INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

TOWARDS REFORM OF THE LAW RELATING TO COHABITATION OUTSIDE MARRIAGE

ISSUES PAPER NO. 2

October, 1987

INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. 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) 432-5291.

The members of the Institute's Board of Directors are J.W. Beames, Q.C. (Chairman); Professor R.G. Hammond (Director); Myra B. Bielby; C.W. Dalton; J.L. Foster; W.H. Hurlburt, Q.C.; H.J.L. Irwin; Professor J.C. Levy; Professor D.P. Jones; The Honourable Mr. Justice D. Blair Mason; Dr. J.P. Meekison; Bonnie Rawlins; A.C.L. Sims; and C.G. Watkins.

The Institute's legal staff consists of Professor R.G. Hammond, Director; R.W. Bauman; R. Bowes; B.R. Burrows; Professor P. Lown and M.A. Shone. W.H. Hurlburt, Q.C. is a consultant to the Institute.

PREFACE

and

INVITATION TO COMMENT

Adults who choose to live together in a heterosexual relationship of an intimate character may be married, or unmarried. If married the conduct of their relations and the rules and obligations which govern them are governed by a quite complex but fairly well known series of statutory provisions, as well as judicially enforced rules.

On the other hand, if the parties are unmarried their position is much more difficult. There are a handful of Alberta statutes which contain some provisions regulating some questions arising in relation to unmarried cohabitational arrangements. And, there are some judicially created doctrines which can also come into play. On the whole however, where parties choose to live in what is variously referred to as cohabitation, common law or *de facto* relationships the parties are left in some real doubt as to what their legal rights and duties are, and injustices or inequities may arise.

The Institute has been concerned for several years now to see whether or not a fairer regime can and should be evolved for unmarried cohabiting partners. Three years ago it published an empirical study of cohabitational arrangements in Alberta. Then the Institute arranged for a leading authority on matrimonial law in Canada, Professor Christine Davies, to prepare an extensive paper researching the present law, the problems with it, and the possibilities for reform in this jurisdiction.

The indications from that paper, and the Board's own deliberations to date, are that changes are needed in Alberta law. The Institute hopes that its project will result in recommendations for a review of the law relating to cohabitation outside marriage in the province, and which we hope will commend themselves to the Legislature.

The Institute is putting forward this Issues Paper as a preliminary step in presenting a Final Report to the administration of the day. The Issues Paper has two purposes. One is to obtain such further information as we can about the working of the present law and its deficiencies. The second is to obtain informed advice about the policies and principles upon which a better legal regime for cohabitation outside marriage should be based in Alberta today, and for the forseeable future.

The Paper is in two parts. Part A sets out the sort of issues on which the Institute invites submissions. Part B contains, verbatim, the research paper prepared for the Institute by Professor Christine Davies. It contains a great deal of

valuable research and commentary. The paper also puts forward a distinctive view of what legal reforms ought to be implemented. The Institute's Board is of the view that that paper should be made widely available by publication. To the extent that it adopts a distinctive point of view it may or may not attract widespread support. At the very least, it is a thoroughly researched and well written paper which should provide a sound basis for discussion.

The Davies paper is published by authority of the Institute but the views expressed in it have not received the final endorsement of the Institute's Board. The Institute's Board has reviewed the paper and finds itself in sympathy with a substantial number of the recommendations. There are some recommendations which are more controversial and on which the views of Board Members diverge. The Board wishes to take the opportunity to hear wider comment and debate before making final recommendations.

The Institute accordingly invites comment on the matters raised in the Issues Paper, and Professor Davies' paper, and on any other matters touching on or concerning the law relating to cohabitation outside marriage in the province. It is emphasized that the issues and questions raised in this Issues Paper are not intended to restrict the range of submissions which might be made. Commentators should feel free to raise other matters for discussion if thought relevant. There are a number of issues raised in the Issues Paper. There is no need for a commentator to address them all.

It is also proposed to use this Issues Paper as a basis for discussion at consultative workshops to be held in the province later in 1987 and 1988. If any person or organization has an interest in attending one of these workshops it would be helpful if they could so indicate.

Written submissions should be sent to the Institute to the attention of the Director at the following address:

402 Law Centre
University of Alberta
Edmonton, Alberta
Canada T6G 2H5

Written submissions are preferred, but if for any reason that is inexpedient, oral submissions can be made to the Director (Professor R.G. Hammond, Phone (403) 432-5291) by telephone.

Submissions should be in the hands of the Institute not later than February 29, 1988. However, if more time is needed, the Institute will be grateful if the prospective commentator will so advise the Institute so that it will know when the comments will be expected.

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PART A - ISSUES PAPER

CHAPTER 1. INTRODUCTION

A. The Subject Matter and Purpose of the Paper

1.1 When a man and a woman marry according to law, the state recognizes that union, and certain rights and obligations then arise between the parties to it. A quite elaborate array of rules, both statutory and judge-made, come into play to regulate that union (particularly in the case of a marriage breakdown).

1.2 Although there has been much debate over the years as to how easy it should be to marry, how easy it should be to terminate that union, and what the various rules relating to matrimonial property, maintenance and the like should be, in general there is a well settled legal regime. Moreover this regime is quite widely known by the person in the street.

1.3 The legal position surrounding the status and incidence of persons who enter cohabitational arrangements outside marriage is much less clear. The operation of the law in its current state may result in inequity and injustice in certain cases.

1.4 By a cohabitational relationship, for the purposes of this paper, we mean a relationship between a man and a woman who are living together on a *bona fide* basis, but who are not married to one another. In popular parlance such arrangements are also commonly referred to as common law marriages, or *de facto* arrangements. In short we mean a man and a woman who choose to live together in a marriage like state, but without being married

according to law. We are not addressing the position of homosexual arrangements, home sharing for economic reasons or the like.

1.5 This Issues Paper is being published for the purpose of assisting Albertans to understand the present legal regime as it pertains to cohabitational arrangements in this province, and to elicit their views on what the law in Alberta should be with respect to such arrangements.

B. The History of the Project

1.6 Social arrangements of this kind have probably existed throughout human history. In this century, it is commonly recognized that there has been a wide-spread increase in the incidence of such arrangements.

1.7 In recognition of what was thought to be a wide-spread social phenomenon, and one with significant potential social and legal implications, the Board of the Institute of Law Research and Reform thought it appropriate to review this subject area with a view, ultimately, to bringing forward recommendations for such legislative change in Alberta law as might be thought to be appropriate.

1.8 A review of the then existing published literature and studies suggested that there was surprisingly little empirical data available as to the degree to which such arrangements had arisen in Alberta, and what, if any, patterns of behaviour or other significant effects were associated therewith. In the result the Institute's Board decided to commission a research paper to survey the prevalence of non-married cohabitation among

urban Albertans, and examine their attitudes towards some of the legal issues related to non-marital cohabitation.

1.9 A survey was conducted in the fall of 1983 over a sample of over 2,000 respondents. For the purpose of that survey, non-marital cohabitants were defined as persons living with an unrelated partner of the opposite gender for six months or more. The relationship included at least one of the following characteristics: sexual intimacy, the provision of emotional support, the presence of dependant children in the home, the holding of property in common or the pooling of resources. The results of that survey were published as Research Paper No. 15, "Survey of Adult Living Arrangements: A Technical Report" in November of 1984.

1.10 The Institute was then fortunate to be able to arrange for Professor Christine Davies of the Faculty of Law at the University of Alberta - a noted matrimonial law scholar - to transfer to the Institute's legal staff full time for a period of time under a secondment agreement. Professor Davies undertook to produce a paper for the Institute's Board which would outline the present law, indicate the difficulties which had been encountered with respect thereto, identify possibilities for reform and produce a tentative set of proposals for reform, for consideration by the Institute's Board.

1.11 That paper was duly produced and reviewed by the Institute's Board. It is reproduced in Part B of this Issues Paper.

1.12 The Institute's Board found the paper to be a valuable one. Indeed it is indispensable to an understanding of the present position in Alberta. The paper espouses a particular approach to cohabitational arrangements. It offers a consistent thesis and resolution of issues within the premises of that thesis. The Institute's Board was concerned that those premises might not commend themselves to all, or even a significant majority of Albertans, and that before it could issue a report to the Attorney General on this subject, there should be an Issues Paper which would outline the sorts of questions which would need to be addressed in an overhaul - whether in part or of the root and branch variety - of the present legal regime pertaining to cohabitational arrangements. The Board thought there should be further consultation.

C. The Form of the Paper

1.13 In the result, this paper takes a slightly unusual form. In Part A an attempt is made to give a general overview, in a relatively broad brush way, of this subject area. The intention behind Part A is to enable lay and professional persons, and organizations, to get an overview of the issues which Professor Davies, and the Institute's Board have been able to identify, and to communicate their views with respect to same. Such a broad brush approach is necessarily attenuated. Professor Davies' paper is particularly valuable because it contains full detail on the existing legal regime. Readers will find it necessary to refer to Professor Davies' paper for greater particularity.

1.14 It is intended, once this Issues Paper has been published, to receive written or oral commentary on the issues arising, and to consult as widely as may be possible with interested persons and organizations in the province. Once that consultative process has been followed, the Institute's Board will again review this subject area prior to making a Final Report to the Attorney General.

1.15 It follows that the Institute's Board does not presently have a definitive stance either on the philosophy which should underpin new legislation, or on any particular features of it. The Institute's Board is concerned that on a subject which will undoubtedly attract controversy there should be the widest opportunity for both public and professional comment. This not only serves democratic values in a subject area of some public importance, it will undoubtedly improve the quality of whatever proposals the Institute's Board finally endorses. And, to the extent that some kind of concensus may emerge, the consultative process should lead to greater acceptability of the final recommendations to the administration of the day as well as to the people of the Province.

CHAPTER 2. THE SOCIAL SETTING

A. Introduction

2.1 Cohabitational living arrangements outside marriage have existed throughout human history. In more modern times, both state and church took a particular stance on the question of marriage, and unmarried cohabitants were, for legal purposes, largely "beyond the pale" of the law. It is often suggested that there has been a dramatic increase in the incidence of such arrangements, particularly since World War II.

2.2 Research Paper No. 15 suggested that 8.8% of urban Alberta couples are cohabiting non-maritally. And, more than a quarter of urban Albertans have at one time or another cohabited non-maritally with an unrelated partner of the opposite gender for a period of six months or more. These are significant figures. They suggest that more than one in four Albertans at one time or another will live in a cohabitational arrangement, and that at any given time one in eleven adult Albertans is living in such an arrangement.

2.3 Generally speaking such arrangements appear to be more prevalent in western Canada than in many other parts of the world but apparently such arrangements are everywhere on the increase.

2.4 Whatever the precise figures may be in a given jurisdiction, it appears that there is a sufficiently significant proportion of the population affected by such arrangements that this social phenomenon cannot be brushed aside as not being of sufficient moment as to warrant legislative attention. Given the

social and economic consequences which attend such arrangements it is apparent that a review of the present legislation relating to such arrangements is timely.

