engagement rings was necessary" and therefore made no recommendation for legislation on this point.[161]

---

158 Bromley, *supra*, note 155 at 21.

159 Scottish Law Commission, Scot. Law Com. No. 76, *supra*, note 27, para. 214.

160 Bromley, *supra*, note 155 at 21.

161 Scottish Law Commission, Scot. Law Com. No. 76, *supra*, note 27, para. 2.15.

(5) Recommendation

We endorse the statutory approach taken in Ontario and recommend that the Alberta Legislature enact legislation to preclude consideration of the fault of the donor in determining whether the donor has the right to recover a gift made in contemplation of or conditional upon marriage to the donee. As in Ontario, the effect of our recommendation would be to make the ordinary law of gifts apply to gifts between engaged persons. Tjos recommendation includes engagement rings.

RECOMMENDATION 9:

We recommend that the following provision be enacted in Alberta:

Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.

CHAPTER 5 — JACTITATION OF MARRIAGE AND DECLARATIONS OF STATUS

A. Introduction

Actions for jactitation of marriage and for declarations of status in family matters establish marital or parental status.

B. Jactitation of Marriage

(1) Description

Jactitation of marriage signifies that a person falsely asserts that they are married to the person bringing the action. The purpose of a petition for jactitation of marriage is to prevent such unjustifiable assertions. If the petition is successful, the court will grant a declaration that the parties are not married and an injunction forbidding the respondent from claiming to be married to the petitioner. If a valid marriage is found to exist, the court will grant a declaration as to the validity of the marriage which, apparently, would be binding *in rem*.[162]

(2) Origin

The action for jactitation of marriage originated in England where, until 1857, the proceedings were instituted in the ecclesiastical courts. The marriage and divorce laws were secularized with the enactment of the *Matrimonial Causes Act* of 1857.

Before 1753, proceedings for jactitation of marriage were commonly used to resolve doubt whether a marriage had taken place.[163] In 1753, the English Parliament passed Lord Hardwicke's *Marriage Act*. That Act was designed to prevent clandestine marriages by imposing a legal requirement for a formal ceremony of marriage. According to the Law Commission of England:

> [Until] the Act of 1753 a suit for jactitation was the usual mode by which question as to the validity of a

---

162 Law Commission (England), Law Com. No. 132, *Family Law—Declarations In Family Matters*, February 22, 1984, para. 4.2.

163 *Ibid.*, para. 4.3.

> marriage was determined. With the requirement of a formal ceremony in order to constitute a marriage, proof of such ceremony was all that was needed to establish a marriage and the necessity for frequent resort to the court for this purpose disappeared.[164]

By 1820, jactitation of marriage was already "a proceeding not now very familiar" to the court in England.[165]

Actions for jactitation of marriage are extremely rare today. In Canada, "[t]here does not appear to be any reported instance of the bringing of this action".[166] In England, the petitions "presented in recent years have been prompted by the desire to get a declaration as to the validity of a divorce decree obtained in another country rather than by the need to restrain the defendant from actively claiming a false relationship."[167] The last known case in England occurred in 1977.

(3) Alberta Law

In Alberta, the action for jactitation of marriage is expressly preserved by section 44 of the *DRA*.

(4) Law Elsewhere

Jactitation of marriage survived as a cause of action in England until 1986, when it was statutorily abolished[168] pursuant to the recommendation of the Law Commission.[169] The right of action also has been abolished in Australia and

---

164 *Ibid.*

165 *Ibid.*, para. 4.5, citing Lord Stowell.

166 Davies, *supra*, note 23 at 83.

167 *Ibid.*

168 *Family Law Act* (England), 1986, s. 61.

169 Law Commission (England), Law Com. No. 132, *supra*, note 162, paras. 4.6 to 4.11.

New Zealand[170] and in Canada in the provinces of British Columbia,[171] in 1979, and Manitoba,[172] in 1987 on the recommendation of the Manitoba Law Reform Commission.[173] Courts in Ontario lack jurisdiction to entertain such proceedings.[174] The Scottish Law Commission has recommended abolition.[175]

(5) Retention or Abolition?

(a) Arguments for retention

The English Law Commission concluded that "the only remaining purpose of a jactitation suit is to restrain a party from repeating an embarrassing falsehood about the existence of a marriage."[176] Even for this purpose the remedy is limited in that "it can be used only by one party to the alleged marriage against the other" and "it cannot be used to restrain a third party, for instance, a newspaper, from repeating the false allegation."[177]

(b) Arguments for abolition

At least three reasons support the abolition of the action for jactitation of marriage in Alberta:

(1) Actions for jactitation of marriage, which are virtually unknown to Canadian jurisprudence, have clearly outlived their usefulness.[178]

---

170 *Ibid.*, para. 4.9.

171 *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75.

172 *Equality of Status Act*, R.S.M. 1987, c. E130, s. 3, as am. by *Family Law Amendment Act*, S.M. 1987-88, c. 21, s. 3.

173 Manitoba Law Reform Commission, *14th Annual Report*, 1985, at 7.

174 Davies, *supra*, note 23 at 83.

175 Scottish Law Commission, Discussion Paper No. 85, *supra*, note 59, paras. 4.3 and 4.4.

176 Law Commission (England), Law Com. No. 132, *supra*, note 162, paras. 4.6 to 4.11.

177 *Ibid.*

178 Davies, *supra*, note 23 at 83.

(2) The action is not needed to obtain a declaration as to the validity of marriage. Such relief is already available in Alberta pursuant to section 11 of the *Judicature Act*.[179]

(3) The false allegation of marriage may well be defamatory, for example, where the petitioner is married to someone else. If it is, a remedy is already available in defamation.[180]

(c) Retention with modification

The Law Commission raised, and then rejected, the idea that a more effective remedy should be created. The Commissioners could see "no valid reason why a false claim as to marriage should be treated differently from any other false claim."[181] As they pointed out:

> If a person makes a false claim, for instance, that he is someone's son or brother, or that the parties are engaged, such a claim does not of itself enable the person aggrieved to obtain an injunction, even though the allegation may be just as embarrassing as an allegation that the parties are married.[182]

We agree with their conclusion.