2.5 It may be that there are persons or organizations who have statistical or other information of a systematic character which has been generated since Professor Davies' paper was prepared. The Institute would be particularly interested in receiving communications with respect to any such information or studies being undertaken.

CHAPTER 3. THE PRESENT LEGAL REGIME

A. General

3.1 Alberta law, in common with that of the other common law provinces, presently recognizes a number of distinct "statuses" which persons might enjoy within the law. For legal purposes one is married, single, adult or minor, a corporation or a natural person, and so on. The law does not presently recognize a cohabitational arrangement as having any distinct status.

B. Legislative Incursions

3.2 This general approach, has however been eroded by some Alberta statutes which grant rights upon non-marital cohabitants. These are detailed in Professor Davies' report and include the Change of Name Act, The Child Welfare Act, The Criminal Injuries Compensation Act, The Fatality Inquiries Act, The Pensions Plan Act, The Reciprocal Enforcement of Maintenance Orders Act 1980, and The Workers' Compensation Act. Each of those statutes to some extent recognizes, for specific purposes, rights or obligations of a cohabitational partner.

C. Judge-Made Incursions

3.3 Probably the most difficult issues in law relating to non-married cohabitants are those of property and maintenance. How far should one partner be entitled to the property of the other if the arrangement terminates, and how far should one partner be entitled to look for support from the other partner again in the event of termination of the arrangement? To some

extent, Canadian courts have already responded to these questions. For instance in the area of matrimonial property in certain circumstances constructive trusts have been used to secure property benefits, and maintenance like awards have been claimed under the technical head of *quantum meruit* claims.

3.4 For present purposes, the technical details of such actions do not matter. What is important is to note that to some extent the judiciary has already responded to claims of injustices arising out of particularly the termination of cohabitational arrangements.

D. The Overall Effect of the Present Law

3.5 Absent a distinct status for non-married cohabitants, or a specific legislative provision, at present a partner to such an arrangement has to endeavour to utilize one of the general doctrines of common law or equity to have any claims sustainable in a court of law. The cases have not been consistent, whether as to policy or result.

CHAPTER 4. POSSIBILITIES FOR CHANGE

A. Is There a Need for Change?

4.1 It is generally accepted in relation to legislative development of the law, that change for change's sake is undesirable. Most people would accept that, as a manner of proceeding, proponents of change should first identify what is wrong with the existing law, then offer specific proposals for reform, and that the burden of proof is on those who advocate such reforms.

4.2 This is not mere conservatism. It is a recognition of the rule of law. That is, although it is not universally true that every law ever enacted is a sound law, as a starting point anybody reviewing a given legal provision has to assume that the law was enacted, in most cases, for what was thought to be good and sufficient reasons.

4.3 And, political reality is political reality. On contentious issues of social policy such as abortion, cohabitational arrangements and the like, legislatures are traditionally cautious and reluctant to embrace reforms save where there are clear injustices which cry out for intervention, or where the legislature is satisfied that some kind of community concensus has emerged.

B. The Case for Reform with Respect to Cohabitational Arrangements

4.4 The case for legislative reform in this subject area probably proceeds on the following lines:

(a) There is a known social phenomenon of significant proportions.

(b) Both legislatures and judges in the common law world had responded to this phenomenon to some extent, but, in the eyes of many persons, not sufficiently.

(c) The "coverage" of the law is presently uneven. That is, cohabitational arrangements are recognized for some purposes but not others and it is difficult to justify the differences from one instance to another.

(d) There have been known instances of great injustice to particular litigants. If often seems unfair for one cohabitant to reap the whole economic benefit arising from years of cohabitation and economic sharing. The case of *Rosa Becker*, for instance, attracted national attention and controversy. Miss Becker, after some years of loyal and determined support ultimately committed suicide, when the fruits of years of expensive litigation yielded nothing. There was a public outcry, and the Supreme Court of Canada through Chief Justice Dixon was moved to comment publicly (and extra-judicially) that the law was in urgent need of attention.

C. The Case Against Reform

4.5 The case against reform might proceed on some or all of the following premises:

(a) That there is not a sufficiently serious social phenomenon such as to warrant legislative attention.

(b) That any recognition of cohabitational arrangements is inimical to the sanctity of marriage and therefore should be resisted. Any incursion, it might be argued, represents the thin edge of the wedge.

(c) That such legislative or judicial adjustments as have been made to date, are in and of themselves sufficient.

(d) That in any event, particular injustices arise in every area of the law. The law, or so it might be argued, is systematic. It cannot solve every problem perfectly and there will always be some instances of injustice.

D. The Position of the Institute's Board

4.6 As a general indication of its present position, the Institute's Board is of the view that this is an area which is an appropriate one for legislative change. It accepts, based on the review of Alberta statutes by Professor Davies, that there is great unevenness in the statute book at present, and it is troubled by obvious instances of injustice.

4.7 Having said that, and accepting that in general there is a case for reform, the Board recognizes that there is room for some divergence of views as to both the philosophy on which reform should be effected (or even whether there should be a particular philosophy), and the implementation of that philosophy to the particular questions which need to be addressed.

4.8 In the next chapter we set out specific issues on which the Institute seeks assistance, together with short commentary thereon.

CHAPTER 5.

A. General

5.1 In this chapter we set out, as a matter of convenience, specific issues on which the Institute desires public input. These are not intended to preclude commentators raising other issues, whether as to approach or as to particular matters. In each case an issue is stated, followed thereafter, where appropriate by some short form commentary. In general the issues follow the order established in Professor Davies' paper, for ease of cross-reference. In some cases you will have to read what Professor Davies has to say in order to deal effectively with the questions.

B. Issue No. 1: Incidence

5.2 Reference has been made to Research Paper No. 15. Are there other empirical studies which have not been noted? Do you have any information bearing generally on either the numbers and kinds of cohabitational arrangements, or how people behave on particular questions within them?

C. Issue No. 2: The Need for Reform

5.3 As a general proposition do you agree that the law affecting the rights and obligations of cohabitants between themselves is in need of legislative review? If you think the subject area should be left alone at the present time, or for some foreseeable period, what reasons would you advance for that position?

D. Issue No. 3: The Policy Direction for Reform

5.4 It appears to be widely agreed that there are basically four policy directions which could be taken with respect to reform of the law affecting cohabitational arrangements. The first would be to equate such relationships to marriage on a policy of full legal equivalence. The functional effect would be to give non-married cohabitees the same rights and obligations as married persons.

5.5 Proponents of such an approach would generally argue from a premise of social reality, namely that society accepts such relationships, behaviour within such relationships is marriage like, and injustice arises in a number of respects if the status is not granted.

Opponents of this approach generally point to the very real constitutional difficulties which a Province would encounter in legislating such a course. They also note that freedom to choose is important. Some persons make a conscious decision not to marry because they wish to avoid the legal consequences of marriage.

So far as we are aware, no jurisdiction in the common law world has as yet taken the step of giving full marriage status to cohabitational arrangements.

5.6 A second approach is to grant non-marital cohabitees a "lesser" status by giving them at least *some* rights and obligations which would normally attach only to married persons. In effect this is a partial equation with marriage.

5.7 This approach has been adopted in South Australia and puts a cohabitant in the same legal position as a spouse for some purposes.

5.8 There may be less concern on the constitutional front with such an approach, but the same concerns about freedom of choice exist with respect to this approach as with the first.

5.9 A third approach is to give cohabitational partners *some* specific rights and obligations in certain areas, but only on proof that a particular claimant either has a particular kind of expectation, or dependence, not merely because there is or has been a cohabitational arrangement.

5.10 In general the arguments for this kind of approach are that the special status of marriage is not thereby impugned; freedom of choice is not necessarily inhibited, or constrained; that the matter is clearly within provincial jurisdiction; that dependency or expectation concepts are well embedded in our law in such vehicles as family relief legislation, fatal accidents legislation and the like. As against that it may be argued that "dependence" is an old-fashioned concept and is a "stereotype" of the modern roles of men and women.

5.11 A fourth approach is more context-specific, and would involve amending the law in certain specific areas only in order to remedy injustice.

5.12 This fourth approach attracted overwhelming support in New South Wales. In addition to support in the course of submissions, the New South Wales Law Reform Commission in its report noted that this approach can be applied "without

necessarily imposing on *de facto* partners the same legal rules as govern married couples and without detracting from the significance of marriage as an institution".

5.13 It is worth setting out the principles which the New South Wales Law Reform Commission thought it should follow in endeavouring to implement this approach:

- The policy of the law is not, and should not be, actively to discourage *de facto* relationships, whether by withholding benefits, imposing penalties or otherwise. In a pluralist society, people may choose to live together in such relationships.

- The basis for the intervention of law, in conferring rights or imposing obligations on *de facto* partners, should be the minimization of injustice or the removal of significant anomalies.

- It should not be assumed that the rights and obligations of *de facto* partners should be the same as those of married couples. In some cases it may be appropriate for the law to distinguish between them.

- Conflicting claims may be made by a person's legal spouse and by his or her *de facto* partner. There is no uniform solution to this problem. In some cases, such as succession on intestacy or property disputes, the legitimate expectations of a spouse should be protected against claims of a party to a short term relationship.

- In general, the law should not impose a regime on *de*

facto partners that may be inconsistent with their specific wishes, particularly in relation to financial matters.

- Where proposals affect children, their welfare should be the primary concern.

- In defining the basis on which rights are conferred or obligations imposed, it is not necessarily appropriate that uniform criteria should be employed in all cases. In particular, a requirement that the relationship should have continued for a specific period will be appropriate in some cases, but not in others. (See N.S.W. Outline of Report on *De Facto* Relationships, 1983 at pp. 5-6.)

5.14 Several Canadian jurisdictions have adopted an approach which involves extending specific rights to cohabitees. Ontario, for example, has been generous in granting rights of a kind which have historically been granted only to married persons. In general, however, such extended rights have been granted only upon the parties having cohabited for a specified period or for a lesser period and there is a child of the parties.

5.15 Our deliberations to date reveal some divergence of opinion on the question of the proper approach to be taken to reform in this area. No member of the Board has to date expressed a view in favour of the full equation of cohabitation with marriage. Some members of the Board are in favour of the granting of a significant number of the rights attached to

marriage, in defined circumstances (such as the passage of a specific period of time of cohabitation or the birth of a child). Other members of the Board are in favour of creating dependency or expectation rights, together with modifications to specific statutes to cure anomalies and injustices. Still other members of the Board are presently inclined to the viewpoint expressed by Professor Davies that no special or quasi-status should be created and that legislative intervention should be restricted to specific areas of injustice in specific legislation.

5.16 It is important that persons addressing this subject give full consideration to these possible approaches (or any other approaches which might occur to them). One of the major criticisms of the present law is that it is inconsistent and in places incoherent in its treatment of cohabitants. This certainly raises justice issues, and may even create constitutional issues under the Charter of Rights. It is of considerable importance to the Institute's deliberations that it establish, so far as it can be established by this sort of process, whether there is any consensus as to the sort of approach which should be adopted to reform.