(6) Recommendation

We are persuaded by the arguments that support the abolition of the action for jactitation of marriage. We recommend that the action be abolished in Alberta and that section 44 of the *DRA* be repealed.

---

179 R.S.A. 1980, c. J-1.

180 Law Commission (England), Law Com. No. 132, *supra*, note 162, paras. 4.6 to 4.11.

181 *Ibid.*

182 *Ibid.*

RECOMMENDATION 10:

We recommend that the action for jactitation of marriage be abolished and that section 44 of the *DRA* be repealed.

C. Introduction to Declarations of Status

Although rights may be affected by it, the purpose of a declaratory judgment is not to confer legal rights or remedies on the parties but merely to affirm their existing rights without reference to enforcement.[183]

A judicial declaration of status provides "a convenient method" of determining a person's family status.[184] For example, a person may wish to know whether their marriage is valid, whether a foreign divorce, nullity or adoption judgment will be recognized in Alberta, or who their parents are.[185] Although these issues may arise incidentally in the course of proceedings, for example, in support or succession claims, it is far more advantageous for persons to be able to determine their status for all legal purposes, without awaiting the possibility of contested litigation at some future date.

D. Declarations of Marital Status

(1) Description

A declaration of marital status declares whether a person is or is not married to another person.

(2) Alberta Law

Section 11 of the *Judicature Act*,[186] regulates the exercise of jurisdiction by the courts in the province of Alberta over declarations of marital status where no

---

183 Cheshire and North on *Private International Law*, Butterworths, 1987, at 687.

184 Law Commission (England), Law Com. No. 132, *supra*, note 162, para. 1.2.

185 See discussion under heading "E. Declarations of Legitimacy or Parentage."

186 R.S.A. 1980, c. J-1.

consequential relief is sought. Section 11 is not confined to family matters. It provides:

> **11.** No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

(3) Law Elsewhere

The courts in England and in several provinces in Canada have exercised jurisdiction over declarations of marital status under similar legislative provisions.

(4) Conclusion

The jurisdiction of courts to grant some form of declaratory relief as a means of resolving doubt as to status without granting further relief is generally acknowledged to be useful.[187] We think that the Alberta law governing declarations of marital status is functioning satisfactorily and we make no recommendation for change.

E. Declarations of Legitimacy or Parentage

(1) Description

A declaration of legitimacy declares whether a person was born within or outside marriage. A declaration of parentage declares whether a person is the parent of a child.

(2) Origin

Statutory provisions for declarations of legitimacy were included in the *Legitimacy Declaration Act* (England), 1858.[188] This statute served only a limited

---

187 Law Commission (England), Law Com. No. 132, *supra*, note 162, para. 5.1.

188 21 & 22 Vict., c. 93.

purpose even in nineteenth century England. It is not certain that it applies in the western provinces.[189]

(3) Alberta Law

In 1991, Alberta added Part 8 (establishing parentage) to the *DRA*. Part 8 provides that an application may be made to the Court of Queen's Bench for a declaration to establish the parentage of a person whose parentage is in doubt. The provisions define eligible applicants, jurisdictional criteria, notice to third parties, and the effect and duration of a declaration of parentage. They are based on detailed recommendations that were formulated by this Institute in Report No. 60 on *Status of Children—Revised Report, 1991* (March 1991).[190]

Before Part 8 was enacted, a person who sought a declaration of parentage or legitimacy in Alberta presumably could invoke the jurisdiction of the Court of Queen's Bench under section 11 of the *Judicature Act*.

In Report No. 60, the Institute also recommended that all children should be treated equally[191] and that legal distinctions between legitimate and illegitimate children should be eliminated. This recommendation has not been enacted so it could still be necessary to call upon the power of the court to grant a declaration of legitimacy under section 11.

(4) Law Elsewhere

Many Canadian provinces now legislatively provide for declarations of parentage. The same jurisdictions have abolished the legal status of illegitimacy.

---

189 Davies, *supra*, note 23 at 84.

190 Alberta Law Reform Institute, *Report No. 60* on *Status of Children: Revised Report, 1991* (March 1991).

191 This accords with s. 15 of the *Canadian Charter of Rights and Freedoms*, which has spawned several provincial statutes that abolish distinctions between legitimacy and illegitimacy.

(5) Conclusion

We think that the provisions in Part 8 of the *DRA* providing for declarations of parentage to be made in the Court of Queen's Bench are satisfactory and we make no further recommendation with respect to them. We will consider questions relating to the jurisdiction of the Provincial Court (Family Division) in family matters, including the determination of parentage, in Phase 3 of the project on child guardianship, custody and access.

F. A New Legislated Code?

As previously stated, section 11 of the *Judicature Act* is not confined to family law matters. A comprehensive analysis of section 11 and of the inherent and statutory jurisdiction of the Court of Queen's Bench of Alberta to grant declaratory orders falls beyond the scope of this project. It may be appropriate, however, to examine the desirability of enacting "a new legislative code" to regulate declaratory judgments in family matters, as has been done in England.[192]

(1) The "Legislated Code" in England

Order 15, rule 16 of the *English Rules of the Supreme Court, 1965* states:

> **16.** No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

In commenting on Order 15, rule 16, the Law Commission in England stated:

> The rule does no more than make clear that the rules of court do not prevent the exercise of a declaratory jurisdiction: it does not create any such jurisdiction or specify what declarations are available. One must look to the cases to discover the nature of the

---

192 *Family Law Act* (England), 1986, c. 55, ss 55-63, as am. by the *Family Law Reform Act* (England), 1987, c. 42, s. 22.

> jurisdiction and the declarations that a court can make.[193]

After summarizing the relevant case law, the Law Commission concluded that Order 15, rule 16 is deficient and recommended that "a new legislative code, based on consistent principles, should replace the existing hotchpotch of statutory and discretionary relief." This recommendation was accompanied by draft legislation designed to provide consistent and comprehensive principles to regulate "the declaratory relief available in matters of matrimonial status, legitimacy, legitimation and adoption".[194] Subject to relatively modest amendments, the draft legislation formulated by the Law Commission was incorporated in Part III of the *Family Law Act* (England), 1986, as amended by section 22 of the *Family Law Reform Act* (England), 1987.

Although it is no longer possible to invoke Order 15, rule 16 of the *Rules of the Supreme Court, 1965* for the purpose of obtaining a declaration of family status in England,[195] the rule itself has not been abolished. The reason for its retention lies in the fact that Order 15, rule 16 has always extended far beyond the realm of family law. It may be invoked for a variety of purposes in diverse fields of law.[196]

(2) Arguments for a Legislated Code

The same criticisms that were levelled against Order 15, rule 16 by the Law Commission in England may be levelled against section 11 of the *Judicature Act* in Alberta. They are:

> (1) Uncertainty exists as to the types of declaration that can be made. As is pointed out in one leading English text, "the main case for statutory reform [lies] not in the need to make fundamental changes but rather in the desirability of providing the clarity and certainty of legislation."[197]

---

193 Law Commission (England), Law Com. No. 132, *supra*, note 162, para. 2.6.

194 *Ibid.*, para. 213.

195 *Family Law Act* (England), 1986, s. 58(4).

196 Sir Jack I.H. Jacob, *The Supreme Court Practice, 1988*, Sweet & Maxwell, Vol. 1, Part 1, at 224-29.

197 Cheshire and North, *supra*, note 183 at 596.

(2) Section 11 of the *Judicature Act* lacks any safeguards other than the discretionary powers of the court.

(3) The jurisdictional criteria which circumscribe judicial competence under section 11 are not clear.

(3) Arguments Against a Legislated Code

Not everyone agrees that the principles governing declarations in family matters should be codified. There are strong reasons for a non-interventionist stance:

(1) Any attempt to provide a "legislated code" for declaratory judgments in family matters along the broad lines of that implemented in England has extra-territorial implications. In view of the division of legislative authority under sections 91 and 92 of the *Constitution Act, 1867*, any reform of substantive choice of law rules relating to marriage, divorce and the status of children would necessitate close co-operation between all provinces and the federal government. In addition, the extra-provincial and international implications of any decisions taken should not be ignored when matters of personal status are involved. Issues of private international law and inter-provincial or extra-territorial recognition might be more properly addressed through the Uniform Law Conference of Canada or the Hague Conference on Private International Law. It is noteworthy that the Hague Conference on Private International Law has produced a Convention on the Recognition of Divorces and Legal Separations[198] and a separate Convention on Celebration and Recognition of the Validity of Marriage.[199] In addition, the Uniform Law Conference

---

198 The *Convention on the Recognition of Divorces and Legal Separations*, 1970, was legislatively endorsed in England by the *Recognition of Divorces and Legal Separations Act* (England), 1971, since superseded by Part II of the *Family Law Act* (England), 1986. In Canada, the *Divorce Act 1985*, *supra*, note 8, s. 22, preserves the common law principles that have been superseded in England.

199 This Convention was "signed by only five states and ratified by none": Cheshire and North, *supra*, note 183 at 594-96.

of Canada has drafted a *Uniform Child Status Act*,[200] which includes specific sections dealing with declaratory judgments.[201] However, neither the Hague Conference on Private International Law nor the Uniform Law Conference of Canada has examined declaratory judgments in family law matters.

(2) Alberta already has principled legislation providing for declarations of parentage with respect to persons who come within the jurisdiction of Alberta law.[202]

(3) There is little hard evidence that the law goes wrong in practice, that serious injustice is caused—and it is difficult to justify the use of law reform and drafting resources where the need for reform is not clearly made out.[203]

(4) Statutory reform, or codification, might inhibit the flexible development of choice of law rules by the courts. In other words, reform of this area of private international law might be better left to the judges than to Parliament.[204]

(4) Conclusion

In our view, a new legislated code of consistent and comprehensive principles is not needed in Alberta to regulate the availability of declarations in matters of matrimonial status, paternity or legitimacy, and adoption. In short, we do not recommend the enactment of a new legislated code to regulate declaratory judgments in family matters.

---

200 Uniform Law Conference of Canada, *Uniform Child Status Act*, in *Consolidation of Uniform Acts*, Loose Leaf Edition, 1990 Supplement, at 5-1 to 5-8.

201 *Ibid.*, ss 5, 6, 7 and 8.

202 *DRA*, Part 8, enacted in 1991.

203 Cheshire and North, *supra*, note 183 at 596.

204 *Ibid.*

C.W. DALTON
A. FRUMAN
W.H. HURLBURT
D.P. JONES
J.C. LEVY
B.L. RAWLINS

J.L. FOSTER
A.D. HUNTER
H.J.L. IRWIN
F.A. LAUX
P.J.M. LOWN
A.C.L. SIMS

CHAIRMAN

DIRECTOR

March 1993

PART III — APPENDICES

APPENDIX 1

DOMESTIC RELATIONS ACT

CHAPTER D-37

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

[Definition]
1 In this Act, except in Part 7, "Court' means the Court of Queen's Bench.

PART 1
RESTITUTION OF CONJUGAL RIGHTS

[Judgment for restitution of conjugal rights]
2 If one party to a marriage refuses to cohabit with the other party, the Court may, in its discretion, give a judgment for restitution of conjugal rights.

[Judgment not enforced by attachment]
3 No judgment for restitution of conjugal rights shall be enforced by attachment.