E. Issue No. 4: Maintenance

5.17 The question of support for non-married cohabitants should that relationship break down is undoubtedly one of the most controversial topics in this subject area. It provoked a variety of responses from our members when Professor Davies' paper was under review, and, as that paper itself notes, notwithstanding that several Canadian provinces have enacted legislation to provide for support, "there is little consistency

in [this] legislation on the nature of the relationship that must exist before the support obligation applies".

5.18 The arguments against providing for support obligations are canvassed in the Davies report and it is Professor Davies' view that there should not be a support obligation.

5.19 Some of us are tentatively of the view that there *should* be some kind of support obligation based upon a specific evaluation in the particular case, and where there is clear dependency or need.

5.20 The issue is a most important one. Should there be support obligations between cohabiting partners? If so, why? If not, why not? Would there be particular difficulties in assessing support in this situation? Would there be particular difficulties in collecting support obligations in this situation?

F. Issue No. 5: Property

5.21 It has been noted that courts presently have some limited ability to allocate property between cohabitants under the law of trusts where justice so requires. There is a significant issue as to whether the sharing provisions of the Matrimonial Property Act (Alberta) or something like them should be extended to cover cohabitants.

5.22 Professor Davies is of the view that the Matrimonial Property Act should not be so amended. This argument is based upon a view that the courts are doing well enough with the judicial vehicles already available, and that where legislative

reform has been made in other jurisdictions (such as New South Wales) it is because some equitable doctrines are not available there which are available to Canadian courts.

5.23 Some of us are of the view that since the resolution of questions of title of property is very important, there is a case for having a series of "rules" or "guidelines" for sorting out questions of title of property and the allocation of property. If such a regime were implemented along with a provision for partners to "contract out" of the scheme then freedom of choice would be maintained, but there would be a series of rules or guidelines - perhaps of the variety in the Matrimonial Property Act - to assist in the resolution of such disputes.

5.24 Comment is particularly solicited from the legal profession and the public at large as to whether practical operating experience in Alberta with the judicial doctrines has revealed any anomalies or injustices. Is the law difficult to establish? Is it unduly expensive to mount a claim because of the largely discretionary nature of equity jurisprudence? Are there perceived anomalies in result between one case and the next? Is it the case that the existing law by nature of the uncertainty of individual discretion deters applications to the courts? And does reliance on discretionary principles deter many small claims which might be readily disposed of under a more "formula" regime?

G. Issue No. 6: Possession

5.25 The Davies report suggests that a cohabitant might be given limited rights to occupancy of a matrimonial home and/or possession of household goods owned by the other cohabitant. These rights, it is suggested, should arise only where children are involved. The report indicates some divergence of treatment of this question across Canada.

H. Issue No. 7: Domestic Contracts

5.26 There is some doubt whether a contract between cohabitants is valid in Alberta at present. Some provinces have legislation on this issue. The question is fully traversed in the Davies report with the arguments for and against such contracts. That paper recommends that such contracts be made enforceable.

5.27 In our deliberations to date we are in favour of that approach. Disputes between cohabiting couples are better dealt with according to their agreement than by litigation; agreements between the parties enables them to achieve certainty about legal aspects of their relationship; Research Paper No. 15 indicated that many cohabitees feel that agreements concerning their arrangements to be made on breakup, as well as other matters, should be legally binding.

I. Issue No. 8: Succession

5.28 At present the Intestate Succession Act of Alberta does not enable a cohabitant to share in the property of his or her cohabitant partner who dies without leaving a will. Professor Davies suggests that the Act should be amended to enable the cohabitees to share in the intestate estate. This is

for the reason that persons in such relationships view themselves as members of a societal unit, and inclusion of a cohabitant within the list of persons entitled to succeed on intestacy will probably reflect the deceased's wishes.

5.29 Is it correct to see persons living in cohabitational relationships as part of a societally approved "family unit", outside marriage? This will presumably bring conflicts between cohabitees and former (but undivorced) spouses. How should such disputes be resolved?

J. Issue No. 9: Family Relief

5.30 At present Alberta law does not allow a cohabitee to bring a claim under the Family Relief Act, under which the court can provide a spouse or child with support from the estate of a deceased spouse who has not made adequate provision for their support.

5.31 The Institute in a prior report described the Family Relief Act as a statute which transfers the legal support obligation owed by a deceased during his lifetime over to his estate. That report recommended *against* extending the support obligation to cohabitees during their joint lifetime. If this reasoning is correct, it follows that a claim for maintenance by one cohabitee against the estate of the other should not be allowed. Is it correct?

K. Issue No. 10: Status of Children

5.32 The Institute has previously recommended that the "status" of illegitimacy be abolished. Its recommendations have

not to date been enacted. It is suggested by Professor Davies that they should be enacted. Do you agree?

L. Issue No. 11: Agency of Necessity

5.33 The Institute has previously recommended that the separated wife's "agency of necessity" should be abolished as being archaic and not suited to current opinions. The agency of necessity enables her to pledge her husband's credit for necessaries. This has not, to date, been legislated.

M. Issue No. 12: Fatal Accidents

5.34 The Fatal Accidents Act enables a family unit that has suffered economic loss as a result of the death, through a wrongful act, of one of its members to get compensation from the wrongdoer. At present, cohabitants are not included within the list of specified relatives on whose behalf an action can be brought under the Act for loss of pecuniary benefits. Should they be added to the list?

5.35 The Alberta Workers' Compensation Act provides that a cohabitant *can* receive compensation under the Workers' Compensation Act. Hence there is here an inconsistency with the Fatal Accidents Act.

5.36 Under the Fatal Accidents Act there is a limited class of specified relatives who are entitled to claim damages from wrongdoers for bereavements. Should the cohabitant be added to that list?

N. Issue No. 13: Workers' Compensation Act

5.37 The Workers' Compensation Act presently provides for recognition of cohabitees. There are definitional difficulties. And there are questions of priorities between a dependant spouse and a cohabitee.

5.38 The Davies paper suggests certain specific recommendations to overcome these problems. Do you agree with them?

O. Issue No. 14: Insurance

5.39 There is a question as to whether a cohabitant should be able to insure the other cohabitant against death or sickness. Is it necessary to provide for an insurable interest for a cohabitant in legislation of this kind?

5.40 How should death benefits in automobile insurance be treated?

P. Issue No. 15: Exemptions

5.41 Under the Exemptions Act certain property of an execution debtor is exempt from seizure under a writ of execution, following upon a judgment. There are questions as to the manner in which these exemptions provisions and certain of the rules of courts should apply to cohabitants. The Davies paper recommends no exemption in favour of cohabitants. Is this the preferred course?

Q. Issue No. 16: Pensions

5.42 There are inconsistencies in definition between a number of statutes relating to pensions in the province. The

Davies paper recommends that one definition of spouse be adopted for the purpose of all of these statutes.

5.43 Would there be any particular difficulties created by so proceeding?

R. Issue No. 17: Evidence

5.44 The Alberta Evidence Act contains provisions relating to the ability of a party to compel one spouse to give evidence against the other. There are also provisions under federal and provincial legislation making a spouse non-compellable.

5.45 These provisions and proposed changes have always been contentious.

5.46 None of the various inquiries and reports on the law of evidence have so far recommended making cohabitants non-compellable where spouses are. The question here is whether this is the correct policy. If the rules about spouses are to be extended to cohabitants, how should they be framed?

S. Issue No. 18: Other Issues

5.47 Are there any other Alberta statutes which we have not located which either contain definitions relating to cohabitants or, other situations which we have not identified where the definition of a cohabitant is relevant?

T. Issue No. 19: The Definition of a Cohabitant

5.48 If a cohabitant is to be referred to in a number of Alberta statutes it is desirable that there be a common definition.

5.49 The Davies paper recommends, in a number of contexts, that the definition to be established should be "a person of the opposite sex to the other party who, at the relevant time, was living with that other party on a *bona fide* domestic basis".

5.50 Is that definition appropriate? Is it likely to raise any particular difficulties that you can identify? Would you prefer some other definition?

5.51 Would there be, as a matter of legislative placement, something to be gained by placing the definition in the Interpretation Act or is it safer to deal with the definition in the context of each statute to which it is sought to apply it?

PART B

COHABITATION OUTSIDE MARRIAGE

A Research Paper Prepared for the
Institute of Law Research and Reform
Edmonton, Alberta

by

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COHABITATION OUTSIDE MARRIAGE

PART I

OUTLINE OF PRINCIPLE RECOMMENDATIONS

Here we list the principle recommendations advanced in this report. The reader should be concious of the fact that in this outline the recommendations have been reduced to bald and summary form; for a more complete picture it is necessary to refer to the body of the report. Page references to the text are given after each recommendation.

The report is divided into four parts. Part II deals with considerations of policy. Part III sets out those Alberta statutes which presently give some recognition to cohabitational relationships. Part IV outlines those areas of Alberta law that might be the subject of amendment. In Part II we debate whether non-marital cohabitants should be accorded a status more or less akin to that of married persons. We conclude that non-marital cohabitation should not confer a marriage-like status but that the law should be amended in certain specific areas only in order to cure inequities or situations of hardship. In the light of that basic policy decision we go on, in Part IV of the report, to explore those specific areas of law which might be the subject of amendment.

We now set out in summary form the principle recommendations made in respect of those specific areas of law. The recommendations are grouped under three headings: (1) Those areas of law which involve relations between the cohabitants inter se; (2) Those areas of law involving rights and obligations

as between cohabitants and third parties; (3) Those areas of law which involve relations between cohabitants and the state.

It should be noted that when we speak of a cohabitational relationship from which rights and obligations may or should flow, we are generally referring to a relationship between a man and a woman who are living together on a bona fide domestic basis but who are not married to one another.

1. Those Areas of Law Which Involve Relations Between the Cohabitants inter se

A. Maintenance

Recommendation 1

Alberta law should not be amended so as to provide for support between cohabitants (pp. 63-68).

B. Property

(a) The allocation of title between cohabitants

Recommendation 2

Alberta law should not be amended so as to make statutory provision for the allocation of property between cohabitants (pp. 73-76).

(b) Possessory and occupational rights as between cohabitants

Recommendation 3

Alberta law should be amended so that Part II of the Matrimonial Property Act (which permits for orders of exclusive possession of a matrimonial home and household goods) be extended to cover cohabitants who have care and control of a child of the relationship (pp. 79-86).

C. Domestic Contracts

Recommendation 4

Alberta law should be amended to provide for the enforceability of domestic contracts. Such legislation would generally follow the form of legislation presently in place in Ontario, Prince Edward Island, New Brunswick, Newfoundland and the Yukon Territory (pp. 108-112).

D. Distribution on Death

(a) Intestate succession

Recommendation 5

The Intestate Succession Act of Alberta should be amended to enable a cohabitant to share in the intestate estate of his or her partner. Entitlement should depend on whether the deceased left a legal spouse and/or children of a relationship with someone other than the cohabitant (pp. 117-120).