[Action for judicial separation]
4 If the defendant fails to comply with a judgment of the Court for restitution of conjugal rights, the defendant shall thereupon be deemed to have been guilty of desertion without reasonable cause, and an action for judicial separation may be forthwith instituted and a judgment of judicial separation may be pronounced although the period of 2 years mentioned in section 6 has not elapsed since the failure to comply with the judgment for restitution of conjugal rights.

PART 2
JUDICIAL SEPARATION

[Definition]
5 In this Part "matrimonial offence' means any of the offences mentioned in section 6.

[Grounds for judgment or judicial separation]
6(1) A judgment of judicial separation may be obtained from the Court by either spouse if the other spouse has since the celebration of marriage been guilty of

(a) adultery,

(b) cruelty,

(c) desertion

(i) for 2 years or upwards without reasonable cause, or

(ii) constituted by the fact of the other spouse having failed to comply with a judgment for restitution of conjugal rights,

or

(d) sodomy or bestiality, or an attempt to commit either of those offences.

(2) In this Act "cruelty" is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes any course of conduct that in the opinion of the Court is grossly insulting and intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after the other has been guilty of that conduct.

[Jurisdiction of Court to hear actions]
7 The Court has jurisdiction to hear an action for judicial separation or restitution of conjugal rights, or an application for alimony, when both the parties to the action

(a) are domiciled in Alberta at the time of the commencement of the action,

(b) had a matrimonial home in Alberta when their cohabitation ceased, or when the events occurred on which the claim for separation is based, or

(c) are resident in Alberta at the time of the commencement of the action.

[Where judgment of judicial separation not granted]
8 No judgment of judicial separation shall be granted when it is made to appear at the hearing of the case that the plaintiff has

(a) in any case where judicial separation is sought on the ground of adultery, been accessory to or connived at the adultery of the other party,

(b) condoned the matrimonial offence complained of,

(c) presented or prosecuted the claim in collusion with the respondent, or

(d) during the existence of the marriage committed adultery that has not been condoned.

[Conduct conducing to adultery]

9 A judgment of judicial separation may be refused when the claim has been presented on the grounds of adultery and it is made to appear at the hearing that the plaintiff has been guilty of conduct conducing to the adultery.

[Effect of judgment of judicial separation]

10 After a judgment of judicial separation has been granted

(a) neither spouse is under any duty of cohabitation, and

(b) the wife shall, during the continuance of the separation, be considered as a femme sole for the purposes of contracts and wrongs and injuries and suing and being sued in a civil proceeding, and for all other purposes, and shall be reckoned as sui juris and as an independent person for all purposes, including the acquisition of a new domicile distinct from that of her husband.

[Property after judicial separation]

11 If, after a judgment of judicial separation, a spouse dies intestate during the continuance of the separation, the property of the person so dying devolves as though that person had been predeceased by the survivor.

[Liability for spouse's actions]

12 After a judgment of judicial separation and during the continuance of the separation, a spouse is not liable in respect of any engagement or contract the other spouse has entered or enters into, or for a wrongful act or omission by, or for any costs the other spouse incurs in any action.

[Damages arising from adultery]

13 A married person, either by an action for judicial separation or by an action limited to the recovery of damages only, may recover damages from a person who has committed adultery with the married person's spouse, and the Court may direct in what manner the damages may be paid and applied, and may direct that the whole or a part thereof shall be settled for the benefit of the children, if any, of the marriage, or as provision for the maintenance of that spouse.

[Dismissal of action for damages]

14(1) The Court shall dismiss an action under section 13 if it finds that

(a) the plaintiff during the marriage has been accessory to or has connived at the adultery complained of,

(b) the plaintiff has condoned the adultery complained of, or

(c) the action has been presented or prosecuted in collusion with the plaintiff's spouse.

(2) The Court may dismiss an action under section 13 if it finds that the plaintiff has been guilty of

(a) adultery during the marriage,

(b) unreasonable delay in presenting or prosecuting the action,

(c) cruelty toward the plaintiff's spouse,

(d) desertion or wilful separation from the plaintiff's spouse before the adultery complained of, or

(e) wilful neglect or misconduct that has conduced to the adultery.

PART 3
ALIMONY AND MAINTENANCE

[Alimony]
15 The Court has jurisdiction to grant alimony to either spouse in an action limited to that object only in a case where the plaintiff would be entitled to a judgment of judicial separation or a judgment for restitution of conjugal rights.

[Interim order for alimony]
16(1) When an application is made in an action for

(a) alimony,

(b) dissolution of marriage, or

(c) a declaration of nullity, judicial separation or restitution of conjugal rights,

an interim order for the payment of alimony to the plaintiff pendente lite may be made, and in the event of an appeal the alimony may be continued by a further interim order until the determination thereof.

(2) No interim order shall be made if the plaintiff has from any source whatsoever sufficient means of support independent of the defendant.

(3) The interim order may direct the payment of periodical sums of money, and the amount of the alimony directed is in the discretion of the Court.

(4) When an application is made in an action referred to in subsection (1), the Court may order from time to time the payment by the defendant of any sums the Court considers reasonable and proper on account of the necessary

disbursements of the plaintiff of and incidental to the action, at the time, in the manner and to the persons the Court considers proper.

[Alimony after judicial separation]

17(1) When a judgment for judicial separation has been given, the Court may in an action for alimony order that the defendant pay to the plaintiff until further order, or during their joint lives or during a shorter period, a periodical sum as alimony.

(2) When a decree for restitution of conjugal rights has been granted, the Court may make a similar order, to take effect in the event of the decree not being complied with.

[Liability for necessaries]

18 When an interim or other order for alimony is subsisting and the payment of alimony is not in arrears under that order the defendant is not liable for necessaries supplied to the plaintiff.

[Injunction re disposal of property]

19 When an application for alimony is made, the Court may either before or after judgment, grant an injunction for a time and on any terms that are just to prevent any apprehended disposition by the defendant of the defendant's real or personal property.

[Registration of order for alimony, etc.]

20 An order or judgment for alimony, whether interim or otherwise, may be registered in any land titles office, and the registration so long as the order or judgment remains in force,

> (a) binds the estate and interest of every description that the defendant has in any land in the land registration district where the registration is made, and
>
> (b) operates thereon in the same manner and with the same effect as a registration of a charge by the defendant of a life annuity on the defendant's land.

[Settlement of property]

21 When a married person has obtained a judgment of judicial separation or a decree of divorce for adultery of that person's spouse, the Court may order a settlement that it thinks reasonable of any property to which that spouse is entitled in possession or reversion for the benefit of the innocent party and of the children of the marriage, or either or any of them.

[Payments after divorce or nullity]

22(1) When a decree of divorce or declaration of nullity of marriage has been obtained, the Court may order that either party, to the satisfaction of the Court, secure to the other party an annual sum of money for any term not exceeding the lifetime of the other party that 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.

(2) If it thinks fit, the Court may in addition to or in the alternative order that one of the parties pay to the other during their joint lives a monthly or weekly sum for the other party's maintenance and support, that the Court thinks reasonable.

(3) On a decree of divorce, an order may be made in favour of either party, notwithstanding that the party has been guilty of adultery.

[Disposition of property]
23 When a decree absolute of divorce or declaration of nullity of marriage is given, the Court may make any order that to the Court seems fit with regard to the property comprised in an ante-nuptial or post-nuptial settlement made on the parties to the marriage and with regard to the application of the property either for the benefit of the children of the marriage or of the parties to the marriage or both.

[Restitution of conjugal rights]
24 When a judgment for restitution of conjugal rights is given, and the defendant is entitled to property, or is in receipt of any profits of trade or earnings, the Court may order

(a) that a settlement be made of the property for the benefit of the plaintiff and the children of the marriage or any of them, or

(b) that part of the profit of trade or earnings be periodically paid to the plaintiff for the plaintiff's own benefit, or to the plaintiff or another person for the benefit of the children of the marriage or either or any of them.

[Variation of order for alimony or maintenance]
25 In a case in which an order has been made for the payment of alimony, or for the payment of maintenance in an action for alimony, divorce, judicial separation, a declaration of nullity or restitution of conjugal rights, on it being made to appear

(a) that the means of either spouse have increased or decreased, or

(b) that either spouse has been guilty of misconduct or, being divorced, has married again,

the Court may from time to time vary or modify the order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the money so ordered to be paid and may again revive the order wholly or in part, as the Court thinks fit.

. . .

PART 5
LOSS OF CONSORTIUM

[Inducing spouse to leave]

40 A person who, without lawful excuse, knowingly and wilfully persuades or procures a married person to leave that married person's spouse against the will of that married person, whereby the married person is deprived of the society and comfort of that spouse, is liable to an action for damages by that married person.

[Harbouring of spouse]

41 A married person also has a right of action for damages against a person who, without lawful excuse, knowingly receives, harbours and detains the spouse of the married person against the will of the married person.

[When harbouring not actionable]

42 No action lies under section 41 if

(a) the plaintiff and the plaintiff's spouse were living apart by agreement, or were judicially separated, when the act of the defendant took place,

(b) the plaintiff has been guilty of cruelty to his or her spouse, and the defendant harbours the plaintiff's spouse from motives of humanity, or

(c) the defendant has reasonable grounds for supposing that the plaintiff has been guilty of cruelty to his or her spouse, and harbours the spouse from motives of humanity.

[Loss of consortium through injury]

43(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable to an action for damages by the married person in respect of the deprivation.

(2) The right of a married person to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the spouse has, or any action that the married person in the name of the spouse has, for injury inflicted on the spouse.

PART 6
JACTITATION OF MARRIAGE

[Action of jactitation of marriage]

44(1) If a person persistently and falsely alleges that he is married to another person, that other person in an action of jactitation of marriage may obtain a judgment forbidding the making of the allegations.

(2) No such judgment shall be granted in favour of a person who has at any time acquiesced in the making of the allegations.

. . .

APPENDIX 2

REFERENCES

Law Reform Publications

International

Hague Conference on Private International Law, *Convention on the Recognition of Divorces and Legal Separations*, 1970.

Hague Conference on Private International Law, *Convention on Celebration and Recognition of the Validity of Marriage*, 1970.

Australia

South Australia, Law Reform Committee, Report No. 11, *Law Relating to Women and Women's Rights*, 1970 (recommended abolition of actions for enticement and harbouring but retention of action for seduction).

Canada

Federal

The Law Reform Commission of Canada, *The Distribution of Legislative Authority in Family Law* by Leslie Katz, Family Law Project, December, 1972.

Uniform Law Conference of Canada, *Uniform Child Status Act*, in *Consolidation of Uniform Acts*, Loose Leaf Edition, 1990 Supplement (as approved in 1980 Proceedings).

_____, *Uniform Effect of Adoption Act*, in *Consolidation of Uniform Acts*, Loose Leaf Edition, 1990 Supplement (as approved in 1969 Proceedings).

Alberta

Alberta Law Reform Institute, Report No. 29, *Family Relief*, June, 1978.

_____, Report No. 33, *Inter-Spousal Tort Immunity*, April 1979.

_____, Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, June 1989.

_____, Report No. 60, *Status of Children: Revised Report, 1991*, March 1991.

British Columbia

Law Reform Commission of British Columbia, Report No. 68, *Intentional Interference with Domestic Relations*, 1983.

Eighth Report of the Royal Commission on Family and Children's Law, *Preparation For Marriage*, Vancouver, British Columbia, September 1975.

Manitoba

Manitoba, Law Reform Commission, Report No. 9C, *The Seduction Act*, 1979.

Newfoundland

Raymond Gushue and David Day, *Family Law* in Newfoundland, Carswell, 1973 (study containing twenty specific recommendations for implementation of an appropriate education program for family living, marriage and family counselling and marriage reconciliation).

Ontario

Ontario Law Reform Commission, Study Prepared by the Family Law Project, Volume XI, *Separation and Divorce, Support Obligations, Part I*, 1969.