(b) Family relief

Recommendation 6

Alberta law should not be amended to include cohabitants within the list of dependants entitled to claim relief under the Family Relief Act (pp. 122, 123).

2. Those Areas of Law Involving Rights and Obligations Between Cohabitants and Third Parties

A. The Children of Cohabitants

Recommendation 7

The report of the Institute entitled "Status of Children" would abolish the 'status' of legitimacy and that of illegitimacy. The recommendations made in this report should be implemented (pp. 123-125).

B. Agency of Necessity

Recommendation 8

The report of the Institute entitled "Matrimonial Support" recommends that the separated wife's agency of necessity should be abolished. We endorse that recommendation (pp. 125-131).

C. Fatal Accidents

(a) Damages for economic loss

Recommendation 9

Cohabitants should be included within the list of specified relatives on whose behalf an action can be brought under the Fatal Accidents Act for loss of pecuniary benefits. For this purpose a cohabitant should be defined as one who was living with the deceased on a bona fide domestic basis on the date of death (pp. 141-143).

Recommendation 10

Cohabitants should be included within the more limited class of specified relatives entitled to claim under the Fatal Accidents Act for damages for bereavement. 'Cohabitant' in this context should be defined as under recommendation 9 (pp. 143-150).

D. Workers' Compensation

Recommendation 11

Section 1(3) of the Workers' Compensation Act should be amended to provide that a common law spouse is one, who, immediately preceding the workers' death, lived with the deceased on a bona fide domestic basis (pp. 160-165).

Recommendation 12

Section 44 of the Workers' Compensation Act (which permits the Workers' Compensation Board to redirect all or part of a workers' compensation to his spouse or child if (a) the spouse or child is, or is likely to become, a public charge or a charge on private charity, or (b) the worker is delinquent under an order of spousal maintenance or child support) should be repealed and the Maintenance Enforcement Act of Alberta should be amended to ensure that workers' compensation payments are attachable under that Act (pp. 153-156).

Recommendation 13

Where the deceased leaves both a dependent legal spouse and a dependent common law spouse the pension payable under the Workers' Compensation Act should be apportioned between them according to what is reasonable and proportionate to the degree of dependency (pp. 166-169).

E. Insurance

(a) Insurable interest

Recommendation 14

Alberta legislation should not be amended to provide that a person has an insurable interest in the person with whom he cohabits (pp. 170-172).

(b) Death benefits in automobile insurance

Recommendation 15

Section 313 of the Insurance Act should be amended to provide that if a deceased insured does not have a legal spouse at the time of his death who has an enforceable claim for benefits under that section the benefits to which a spouse would have been entitled shall be paid to a person of the opposite sex to the insured who, at the time of the accident causing death, was living with him on a bona fide domestic basis (pp. 172-180).

F. Exemptions

Recommendation 16

The Exemptions Act should not be amended to provide that an exemption extend beyond the life time of the debtor for the benefit of a surviving cohabitant (pp. 180-184).

Recommendation 17

Rule 483 of the Rules of Court should not be amended so as to accord cohabitants the same monetary exemption as married persons (pp. 184-187).

Recommendation 18

Sections 265(2) and 374(2) of the Insurance Act should not be amended so as to exempt from execution or seizure policies wherein there is a designation in favour of a cohabitant (pp. 187-188).

G. Pensions

Recommendation 19

The definition of 'spouse' adopted in the Employment Pension Plans Act should be adopted for the purposes of pensions falling under the following statutes:

The Alberta Government Telephone Act;
The Teachers Retirement Fund Act;
The Public Service Management Pension Plan Act;
The Public Service Pension Plan Act;
The Universities Academic Pension Plan Act;
The Special Forces Pension Plan Act;
The Members of the Legislative Assembly Pension Plan Act;
The Local Authorities Pension Plan Act (pp. 197-198).

Recommendation 20

If a cohabitant falls within the definition of spouse referred to in recommendation 19 he or she should be entitled to spousal benefits (p. 198).

3. Those Areas of Law Which Involve Relations Between Cohabitants and the State

A. Spousal Competency, Compellability and Communications

Recommendation 21

Neither the present Evidence Act nor the Uniform Evidence Act proposed by the Institute in its Report No. 37A should be amended to extend the definition of spouse for the purposes of the rules relating to competence, compellability and privileged communications (pp. 202-203).

B. Criminal Injuries Compensation

Recommendation 22

The Criminal Injuries Compensation Act should be amended to define spouse as including a person of the opposite sex to the victim who, at the time of the victim's application for compensation, or, in the event of the victim's death, his death,

was living with the victim on a bona fide domestic basis (pp. 203-210).

C. Fatality Inquiries

Recommendation 23

The term 'common law spouse' in the Fatality Inquiries Act should be defined to mean a person of the opposite sex to the deceased who, at the time of the deceased's death, was living with the deceased on a bona fide domestic basis (pp. 211-214).

D. Welfare

Recommendation 24

Regulations under the Social Development Act should be amended to provide that the resources of any person living with an applicant for, or recipient of, social assistance should not be taken into account in assessing the amount of the claimant or recipient's social allowance unless (a) that person is providing an economic contribution to the applicant or recipient or a child thereof and (b) his relationship with the applicant or recipient is of a social or familial nature (pp. 215-221).

PART II

CONSIDERATIONS OF POLICY

Introduction

The first question that should be asked in any study proporting to deal with those living together outside marriage is should laws be specifically directed to them? Living together (presently, at any rate,) creates no status. Thus, should the law treat people within that relationship in any special way? If the answer to that question is "yes", then why should this be so? Would not any special treatment, any legal recognition of the living together relationship undermine the status of marriage?

Further, there are various types of living together relationships: homosexual, heterosexual, adulterous (i.e. where at least one party to the relationship is married to a third party), commune living, home sharing for friendship or economic reasons. Are we, the reformers, to deal with one type of living together relationship and ignore the others? Even assuming there to be some sort of justification for our dealing solely with the heterosexual living together situation, how are we to distinguish between the solid and the ephemeral relationship? Is the birth of a child the determinative criterion, the length of cohabitation, or both? Should the fact that one of the parties has a living spouse be relevant?

Finally, if the law is to provide recognition of the living together relationship, how should that recognition be afforded? Should heterosexual cohabitation outside marriage be afforded a

status equivalent to marriage? Should it be afforded a status equivalent to marriage in some, but not in all, ways? Should there simply be some changes made to the law alleviating hardships or inequities in particular situations?

1. The Type of Cohabitation Arrangement With Which We Shall be Dealing

As adverted to above there are various forms of cohabitational arrangements: homosexual, heterosexual, adulterous, commune living, home sharing for friendship or economic reasons and probably many others. The terms of reference of this writer are to review the laws as they relate to heterosexual cohabitation (adulterous or otherwise). Clearly, legal problems arise in connection with these other forms of cohabitational arrangements. However, many of the problems will be unique to the particular type of living arrangement and would require separate study.

2. Should Any Legal Recognition be Given to Heterosexual Cohabitation Outside Marriage?

There are several justifications for giving some legal recognition to heterosexual cohabitation outside marriage and, indeed, for singling out the heterosexual relationship from other cohabitational arrangements for legal recognition. Firstly, we cannot turn the clock back, so to speak. In fact, Alberta law does recognize heterosexual cohabitation as creating a special relationship for certain purposes (e.g. a "common law spouse" is, in certain circumstances, entitled to benefits under the Criminal Injuries Compensation Act RSA 1980 chapter C-33, the Workers' Compensation Act RSA 1980 chapter W-16, and several statutes

dealing with pension plans.[1]

Secondly, we cannot blinker our eyes to escape reality. In fact heterosexual couples are living together in marriage like relationships in Alberta. The technical report entitled "Survey of Adult Living Arrangements" commissioned by the Institute in November 1984[2] estimates that the prevalence of urban Albertans 16 years of age or older who are currently cohabiting non-maritally to be 6.2%. Further, it estimates that 8.8% of urban Alberta couples are cohabiting non-maritally.[3] The study also reveals that a total of 27.1% of urban Albertans have at one time or another cohabited non-maritally with an unrelated partner of the opposite gender for a period of six months or more.[4] Census data from 1981 show Alberta and British Columbia to have the highest proportion of cohabitation arrangements in the country: 11% of all unmarried persons 15 years of age or older are living in such arrangements in those provinces. The figure for Quebec is close to 11%. In the remainder of the provinces the proportion of the unmarried population 15 years and over living in marriage like relationships fell in the 6-7% range with the exception of Newfoundland and Prince Edward Island where the figures are significantly lower (5.4% and 4.5% respectively).[5] On a national level a Family History Survey compiled in 1985 and

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1 See Part III of this paper infra.

2 Research Paper No. 15

3 The definition of non-marital cohabitation for the purposes of the Technical Report is set out on pages 3 and 4 of that Report.

4 See Research Paper No. 15 pages 20 to 22.

5 Canadian Social Trends (Statistics Canada) Autumn 1986 pp. 40-41.

published by Statistics Canada[6] shows that 5.2% of all males between the ages of 18 and 64 and 6.5% of all females between those ages were living in a "common law" relationship at the time of the report. About 1/6th of adult Canadians had at one time lived in such a relationship.

Demographic studies from other western jurisdictions indicate that between 4 and 15% of all cohabiting couples comprise persons living outside marriage. The studies show, further, that this trend is greatly on the increase.[7]

3. What Type of Recognition?

Granted that the law should recognize cohabitation outside marriage as a special relationship from which particular consequences flow, to what extent should that relationship be

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6 "Family History Survey: Preliminary Findings" (1985) Statistics Canada Catalogue 99-955 pp. 13, 14.

7 Australia: It is estimated that 4.7% of cohabiting couples were cohabiting non-maritally in 1982 whereas only 2.2% were cohabiting non-maritally in 1976 and 0.6% in 1971. [See Report of New South Wales Law Reform Commission, "Report on De Facto Relationships" (LRC 36 1983)]
Norway: It is estimated that 6.6% of Norwegian couples are cohabiting non-maritally [See Lodrup, "Position of Children of Unmarried but Cohabiting Parents: Uniform Rules in Respect of Determination of Paternity" in Eekelar and Katz (eds), "Marriage and Cohabitation in Contemporary Society" (1980) at page 414.]
Sweden: It is estimated that 15% of all Swedish couples are cohabiting non-maritally and this figure represents in increase. [See Angers, "Cohabitation Without Marriage in Swedish Law" in Eekeler and Katz id. page 245.]
U.S.: In the U.S. as of March 1984 there were 1,988,000 unmarried couples households according to a Census Bureau Study on Marital Status and Living Arrangements. This figure was up 523,000 such couples in 1970 and 1.6 million in the 1980 census.
England: There are no recorded statistics on the actual number of people cohabiting extra-maritally in England but all indications are that this phenomenon is on the increase [See Freeman and Lyon, "Cohabitation Without Marriage" (1983) page 56 et seq.]

recognized? There are various forms that such recognition could take:

a) Non marital cohabitants should be accorded a status akin to that of married persons such that persons living within such a non-married cohabital relationship should, as far as possible, be accorded the same rights and be subject to the same obligations, as married persons.[8]

b) Non marital cohabitants should be accorded a status which gives them certain, but not all, rights and obligations normally accorded only to married persons. That is, certain rights and obligations that attach to the married state would not attach to the cohabitational state.

c) Non marital cohabitation should not confer a marriage like status but the law should be amended in certain specific areas only in order to cure inequities and situations of hardship.