_____, *Report on Family Law, Part I—Torts*, 1969.

_____, *Report on Family Law, Part II—Marriage*, 1970.

Saskatchewan

Law Reform Commission of Saskatchewan, *Proposals on Custody, Parental Guardianship, and the Civil Rights of Minors*, December 1981 (recommended abolition of actions for enticement and seduction of child).

_____, *Proposals for an Equality of Status of Married Persons Act*, May, 1982.

England

Report of the Royal Commission on Divorce and Matrimonial Causes (England), 1909-1912, Cmd. 6478 (1912), chaired by Lord Gorell.

Report of the Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), chaired by Lord Morton of Henryton.

Law Commission (England), Working Paper No. 22, *Family Law—Restitution of Conjugal Rights*, February 17, 1969.

_____, Law Com. No. 23, *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights*, July 24, 1969.

_____, Law Com. No. 25, *Family Law: Report on Financial Provision in Matrimonial Proceedings*, 1969 (recommended abolition of actions for damages for adultery, enticement, harbouring and seduction).

_____, Law Com. No. 26, *Breach of Promise of Marriage*, 1969.

_____, Law Com. No. 132, *Family Law—Declarations In Family Matters*, February 22, 1984.

_____, Working Paper No. 113, *Domestic Violence and Occupation of the Matrimonial Home*, 1989.

_____, Law Com. No. 192, *Family Law—The Ground for Divorce*, October 31, 1990.

Ireland

Law Reform Commission of Ireland, Working Paper No. 5, *The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse*, 1978.

_____, Working Paper No. 6, *The Law Relating to Seduction and the Enticement and Harbouring of a Child*, 1979; Report No. 1, *First Report on Family Law*, 1981 (recommended abolition of actions for harbouring of spouse and reformulation of liability for damages for adultery, enticement, harbouring and seduction of child).

New Zealand

Report of the Torts and General Law Reform Committee of New Zealand, Miscellaneous Actions, 1968 (recommended abolition of actions for damages for adultery, enticement of child, harbouring and seduction; action for enticement of spouse retained).

Scotland

Scottish Law Commission, Scot. Law Com. No. 42, *Family Law: Report on Liability for Adultery and Enticement of a Spouse*, 1976.

_____, Consultative Paper No. 54, *Some Obsolete and Discriminatory Rules in the Law of Husband and Wife*, March, 1982.

_____, Scot. Law Com. No. 76, *Family Law—Report on Outdated Rules in the Law of Husband and Wife*, May 11, 1983.

_____, Scot. Law Com. No. 116, *Report on Reform of the Ground for Divorce*, April 27, 1989.

_____, Scot. Law Com. No. 124, *Report on Succession*, 1990.

_____, Discussion Paper No. 85, *Family Law: Pre-Consolidation Reforms*, March 1990.

_____, Scot. Law Com. No. 125, *Report on Family Law*, January 27, 1992.

Statutes

Australia

Family Law Act (Australia), 1975, s. 120 (abolition of actions for damages against adulterers and for enticement of spouse).

Marriage Amendment Act (Australia), 1976.

Wrongs Act (South Australia), 1936, No. 2267, s. 35, as amended by *Statutes Amendment (Law of Property and Wrongs) Act*, 1972, No. 19, s. 13 (abolition of actions for enticement, harbouring and seduction).

Canada

Federal

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, enacted by the *Canada Act, 1982 (U.K.)*, c. 11.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

An Act to Amend the Divorce Act (Barriers to Religious Remarriage), S.C. 1990, c. 18.

Alberta

Attorney-General Statutes Amendment Act, 1973 (No. 2), S.A. 1973, c. 61 (now *Domestic Relations Act*, R.S.A., 1980, c. D-37, ss. 13-15 and 40-43).

Charter Omnibus Act, S.A. 1985, c. 15, s. 43 (abolition of action for seduction)

Domestic Relations Act, R.S.A. 1980, c. D-37.

Family Relief Act, R.S.A. 1980, c. F-2.

Fatal Accidents Act, R.S.A. 1980, c. F-5.

Gratuitous Passengers and Interspousal Tort Immunity Statutes Amendment Act, S.A. 1990, c. 22 (abolition of the former common law doctrine of inter-spousal tort immunity).

Judicature Act, R.S.A. 1980, c. J-1.

Married Women's Act, R.S.A. 1980, c. M-7, as am. by S.A. 1990, c. 22.

Matrimonial Property Act, R.S.A. 1980, c. M-9.

Seduction Act, R.S.A. 1980, c. S-7, repealed by *Charter Omnibus Act*, S.A. 1985, c. 15.

British Columbia

Family Relations Act, R.S.B.C. 1979, c. 121.

Law and Equity Act, S.B.C. 1988, c. 42.

Manitoba

Equality of Status Act, R.S.M. 1987, c. E130, as am. by *Family Law Amendment Act*, S.M. 1987-88, c. 21, s. 3 (abolition of actions by spouse or parent for damages for adultery, enticement, harbouring, loss of consortium or servitium, seduction and breach of promise of marriage).

Family Maintenance Act, S.M. 1978, c. 25.

Family Maintenance Act, R.S.M. 1987, c. F20, s. 3 (court-ordered investigation) and s. 12 (reconciliation).

New Brunswick

An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms, 1985, S.N.B. 1985, c. 41, s. 4 (abolition of actions by spouse or parent for damages for adultery, enticement, harbouring, loss of consortium or servitium and seduction)

Family Services Act, S.N.B. 1980, c. F-2.2, s. 131 (conciliation).

Newfoundland

Children's Law Act, S. Nfld. 1988, c. 61.

Family Law Act, S. Nfld. 1988, c. 60.

Northwest Territories

Child Welfare Act, R.O.N.W.T. 1974, c. C-3.