Let us now deal with each of these possibilities in turn: Firstly, the equation, so far as possible, of marriage and non-marital cohabitation. The arguments for such equation run as follows:

Non marital cohabitation is on the increase and has won, in large part, social acceptance. Excluding ephemeral cohabitational

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[8] The constitutional implications of this form of recognition are addressed by Cruickshank in his research paper commissioned by the Institute, "Living Together Outside Marriage (April 1979) p. 12.

relationships, cohabitation outside marriage involves exactly the same incidents as cohabitation within marriage. These may be shared accommodation and assets, emotional and financial interdependence, the rearing of children and the appearance of a family unit to third parties. Certainly all these incidents may not adhere to every cohabitational relationship but neither do they to all marital relationships.

When a cohabitational relationship breaks down, is terminated by death (whether naturally or unnaturally caused), or financial misforture or disaster strikes, the same problems confront the cohabitant as the spouse. In a case of break up problems of division of property, custody of children and dealing with any financial dependence which might have grown up may arise in either situation. On death the long term spouse or cohabitant may find him or herself destitute as a result of his or her partner's will or lack thereof, if she is unable to claim pension or insurance benefits, or is disentitled to claim under Fatal Accidents type legislation. Where financial disaster strikes, again, a married or non-married partner may suffer hardship unless he or she can claim pension or insurance benefits.

So far we have spoken of the hardships that may result to the cohabiting partner unless some sort of equation with a married state is created. However, on the other side of the coin, benefits may acrue to the cohabiting partner that would not be available to his or her married counterpart. Pension and Social Security benefits, for example, are generally greater for two single people that for a married couple. Is it equitable that married cohabitants should receive less by way of such

benefits than their non-married counterparts?

The second form that recognition of non-marital cohabitation might take is partial equation with marriage. Under this form cohabitants would have some of, but not all of, the incidents of marriage. This is the form of recognition which pertains in South Australia. South Australian law permits a spouse to apply to the Supreme Court of South Australia for a declaration that he or she possesses the status of "putative spouse". Once that status is declared by the court to exist then the putative spouse has the same entitlement as the married person in a number of specified areas. Most notably the position of putative spouses and married persons are equated in relation to claims consequental on the death of a partner. Thus, a putative spouse and a married person, in general, have the same rights under legislation concerning intestate succession, testator's family relief, fatal accidents and eligibility under government superannuation schemes. The putative spouse is <u>not</u> equated to the rights of a married person, however, with respect to maintenance claims or property settlements during the lifetime of the other party.[9]

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[9] Section 11(1) of the Family Relations Act 1975 (S.A.) provides that a person is a putative spouse if, on the relevant date, he or she is:

"cohabiting with [the other] person as the husband or wife de facto of that other person and

(a) he [or she]

i. has so cohabited with that other person continuously for the period of 5 years immediately preceeding that date; or

ii. has during the period of 6 years immediately preceeding that date so cohabited with that other person for periods aggregating not less than 5 years, or

The third form that recognition of non-marital cohabitation might take is simply to continue along that path that has already been commenced. That is, the law might be amended in certain specific area only in order to cure inequities and situations of hardship. As we have seen[10] non-marital unions are recognized in certain specific areas such as Workers' Compensation and Criminal Injuries Compensation. This third form of recognition would simply expand the list of statutes in which such relationships are recognized. The legislation would deal with particular situations in which hardship might result to the non-married partner (fatal accidents might be an example) and would deal with situations in which non-married partners receive advantages not available to their married counterparts (areas of public law would spring most quickly to mind in the connection).

Which of these three alternative forms of recognition should Alberta adopt?

We have seen[11] that non-marital cohabitation often involves the same incidents as marital cohabitation. However, to equate or partially equate the two ignores various factors. Firstly, whilst non-marital cohabitation is increasing the great majority of Alberta couples <u>are</u>, in fact, married. Further, whilst non-marital cohabitation is gaining social acceptance it would not be true to say that Alberta society today is as equally accepting of such unions as it is of marital unions. To equate

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[9](cont'd)
(b) he [or she] has had sexual relations with that other person resulting in the birth of a child.

[10] <u>Supra</u>, Note 1.

[11] <u>Supra</u>, page 39.

or semi-equate the non-marital and the marital union could well act as a disincentive for parties to marry. In Sweden, where the current legislative trend is to equate cohabitation with marriage, it has been suggested that the legislation has had an adverse effect on the marriage rate, that is, the legislation is leading to an increasingly common attitude that marriage is unnecessary.[12] The laws surrounding the status of marriage have been formulated with a view to protecting the parties to the marriage themselves to protecting their children and, in some instances to the protection of third parties. Divorce laws prevent the impulsive break up of unions which laws, inter alia, are deemed appropriate for the welfare of the children of such unions. If, as the Swedish example would suggest, the equation or semi-equation of marital and non-marital unions would lead to persons choosing not to marry, we must ask ourselves: "Is this the result we wish to achieve?"

A second factor militating against the equation or semi-equation of marital and non-marital cohabitation is as follows. People who live together outside marriage have generally chosen to do so. Prior to 1968 it may be that in many instances there was no freedom of choice as the divorce law was so restrictive. However, since 1968, even a party totally "at fault" may divorce his or her spouse. Under the Divorce Act 1985 the grounds for divorce are even less restrictive. Thus, inability to divorce one's spouse is no longer a reason to live extra-maritally. People generally live together out of choice, not because they cannot get married. This being the case, why

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[12] Angers, "Cohabitation Without Marriage in Swedish Law" in Eekelar and Katz (eds), "Marriage and Cohabitation in Contemporary Society" (1980) at page 245.

should legislation impose upon parties obligations and benefits which they have chosen to avoid? Certainly, there may be particular situations which we feel merit the imposition of a marriage like obligation or benefit (as was done in a case of Workers' Compensation) but these should surely be isolated instances rather than assimilation of marriage and non-marital cohabitation.

Thirdly, many writers today see marriage as a vehicle that has trapped women into a cycle of subordination and dependency. The traditional view of marriage sees the husband as head of the household ("the breadwinner") and the wife as carer of home, hearth and family. This has not only caused men to see women as secondary in financial and business contexts but for women to see themselves in that way too. Once a woman marries it is all too easy for her to fall into the traditional role expected of her. She subordinates her own career goals for her family, becomes largely dependant on her husband financially and, on marriage break up, finds herself severely disadvantaged. With changing patterns of maintenance laws that encourage the "clean break", short term rehabilitative maintenance etc.[13] the plight of the traditional housewife has become even more acute. Much has been written on marriage as an institution which has trapped women into a habit of subject reliance and led to the feminization of poverty.[14] For example, Freeman and Lyon have written "we view

[13] See Davies, "Principles Involved in the Awarding of Spousal Support" 1985 46 RFL (2nd) 210.

[14] See, in particular, Lenore Weitzman, "The Marriage Contract" (1981), Lenore Weitzman, "The Divorce Revolution" (1985), Freeman and Lyon, "Cohabitation Without Marriage (1983), Deech, "The Case Against Legal Recognition of Cohabitation" in Eekelar and Katz (eds) "Marriage and Cohabitation in Contemporary Society" (1980) at page 300.

with some alarm the increasing tendency to treat cohabitation as if it were marriage. It seems that many who avoid marriage because of its idealogical notions of subordination and dependence find the consequences attaching to marriage thrust on them whether they like it or not, almost as if, as one critic notes, women were being told that they were not allowed to escape by cohabiting".[15] And Deech writes: "Women, in particular, may wish to avoid what they see as a male dominated legal institution [marriage] and to preserve their mobility for a career and as much independence and freedom as possible",[16] and "maintenance and property awards to former cohabiting partners are not simply payment for the freedom to leave one woman for another but would also reinforce the outmoded view, upheld by the law, of the man at the head of the household and the woman as being under obligation to provide domestic services and child care, a view which is too unsatisfactory in its application to married persons to permit of its extension to the unmarried".[17]

Initially, there would appear to be a blatant contradiction between the first and third reasons given above for not assimilating marriage and non-marital cohabitation. However, it is submitted that this is not, in fact, so. If non-marital cohabitation was assimilated with marriage, particularly in the areas of maintenance and property division, the female cohabitant would be encouraged to adopt a subordinate and dependent role in the relationship akin to a wife. A strong assimilation might well lead to persons choosing not to marry as it would become

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15 Id. at page 34.

16 Id. at page 302.

17 Id. at page 304.

unnecessary to do so. At least, in one respect cohabitation could not be assimilated with marriage, that is with respect to divorce. Divorce laws prevent the over-hasty termination of a relationship, such laws being perceived to benefit society as a whole and children in particular. Thus, assimilation would have the twofold effect of extending the disadvantages of marriage to cohabitants whilst discouraging persons from marrying and thus avoiding safeguards provided by divorce laws.

It is interesting to note that in the technical report entitled "A Survey of Adult Living Arrangements" commissioned by the Institute in 1984[18] non-married female cohabitants appeared to have retained greater independence and avoided reliance on there male partners to a greater degree than their married counterparts. For instance, the labor force participation rate for non-married, as opposed to married, females was higher by about 20% for those cohabiting 2 years or more. Further, there were proportionately fewer full time homemakers among non-married female cohabitants than among their married counterparts.[19]

In terms of their financial arrangements, non-married cohabitants were seen to have separate bank accounts more often, and to have joint bank accounts less often than their married counterparts. Although the majority of both groups reported that they generally pool their resources, this arrangement was more frequently reported by married cohabitants.

Comparisons of property ownership patterns revealed the following. Home ownership was less common among non-married

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[18] Research Paper No. 15.

[19] Id. at page 43.

cohabitants than among their married counterparts. Also, non-marrieds owning a home were less likely to claim joint ownership than were their married counterparts. In terms of ownership of personal property (such as cars and furniture) non-married respondents who had cohabited for 10 years or less reported that they had mixed ownership more often than joint ownership. The majority of married respondents, on the other hand, reported joint ownership more often than mixed.[20]

A fourth argument against the assimilation of marriage and non-marital cohabitation and one that weighed heavily with the New South Wales Law Reform Commission[21] is that marriage has a special status in the community that is derived in large part from the public commitment entered into by the parties. Whilst de facto relationships may perform similar or even identical functions to marriage (both from the perspective of the parties and of the community generally) a public commitment is not a necessary part of such relationships.

Is this view of marriage vis a vis non-marital cohabitation born out by the technical report commissioned by the Institute?[22] It would seem that it is. The duration of the relationship of non-married cohabitants tended to be much shorter on average than that of their married counterparts. The median duration for non-married and married cohabitant relationships was 2.08 and 13.33 years respectively.[23] Further, in stating their

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20 Id. at page 57.