Domestic Relations Act, R.O.N.W.T. 1974, c. D-9, s. 13, as amended by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.N.W.T. 1985 (3rd), c. 10, s. 40 (abolition of action for damages against adulterer).

Judicature Act, R.O.N.W.T. 1974, c. J-1, s. 19.3, as enacted by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.N.W.T. 1985 (3rd), c. 10, s. 65 (abolition of action for seduction).

Ontario

Children's Law Reform Act, R.S.O. 1980, c. 68, as amended by S.O. 1982, c. 20, s. 31 (mediation).

Family Law Reform Act, S.O. 1978, c. 2, s. 69 (abolition of actions by spouse or parent for damages for adultery, enticement, harbouring, loss of consortium or servitium and seduction).

Family Law Act, S.O. 1986, c. 4.

Marriage Act, R.S.O. 1980, c. 256.

Prince Edward Island

Child Status Act, R.S.P.E.I. 1988, c. C-6.

Quebec

Québec Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 815.2 and 815.3 (reconciliation and conciliation); arts. 822 to 822.5.

Saskatchewan

Equality of Status of Married Persons Act, S.S. 1984-85-86, c. E-10.3, s. 6 (abolition of actions for damages for adultery, enticement, harbouring and loss of consortium of spouse).

Children's Law Act, S.S. 1990, c. C-8.1, ss. 10 and 11 (mediation).

Family Maintenance Act, S.S. 1990, c. F-6.1, ss. 13 and 14 (mediation).

Yukon

Children's Act, R.S.Y. 1986, c. 22, s. 178 (abolition of actions for enticement, harbouring, seduction and loss of services of children).

England

Administration of Justice Act (England), 1982, c. 53, s. 2 (abolition of actions for loss of services by husband, father or employer).

Divorce and Matrimonial Causes Act (England), 1857, 20 & 21 Vict., c. 85.

Family Law Act (England), 1986.

Family Law Reform Act (England), 1987, c. 42, and especially s. 22, amending *Family Law Act*, 1986, c. 55, s. 56.

Law Reform (Miscellaneous Provisions) Act (England), 1970, c. 33, ss. 4 and 5 (abolition of action for damages for adultery, enticement or harbouring of a spouse and of a parent's action for enticement, harbouring or seduction of a child).

Matrimonial Causes Act (England), 1973 (since repealed).

Matrimonial Proceedings and Property Act, 1970 (England), 1970, c. 45, s. 20.

Recognition of Divorces and Legal Separations Act (England), 1971 (since superseded by Part II of the *Family Law Act* (England), 1986).

Ireland

Family Law Act (Ireland) 1981, No. 22.

New Zealand

Domestic Relations Act (New Zealand), 1975.

Domestic Protection Act (New Zealand), 1982.

Family Proceedings Act (New Zealand), 1980, No. 94, s. 22; s. 190 (abolition of actions for damages for adultery, enticement, harbouring and seduction).

Scotland

Divorce (Scotland) Act, 1976, c. 39, s. 2.10 (abolition of actions for damages against adulterers).

Law Reform (Husband and Wife) (Scotland) Act, 1984, c. 15, s. 2(2) (abolition of action for enticement of spouse).

Cases

A.G. Can. v. *Lavery* (1991), 52 B.C.L.R. (2d) 273 (B.C.C.A.).

A.G. Can v. *Szaniszlo* (1985), 69 B.C.L.R. 96, 16 C.C.L.T. 83, 25 D.L.R. (4th) 606 (S.C.), *per* McEachern C.J.S.C.

Best v. *Samuel Fox and Co. Ltd.*, [1951] 2 All E.R. 116 at 124-26, aff'd [1952] A.C. 716 (H.L.).

Bradesku v. *Antion* (1969), 255 N.E. 2d 265 (Ohio).

Brizard v. *Heynen* (1914), 27 W.L.R. 308 (Eng. C.A.).

Cohen v. *Sellar* [1926] 1 K.B. 536.

Davenport v. *Miller* (1990), 70 D.L.R. (4th) 181 (N.S.S.C.).

Endridge v. *Copp* (1966), 57 D.L.R. (2d) 239 (B.C.).

Frame v. *Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225.

Fumerton v. *Fumerton*, (1970) 12 D.L.R. (3d) 504 (B.C.S.C.).

Gottlieb v. *Gleiser*, [1957] 3 All E.R. 715.

Hadden v. *Hadden* (1887), 18 Q.B.D. 778.

Holmes v. *Holmes* [1923] 1 D.L.R. 294, at 300 (Sask. C.A.).

Jeffreys v. *Luck* (1922), 153 L.T.J. 139.

Kungl v. *Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278, varying [1961] O.R. 1, 25 D.L.R. (2d) 344.

M.M. v. *K.K.* (1989), 38 B.C.L.R. (2d) 273 (B.C.C.A.).

Montreal Tramways v. *McGuire*, [1954] 1 D.L.R. 583 at 586 (S.C.C.).

Nanda v. *Nanda* [1968] P. 315, [1968] 2 W.L.R. 404, [1967] 3 All E.R. 401.

Power v. *Moss* (1986), 38 C.C.L.T. 31, 61 Nfld. & P.E.I.R. 5, 185 A.P.R. 5 (Nfld. S.C.).

Reference re Section 6 of the Family Relations Act, [1982] 1 S.C.R. 62, [1982] 3 W.W.R. 1, 36 B.C.L.R. 1, 26 R.F.L. (2d) 113, 131 D.L.R. (3d) 257.

R. v. *Buchinsky* [1983] 1 S.C.R. 481.

R. v. *Turpin* (1989), 48 Can. Crim. Cas. (3d) 8.

Shkwarchuk v. *Hansen* (1984), 30 C.C.L.T. 121, 34 Sask. R. 211.

Smith v. *Kaye* (1904), 20 T.L.R. 261.

Szarfer v. *Chodos* (1988), 66 O.R. (2d) 350, 54 D.L.R. (4th) 383 (Ont. C.A.), aff'g (1985), 54 O.R. (2d) 663, 27 D.L.R. (4th) 388.