21 LRC 36 1983 at page 113.

22 Research Paper No. 15.

23 Id. at page 41.

reasons for cohabiting, avoiding the legal commitment that marriage involves was rated a fairly important reason by non-married cohabitants. Married cohabitants, in contrast, report that the legal commitment involved in marriage was a fairly important reason for them. Non-married cohabitants placed a fair degree of "importance" on the fact that they did not really plan the living arrangement that they were now in and that one of their considerations for staying in the relationship was its convenience. Neither of these considerations were rated very highly by married respondents.[24]

Whilst 56.7% of non-married cohabitants described their living arrangement as a "common law marriage" the vast majority of the remainder chose the term "a close personal relationship". There was a tendency to select the term "a common law marriage" as the duration of the relationship increased. This, and other evidence[25] led the compilers of the report to conclude that those who use the term "a common law marriage" view their living arrangement to be more similar to legal marriage, whereas those who used the term "a close personal relationship" viewed it to be less similar to marriage.[26] These findings would seem to suggest that the public and personal commitment of those in a cohabitational relationship is less than those in a marriage. This would certainly seem to be the case for those who describe

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[24] Id. at page 74.

[25] Such as that non-married cohabitants who describe their relationship as "a common law marriage" and who owned a home were more likely to report joint as opposed to separate ownership. Conversely, those who described their living arrangement as "a close personal arrangement" were more likely to report separate, as opposed to joint, ownership of their home (Id. at page 58).

[26] Id. at page 42.

their relationship as "a close personal relationship" (approximately 40% of the unmarried cohabitants surveyed) than those who described themselves as living in a "common law marriage".

In further pursuit of the differences between marriage and non-marital cohabitation it becomes relevant to ask "Why do people choose to live together outside marriage?"

4. The Reasons People Cohabit Extra-Maritally

Freeman and Lyon[27] posit several reasons why people choose to cohabit rather than marry. These are as follows:

a) Rejection of the traditional marriage contract which state regulated marriage seems to impose.

b) There may be some legal impediment to marriage (such as present inability to divorce, or because the parties are within the prohibited degrees). Alternatively, there may be impediments under religious laws which are, for the groups concerned, as much a barrier to marriage.

c) Rejection of the financial responsibilities imposed by state regulated marriage or acceptance of the financial advantages arising from cohabitation. Once married persons may feel financially drained by the divorce experience and therefore wish to avoid it in future

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[27] Freeman and Lyon, "Cohabitation Without Marriage" (1983) pp. 51 et seq. See also Deech, "The Case Against Legal Recognition of Cohabitation" in Eekelar and Katz (eds) "Marriage and Cohabitation in Contemporary Society" 1980 at pp. 301-302.

relationships. Social Security and tax laws may make it financially unattractive to marry.

d) There may be a desire to postpone marriage. A young couple may choose to cohabit rather than intermarry until their respective careers are established, until they have enough money to buy house and furniture, or, more simply, the cohabitation may be a "trial marriage".

Responses to the survey of adult living arrangements commissioned by the Institute[28] told a somewhat similar story. An important reason for cohabiting for a quarter of the non-married cohabitants was that one or other party was not free to marry. In general, however, avoiding the legal commitment that marriage involves was rated as a fairly important reason by non-married cohabitants.[29]

5. Preliminary Conclusions

In light of the above it may be stated that although there may be strong similarities between the married and cohabitational states there are significant differences that militate against the assimilation, or even partial assimilation, of marital and non-marital cohabitation.

Most cohabitants have chosen not to marry.[30] Many have

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28 Research Paper No. 15

29 Id. at page 74.

30 Although 25% of the cohabitants surveyed in Alberta stated that one or other of the parties were not free to marry, with the easing of divorce laws, the limited rules of consanguinity and affinity and the waning influence of religion (only about one quarter of the non-married

chosen not to marry for the very reason that they wish to avoid the legal commitment involved in marriage and reject the traditional marriage contract. Are we to impose on such people the very status they have freely chosen to avoid? Others have chosen not to marry for financial reasons. These people are well aware of the situation in which they have placed themselves. If they have suffered a financially draining divorce and wish to avoid a repetition why should the law force upon them a similar fate? Piecemeal reform to avoid inequity and hardship would appear more apposite here than assimilation of marriage and cohabitation. Finally, it seems quite inappropriate to impose the rights and obligations of marriage on people who lack the interspousal commitment that marriage involves. Those people who have chosen to cohabit for a trial period before marriage should surely not have imposed upon them those very obligations that they deliberately saught to avoid until the experimental period has expired.

It is submitted that the argument against according non-marital cohabitants a status akin to that of married persons is overwhelming. What, however, of the suggestion that non-marital cohabitants should be accorded a status giving them certain but not all the rights and obligations accorded to married persons? How does this suggestion differ from that of according non-marital cohabitants no special status but amending the law in certain specific areas in order to cure inequities and situations of hardship? It is submitted that there is a

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[30](cont'd) cohabitants surveyed in Alberta viewed religion as being important to them - see Technical Report page 43), it is submitted that non-marital cohabitation <u>is</u> a chosen state.

significant difference between the two suggestions. To give the unmarried cohabitant a status (such as that of the putative spouse in South Australia) means that the unmarried cohabitant upon whom the status is conferred will be defined in the same way for all purposes. Thus, the definition of putative spouse in South Australia[31] does not differ whether rights under Family Relief legislation are at issue or rights under the Fatal Accidents Act or the government's superannuation scheme are in question. It is submitted that it may well be apposite to distinguish between different areas of law. It is submitted that it may be appropriate to treat a certain length of cohabitation as giving rights (or creating obligations) in one case but a lesser length of cohabitation may suffice for another purpose. For instance, under Fatal Accidents legislation a minimal period of cohabitation may suffice to give a cohabitant the right to apply.[32] Under pension schemes a longer period of cohabitation may be appropriate before entitlement is established.

It is accordingly recommended that Alberta law should not accord to non-marital cohabitants a status akin to marriage. Nor should it accord to non-marital cohabitants a status which gives them certain, but not all, rights and obligations normally accorded only to married persons. It is recommended that non-marital cohabitation should not confer a marriage like status but that the law should be amended in certain specific areas only in order to cure inequities and situations of hardship.

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31 See supra note 9.

32 In the case of Fatal Accidents a person on whose behalf an action may be brought must demonstrate a loss of pecuniary benefits. A party to an ephermeral relationship is unlikely to be able to demonstrate such loss.

It is intended now to outline those areas of Alberta law in which the non-marital cohabitant is granted rights or made subject to restraints. Afterwards, specific areas of law will be examined and recommendations will be made as to whether those areas should be amended to take into account the unmarried cohabitant.

PART III

PRESENT ALBERTA LEGISLATION

Introduction

A handful of Alberta statutes grant rights to and impose restraints upon non-marital cohabitants. As well, several statutes deal with the most prominent affects of such unions, namely illegitimate children.[33] Finally some statutes make provision for cohabitants who have gone through a ceremony of marriage, the marriage, however, being either void or voidable.[34]

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[33] E.g.:
The Change of Name Act R.S.A. 1980 c. C-4 s. 11(4) allows the mother of an illegitimate child to apply to change the surname of that child to that of the man with whom she is cohabiting, but only with the consent of the man.
The Domestic Relations Act R.S.A. 1980 c. D-37 s. 47 provides that unless otherwise ordered, the mother of an illegitimate child is its sole guardian.
The Family Relief Act R.S.A. 1980 c. F-2 provides that illegitimate children can make a claim under that Act.
Fatal Accidents Act R.S.A. 1980 c. F-5 provides that illegitimate children can make a claim under that Act.
Intestate Succession Act R.S.A. 1980 c. I-9 provides that for the purposes of that Act an illegitimate child shall be treated as though he were the legitimate child of his mother. Additionally he may have some rights against his father's estate.
Legitimacy Act R.S.A. 1980 c. L-11 provides that children of voidable and certain void marriages are legitimate.
Maintenance and Recovery Act R.S.A. 1980 c. M-2 makes provision for the payment of maintenance by a putative father for the support of his illegitimate child.
The Wills Act R.S.A. 1980 c. W-11 s. 36 provides that in the construction of a will, except where a contrary intention appears, an illegitimate child shall be treated as though he were the legitimate child of his mother.

[34] E.g.
The Matrimonial Property Act R.S.A. 1980 c. M-9 s. 1(e) and s. 2 provides that claims can be made under that Act by parties to voidable and certain void marriages.
The Domestic Relations Act R.S.A. 1980 c. D-37 s. 22 provides for maitenance claims after a decree of nullity.

In this part we shall deal with this first category of legislation, that in which positive rights or obligations are accorded or imposed upon those living in non-marital relationships. A complete review of those statutes dealing with illegitimate children is thought to be unnecessary in light of the Institute's proposal that the status of illegitimacy be abolished.[35] The subject of the void and voidable marriage is not directly within the terms of reference of this report.

1. Alberta Statutes That Grant Positive Rights and Impose Restraints Upon Cohabitants

The following statutes, or groups of statutes, confer rights upon cohabitants.

A. The Change of Name Act[36]

Section 11(4) of the Act allows the mother of an illegitimate child to apply to change the surname of the child to that of the man with whom she is cohabiting. The man must consent to the change. Section 13 prohibits an application by either cohabitor to change their surname to that of the other.

B. The Child Welfare Act[37]

Section 56 of the Act allows any "adult" to apply to adopt a child. Thus, in theory at least, cohabitants in Alberta have the right to adopt children.

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35 Report No. 20, "Status of Children" (1976). [Revised Report 1985, Report No. 45].

36 R.S.A. 1980 c. C-4.

37 S.A. 1984 c. C-8.1.

C. The Criminal Injuries Compensation Act[38]

The Act provides for compensation to be awarded to victims of specified crimes, or to anyone injuried or killed in attempting to assist in the making of an arrest. If the victim is killed, compensation can be given to dependants. A "common law spouse" is included in the definition of dependants. A 'common law spouse' for the purposes of the Act means someone who has cohabited with the victim for at least the 5 years immediately preceding the application for compensation or for at least 2 years if there is a child of the relationship. A common law spouse may also recover compensation where the victim has been killed as a result of the commission by another of certain driving offences.

D. The Fatality Inquiries Act[39]

The Act provides a means by which the state can investigate the cause of death of an individual. A "common law spouse" is entitled to 48 hour notice of disinterment (section 29). In addition, a "common law spouse" is a "next of kin" under section 1(i) and is entitled:

(a) to appear and cross-examine witnesses at a public inquiry into the death of the spouse (section 43),

(b) to receive a report of an investigation or a public inquiry from the Chief Medical Examiner on request (section 31),

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38 R.S.A. 1980 c. C-33.

39 R.S.A. 1980 c. F-6.

(c) to request that all or any part of a public inquiry be held in camera (section 40.2), and

(d) to object to the removal of the deceased's pituitary gland for medical or scientific purposes (section 27).