Vamvakidis v. *Kirkoff* [1930] 2 D.L.R. 877 (Ont. C.A.).

Webb v. *Bulloch* (1971), 13 O.W.N. 343.

Wens v. *Wens* [1939] 3 W.W.R. 606, at 610 (Man.).

Whittaker v. *Sanders* (1975), 21 R.F.L. 398 (Ont. S.C.).

Winchester v. *Fleming*, [1957] 3 All E.R. 711, at 714 (per Devlin, J.), reversed on other grounds [1958] 3 All E.R. 51n (Eng. C.A.).

Winchester v. *Fleming*, [1958] 1 Q.B. 259.

Woelk v. *Halvorson*, [1980] 2 S.C.R. 430.

Books and Periodicals

E.R. Alexander, *The Family and the Law of Torts*, Butterworths, Toronto, 1979.

Cecilia T. Allen, "Interference with Visitation as an Independent Tort" (1985-86), 24 J. Fam. Law 481.

Stella J. Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta" (1979), 17 Alta. L. Rev. 513.

Alastair Bissett-Johnson and Winnifred H. Holland, eds., *Matrimonial Property Law in Canada*, Burroughs & Co., subheading "Alberta" by Peter J. Lown.

W.J. Brockelbank, "The Nature of the Promise to Marry—A Study in Comparative Law" (1946-47), 41 Ill. L. Rev. 1.

P.M. Bromley, *Family Law*, 3rd ed., Butterworths, 1966.

P.M. Bromley, *Family Law*, 7th ed., Butterworths, 1987.

Richard A. Campbell, "Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnapping", [1983] U. Ill. L. Rev. 229.

C.C.H., *Canadian Family Law Guide*, paras. 7005-7615.

C.C.H. *Canadian Family Law Guide*, Vol. 1.

Cheshire and North on Private International Law, Butterworths, 1987.

Clerk and Lindsell on Torts, Sweet and Maxwell, 1989.

Christine Davies, *Family Law in Canada*, Carswell, 1984.

Susan Ellison, "Parent and Child—Loss of Consortium—Negligent Entrustment—Tort Law: North Dakota Allows Recovery for Loss of Filial Consortium and Extends Doctrine of Negligent Entrustment to Include Gun Retailer" (1989), 65 No. Dakota L. Rev. 219.

Eversley's Law of Domestic Relations, 6th ed., Sweet and Maxwell, 1951.

Nathan P. Feinsinger, "Legislative Attack on Heart Balm" (1935), 33 Mich. L. Rev. 979 at 986.

John G. Fleming, *The Law of Torts*, 6th ed., 1983, Sweet and Maxwell.

Jane C. Foushee, "Loss of Consortium and Unmarried Cohabitants: Arguments Before the Court" (1986-87), 25 J. Fam. Law 743.

G.H.L. Fridman, *The Law of Torts in Canada*, Carswell, 1990, Vol. 2.

Terry W. Hainsworth, *The Ontario Family Law Act Manual*, Canada Law Book, 1991.

Sir Jack I.H. Jacob, *The Supreme Court Practice, 1988*, Sweet & Maxwell, Vol. 1.

Leslie Katz, Family Law Project, The Law Reform Commission of Canada, *The Distribution of Legislative Authority in Family Law*, December, 1972.

Lewis N. Klar, Mr. Justice Allen M. Linden, Earl A. Cherniak and Peter W. Kryworuk, *Remedies in Tort*, Carswell, 1987, vol. 1.

Harry D. Krause, *Family Law: Cases and Materials*, West Publishing Co., 1976.

Peter B. Kutner, "Law Reform in Tort: Abolition of Liability for 'Intentional' Interference with Family Relationships" (1987) 6 Can. J. Fam. Law 287. (This article includes two valuable appendices listing law reform publications from Canada, England, Scotland, Ireland, Australia and New Zealand and identifying current legislation in these jurisdictions that abolishes tortious liability for "intentional" interference with family relationships.)

Latey on Divorce, 15th ed., Longman, 1973.

Nancy Wanderer Mackenzie, "Maine Refuses to Recognize a Cause of Action for Loss of Parental Consortium" (1989), 41 Maine Law Rev. 165.

Daniel M. Oyler, "Interspousal Tort Liability for Infliction of a Sexually Transmitted Disease" (1990-91) 29 J. Fam. L. 519.

Julien D. Payne, "Tortious Invasion of the Right of Marital Consortium" (1968), 8 J. Fam. Law 41.

Julien D. Payne, *An Analysis of the Domestic Relations Act*, Alberta Law Reform Institute, 1971.

M.A. Prabhu, *Draft Working Paper on the Domestic Relations Act*, Alberta Law Reform Institute, October 20, 1972.

W. Prosser and W. Keeton, *The Law of Torts*, 5th ed., 1984.

Rayden and Jackson on Divorce and Family Matters, 15th ed., Butterworths, 1988, Vol. 1.

Sandra Davidson Scott, "Abduction of Child by Noncustodial Parent: Damages for Mental Stress" (1981) 46 Mo. L. Rev. 829.

Andrew Schepard, "Divorce, Interspousal Torts, and Res Judicata" (1990), 24 Fam. L.Q. 127.

Sim and Inglis, *Family Court Code [Family Law and Practice in New Zealand]* (ed. B.D. Inglis), Butterworths, 1983.

Mary Louise Taylor, "Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching" (1983), 68 Iowa L. Rev. 495.

J. Dundas White, "Breach of Promise of Marriage" (1894), 10 L.Q.R. 135 at 141-42.

Winfield on Tort, 8th ed., Sweet and Maxwell, 1967 at 528-29, cited in Peter B. Kutner.

Barbara H. Young, "Interspousal Torts and Divorce: Problems, Policies, Procedures" (1988-89), 27 J. Fam. Law 489.

Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1990), 22 Ottawa L. Rev. 139.