A 'common law spouse' is defined by section 1(e) as:

> ...a man or woman who, although not legally married to the deceased, lived and cohabited with the deceased immediately prior to the deceased's death as the deceased's spouse and was known as such in the community in which they lived.

E. The Insurance Act[40]

Section 313 of the Act provides that compulsory no-fault death benefits are to be part of every policy of motor vehicle liability insurance. If an insured person dies (thus entitling the surviving spouse to benefits) and there is no surviving spouse, a common law spouse is entitled to the benefits. The Act establishes a two-stage test. First the parties must have cohabited with the survivor being known in the community as the deceased's spouse (section 313(10)). Second, they must have cohabited for 5 years immediately prior to the insured's death, or 2 years if there is a child of the relationship (section 313(11)).

F. The Pension Plan Acts

Pension plans established under or governed by certain Alberta statutes confer rights upon cohabitants. These statutes

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[40] R.S.A. 1980 c. I-5.

are the Alberta Government Telephone Act,[41] the Employment Pension Plan Act[42] and the six statutes that fall under the Pension Fund Act.[43]

Post retirement survivor benefits mean that where an employee has selected (or is deemed to have selected) a pension plan that endures beyond his lifetime, a surviving cohabitant may be entitled to the benefits of that pension for the remainder of her life. Pre-retirement survivor benefits mean that where an employee dies prior to retirement, return of premiums or, in some cases, other payments, may be made to a surviving cohabitant.

Under all of the above named statutes a cohabitant becomes entitled to survivor benefits by virtue of falling within an expanded definition of the term "spouse". Whilst the six statutes falling under the Pension Fund Act have a common definition of the term, the definition of "spouse" under the Alberta Government Telephones pension plan and the definition under the Employment Pensions Plan Act are different from those and from one another.

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41 R.S.A. 1980 c. A-23.

42 S.A. 1986 c. E-10.05.

43 R.S.A. 1980 c. P-3.1. The six statutes falling under this Act are:
(a) The Local Authorities Pension Plan Act S.A. 1985 c. L-28.
(b) The Members of the Legislative Assembly Pension Plan Act S.A. 1985 c. 12.5.
(c) The Public Service Management Pension Plan Act R.S.A. 1980 c. P-34, R & S 1984 c. P-34.1.
(d) The Public Service Pension Plan Act S.A. 1984 c. P-35.1.
(e) The Special Forces Pension Plan Act S.A. 1985 c. S-21.1.
(f) The Universities Academic Pension Plan Act S.A. 1985 c. U-6.1.

G. Reciprocal Enforcement of Maintenance Orders Act 1980[44]

The definition of "claimant", "final order" and "order" are drafted broadly enough that final and provisional maintenance orders awarded to cohabitants in other states or provinces may be enforced and confirmed in Alberta.[45]

H. The Workers' Compensation Act[46]

Section 64 of the Act provides a dependent spouse with a pension on the death of a worker. A "spouse" is defined in section 1(3) of the Act as including a common law spouse who cohabited with the deceased for the 5 years immediately preceding death, or for 2 years if there is a child of the relationship. The section provides, however, that the claim of a common law spouse can be displaced by the claim of a dependent "legal spouse".

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44 R.S.A. 1980 c. R-7.1.

45 See Davies, "Family Law in Canada" (1984) pp. 281, 282, 284 and cases therein cited.

46 R.S.A. 1980 c. W-16.

PART IV

AREAS OF THE LAW THAT MIGHT BE THE SUBJECT OF AMENDMENT

We shall now examine specific areas of law and question whether amendment in each area is desirable in order to accommodate those who cohabit outside marriage. The areas will be divided into three categories: firstly, we shall examine those areas involving rights and obligations as between the cohabitants themselves. Secondly, we shall explore those areas involving rights and obligations as between cohabitants and third parties. Finally, we shall review those areas involving relations between cohabitants and the state.

1. Those Areas of Law Which Involve Relations Between the Cohabitants inter se

A. Maintenance

i. Provincial legislation

Several of the Canadian provinces have enacted legislation providing for support between non-married couples.[47] There is

[47] The nature of the relationship between whom the support obligation is owed varies from province from province. See: [B.C.] Family Relations Act R.S.B.C. 1979 c. 121 s. 1(c)
> ''spouse' ...includes...a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than 1 year after the date they ceased living together as husband and wife.'

[Manitoba] Family Maintenance Act S.M. 1978 c. 25/F20 (as amended by 1982, 1983, 1984 c. 54 s. 5; 1985 c. 49 s. 1(1)), s. 2(3):
> "The obligation [of support] also exists where a man and a woman, not being married to each other, have cohabited continuously for a period of not less than 5 years in a relationship in which the applicant has been substantially dependent upon the other for support, if an application under this Act is made while they are

little consistency in the legislation on the nature of the relationship that must exist before the support obligation applies. In the Yukon Territory it is necessary only that the parties have cohabited in a relationship of some permanence (no

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[47](cont'd) cohabiting or within 1 year after they cease cohabiting..."

s. 11(1)

"where a man and woman who are not married to each other have cohabited for a period of 1 year or more and there is a child of the union, this Act applies mutatis mutandis if an application for an order is made thereunder by or on behalf of the man or the woman while they are still cohabiting or within 1 year after they cease cohabiting."

[New Brunswick] Family Services Act S.N.B. 1980 c. C-2.1 s. 112(3):

"A man and a woman, not being married to each other, who have cohabited (a) continuously for a period of not less than 3 years in a relationship in which one person has been substantially dependent upon the other for support, or (b) in a relationship of some permanence where there is a child born of whom they are the natural parents,
and have so cohabited within the preceding year..."

[Newfoundland] Maintenance Act R.S. Newfoundland 1970 c. 223 (as amended by 1973 Act No. 119 s. 5) s. 10a:

"where
(a) a woman has lived and cohabited with a man for a period of 1 year or more; and
(b) he is the father of any child born to her, she...may, within 1 year from her ceasing to live and cohabit with him make an application..."

[Nova Scotia] The Family Maintenance Act S.N.S. 1980 c. 6 (as amended by 1983 c. 64 s. 1) s. 2(m):

"'spouse'...for the purpose of this Act, includes a man and woman who, not being married to each other, live together as husband and wife for 1 year."

[Ontario] Family Law Act 1986 S.O. 1986 c. 4 s. 29: "either a man or a woman who are not married to each other and have cohabited,
(a) continuously for a period of not less than 3 years, or
(b) in a relationship of some permanence if they are the natural or adoptive parents of a child."

[Yukon] Matrimonial Property and Family Support Ordinance O.Y.T. 1979 2nd c. 11 (as amended by 1980 2nd c. 15 s. 7); s. 30.6:

"Either of a man and a woman who, not being married to each other and not having gone through a form of marriage with each other, have cohabited in a relationship of some permanence, may, during cohabitation and not later than three months after that cohabitation has ceased, apply to a court for an order for support..."

time period specified). In Manitoba, on the other hand, there must have been continuous cohabitation for a period of 5 years. The other provinces vary from periods of 1 year (Nova Scotia), 2 years (British Columbia), and 3 years (New Brunswick and Ontario). In Ontario and New Brunswick the birth of a child without more will bring the parties within a supporting relationship so long as they have been cohabiting in a relationship of "some permanence". In Manitoba and Newfoundland the birth of child alone is not sufficient, there must also have been cohabitation for a year. In the other provinces the birth of a child is not part of the statutory definition of the supporting relationship.[48] In some provinces there must have been "substantial dependence" by one party on the other[49], in some provinces the parties must have lived in a relationship of "some permanence"[50] and in some the parties must have lived together as "husband and wife"[51]. In the Yukon Territory the application for support must be brought within three months of cohabitation ceasing. In the other provinces the limitation period is longer.

In one respect there is consistency between these provincial and territorial enactments: for the obligation of support to arise the parties must have cohabitated. One might compare the

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48 Clearly the birth of a child would be relevant on the question of whether maintenance should be awarded in the particular case and, if so, in what amount. In British Columbia, Nova Scotia and the Yukon, however, the birth of a child is not part of the statutory definition of 'spouse' or 'common law relationship'.

49 New Brunswick and Manitoba.

50 Ontario, New Brunswick and the Yukon Territory.

51 Nova Scotia and British Columbia.

approach of the New Zealand legislature where support may be paid by one unmarried parent to another if such payment is deemed desirable in the interests of providing or reimbursing the applicant for having provided adequate care for the child. For this obligation to exist it is not necessary that the parties have cohabited.[52]

Apart from providing for alimony after a declaration of nullity[53] Alberta legislation makes no provision for the payment of support between cohabiting couples.

ii. The New South Wales Law Reform Commission

In 1983 the New South Wales Law Reform Commission examined the question of whether a person living in a de facto relationship should be under a legal obligation to support his or her partner or ex-partner and, if so, in what circumstances[54]. The Commission concluded that in general, parties to a de facto relationship should be required to support themselves. However, in two specific circumstances a total denial of the support obligation could cause injustice. The first such circumstance is where one party has the care and control of a child of a de facto relationship and is unable to support him or herself by reason of the child care responsibilities. The second circumstance is where a person's earning capacity has been adversely affected by the de facto relationship (e.g. because domestic responsibilities have precluded that person from acquiring marketable skills) and

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52 Family Proceedings Act 1980 (N.Z.) ss. 79-81.

53 Domestic Relations Act R.S.A. 1980 c. D-37 s. 22.

54 'Report on De Facto Relationships' New South Wales Law Reform Commission 36 (1983) p. 155 et seq.

some training or re-training is required to enable that person to undertake gainful employment. Thus, the New South Wales Law Reform Commission recommended that the support obligation exist between de facto couples only where either one of these circumstances existed.[55] It further recommended that the duration of such maintenance orders should be limited.[56] This recommendation has now been enshrined in legislation.[57]

iii. Should Alberta law be amended so as to require the payment of support in certain circumstances as between cohabiting couples?

Our primary question here must be to ask: "Should support be payable by one person to another when those persons have not

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55 The Commission recommended (id at pp. 162-163) that the general principle governing maintenance between de facto partners should be that each partner is liable to support himself or herself and that neither should be entitled to claim maintenance from the other. Notwithstanding the general principle the court should have power, in proceedings between the de facto partners, to award maintenance to the applicant if, and only if, (a) the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the relationship under the age of 12 years (or in the case of a physically or mentally handicapped child, under the age of 16 years) at the date proceedings are instituted; and/or (b) the applicant is unable to support himself or herself adequately because his or her earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court, first, an order for maintenance would increase the applicant's earning capacity by enabling him or her to undertake a course or program of training or eduction and, secondly, having regard to all the circumstances of the case it is reasonable to make the order.

56 The Commission recommended that in situation (a) outlined in footnote 55 above maintenance should cease when the child reached the age of 12 (or, if handicapped, 16). In situation (b) duration of the order should be limited to a maximum period of 3 years from the date of the order or 4 years from the termination of the de facto relationship, whichever period is shorter.

57 De Facto Relationships Act 1984, No. 147 (N.S.W.) ss. 26, 27. See Appendix I to this report.

inter-married?". The matter of child support is not relevant to this discussion and will be dealt with separately later. Only if we answer the above question in the affirmative will it be necessary to address the circumstances in which the obligation of support should exist.

The philosophy underlying the award of spousal support has changed dramatically in recent years.[58] Maintenance was traditionally seen as a lifetime pension payable to an innocent wife to maintain her in the standard of living to which her husband had accustomed her provided she could prove fault on his part. Today, the emphasis in the award of maintenance is seen more and more as a temporary solution to satisfy needs until self-sufficiency is or should be achieved. Fault on the part of either party is largely irrelevant.[59] Does it not appear incongruous, when spousal support is on the wane, that there should be a suggestion of extending its reach to non-marital relationships?[60]

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58 See generally Davies, "Principles Involved in the Awarding of Spousal Support" (1985) 46 R.F.L. (2d) 210.

59 The new philosophy in the awarding of spousal support is observable in the 1985 Divorce Act (Canada), in recent support legislation of other provinces (discussed by Davies in "Principles Involved in the Awarding of Spousal Support" (1985) 46 R.F.L. (2d) 210) and to the proposals of the Institute relating to matrimonial support (Report No. 27 March 1978).

60 The reasons why spousal support is on the wane are various. They include, (a) the rise in the divorce rate (the corollary to divorce being remarriage, it is deemed inappropriate to keep spouses financially shackled to their erstwhile mates); (b) women's increased participation in the labour force and better wage earnings positions than heretofore; (c) the push for women's equality of opportunity being inconsistent with the picture of the perpetually dependent alimony drone; (d) provincial matrimonial property laws have led to an improvement in the asset position of many wives on marriage breakdown. Do these reasons have relevance to the cohabitational situation? It is submitted

Several writers have warned against extending support obligations to cohabitees.[61] Freeman and Lyon[62] warn of "further institutionalizing women's economic dependence on men". Deech[63] says that "the vicious circle of reduced work opportunity because she is dependent, followed by protective maintenance laws because she cannot be self-sufficient, has to be broken at some stage". Marriage, it is said, has fostered an image of man as breadwinner, wife as dependent helpmate. The women's movement has gone far to dissipating this image. Women are the equal of men, have equivalent rights and capabilities in the work place. They should not see themselves, or be seen, as dependent drones. The new philosophy adopted towards spousal maintenance referred to above[64] with its emphasis on temporary awards to help establish or re-establish self-sufficiency are a reflection of this.

Does all this lead inevitably to the conclusion that Alberta law should not provide for support between cohabitants at all? The two situations that perhaps bespeak hardship under the current law are those addressed by the New South Wales

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[60](cont'd) that an analogy can be drawn between the position of spouses and cohabitees in respect of all but the fourth category (d) set out above. Provincial matrimonial property laws do not cover cohabitees (save those who are parties to a void marriage).

[61] E.G. Freeman and Lyon, "Cohabitation Without Marriage" (1983); Hoggett, "Ends and Means: The Utility of Marriage as a Legal Institution" in Eekelar and Katz (eds), "Marriage and Cohabitation in Contemporary Society" (1980) p. 94 et seq.; Deech, "The Case Against the Legal Recognition of Cohabitation" in Eekelar and Katz id p. 300 et seq.

[62] Ibid. at p. 71.

[63] Ibid. at p. 307.

[64] Post p. 64.

legislation, namely (a) the situation of the middle aged or elderly homemaker whose earning capabilities have been hampered or destroyed by the relationship, and (b) the situation of the mother of young children born of the relationship. Should Alberta law be amended to deal with these two situations? Let us deal with each of these situations in turn; firstly, the case of the displaced homemaker.

As we have discussed earlier[65] a crucial distinction between marriage and cohabitation is that the former, but not the latter, involves a public commitment. The technical report commissioned by the Institute in 1984[66] shows also that the personal commitment of those in a cohabitational relationship is less than in a marriage. Further, the technical report shows that non-married female cohabitees appear to have retained greater independence than their married counterparts.[67] Where women[68] have chosen to live in a relationship that does not involve the commitments of marriage, have largely resisted becoming dependent on their male partners, are we to thrust upon them protective legislation typical of the very institution they have sought to avoid?[69]

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65 Part II of this report p. 46.

66 "Survey of Adult Living Arrangements". Research Paper No. 15 discussed in Part II of this report pp. 19-21.

67 See Part II of this report p. 45.

68 Albeit all support obligations are expressed as equally applicable to men and women, in fact, the vast majority of applicants for support are women and the vast majority of respondents to such applications are men.

69 As Freeman and Lyon so colourfully put it (supra note 61 p. 177), "[W]omen may well wish to escape the fate of being professional parasites but various jurisdictions seem concerned to encourage them to adopt such a role. The cry of "back to the kitchen, we have protected you" could thus be

It is perhaps pertinent to note that the technical report commissioned by the Institute in 1984 found a fairly low degree of concensus among respondents to the survey on the issue of whether support payments should be paid to the dependent partner in the event of breach of the relationship.[70]

Perhaps a case can be made for protecting, by an award of maintenance, a married middle-aged housewife who has become redundant after years of marriage. She, at least, was lulled into a state of dependency by the traditional notions of marriage and the apparent commitment of life-long security that it holds. However, do we wish to encourage female cohabitees into a state of dependency by legislation offering them, too, security in the form of maintenance if their relationship fails and they have allowed themselves to lose their capability of self-support? It is suggested that the answer to this question is 'no'.

Let us turn now to the situation of the mother of young children born of the relationship. Should she be entitled to seek support from her erstwhile cohabitant when the relationship terminates? Many of the arguments advanced above in relation to the displaced homemaker apply with equal force here too. The technical report commissioned by the Institute[71] found as follows. "Approximately 1/4 of the respondents who had been cohabiting non-maritally for ten years or less had dependent children in their homes. In comparison almost 2/3 of married

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[69](cont'd) applied to all cohabiting women, regardless of their desire to remain independent and at considerable cost to the recent reforms affected for married women".

[70] Research Paper No. 15 p. 81.

[71] Research Paper No. 15 pp. 55-56.

respondents who had cohabited for the same period of time had dependent children in their homes. Non-marrieds who did have dependent children in their homes also tended to have fewer children than did their married counterparts. In addition, their children were less likely to be of the current relationship and more likely to be of a previous relationship." Thus, non-married cohabitants in Alberta do not beget children of their relationship to nearly the same extent as their married counterparts. In these days of modern birth control it is naive to suggest that the vast majority of those women who did beget children of their cohabitational relationship did not do so out of choice. The children clearly are entitled to support from their father and, indeed, where the child is so young as to require full-time care the care giver's needs may be taken into account in assessing periodical payments for the child.[72] However, should the mother, in her own right, be entitled to claim maintenance? Once again it is submitted that the answer to this question should be 'no'.

B. Property

The question of property rights as between cohabiting couples inter se involves two principle issues. The first issue is that of ownership: can the court allocate property between the parties in a manner different to that in which title has been taken? Should the court be permitted to make such allocation and if so in what manner and in what circumstances? The second issue insofar as property rights as between cohabiting couples is

[72] Haroutunian v. Jennings (1977) 7 Family Law 210. See also Hoggett, "Ends and Means: The Utility of Marriage as an Institution" in Eekelar and Katz (eds) "Marriage and Cohabitation in Contemporary Society" (1980) at p. 100.

concerned relates to possessory and occupational rights. Should a court be permitted to grant possessory or occupational rights to one cohabitant in property owned by the other? If so, what property and in what circumstances? We shall deal with each of these issues in turn. Firstly, the allocation of title.

i. The allocation of title as between cohabitants

(a) The current law

Currently courts are able to allocate property between cohabiting parties in a manner different to that in which title has been taken by virtue of the trust concept. One party may be held to hold the property, or a certain percentage of that property, in trust for the other. The nature of the trust may be express, implied, resulting or constructive. The first three of these trust types are dependent upon a common intention for their creation. However, the constructive trust is based not on intention but on unjust enrichment. Thus, a constructive trust may be found albeit an agreement to share, express or implied, is absent. The land mark decision of the Supreme Court of Canada in Pettkus v. Becker[73] demonstrates the utility of the constructive trust in this context. The facts of that case, very briefly, were as follows:

Mr. Pettkus and Miss Becker cohabited together for 19 years.

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[73] (1980) 19 R.F.L. (2d) 165. In November 1986 Ms. Becker committed suicide having derived no financial benefit from her litigation. This fact reflects more on the high cost of litigation and deficiencies in the manner in which judgments are enforced than it does on the remedy of constructive trust itself. Enforcement of judgments and less expensive methods of dispute resolution are subjects that will be the subject of future Institute reports.

During cohabitation both contributed towards the acquisition and subsequent agrandisement of a beekeeping business. Title to the beekeeping business and lands on which it was operated was taken in the name of Mr. Pettkus. The majority of the Supreme Court of Canada held that Miss Becker was entitled to a one half interest in the land and in the beekeeping business. The majority based its decision on the fact that Miss Becker's financial contribution and labor had enabled, or assisted in enabling, Mr. Pettkus to acquire the land and business. To permit Mr. Pettkus to retain these assets would be to countenance his unjust enrichment at the expense of Miss Becker. Accordingly, Mr. Pettkus held 50 percent of the beneficial interest in these assets on a constructive trust for Miss Becker. Dickson J. stated the rule thus:[74]

> "Where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it."

The principle established in Pettkus v. Becker was extended in Sorochan v. Sorochan.[75] Here a woman cohabited with a man for 42 years during which time she worked on farmland owned by him. Unlike the situation in Pettkus v. Becker the woman's work contributed to the preservation, maintenance and improvement of the man's land but not to its acquisition. Nonetheless, it was found by the Supreme Court of Canada that there had been an

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[74] At p. 181.

[75] (1986) 2 R.F.L. (3d) 225 (SCC).

unjust enrichment which could be remedied by the imposition of a constructive trust.

In order to prevent the unjust enrichment of one cohabitant vis a vis the other the courts have and do use other non-statutory methods of achieving equity. The action for breach of promise of marriage has in some few cases been valuable in this regard as has the claim for quantum meruit.[76]

Do the laws of other provinces permit the courts to allocate property between cohabitants by methods other than those already mentioned here? Legislation in New Brunswick, Ontario and the Yukon permit a court, where an application for support has been made, to order (inter alia):

> "Any specified property to be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years."[77]

As we have seen[78] the legislation of each of these provinces permits a non-married cohabitant to claim support from his or her partner although the nature of the relationship giving rise to

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[76] See David Cruickshank's paper, "Living Together Outside of Marriage" (April 1979) commissioned by the Institute at pages 47-51; Debbie McNair's paper, "People Who Live Together Outside of Marriage" (November 1980) at pages 76-81 and Davies, "Family Law in Canada" (1984) pages 51-52 and 269-271. See also Davies, "Unjust Enrichment and the Remedies of Constructive Trust and Quantum Meruit" (1987) 25 Alberta Law Review 286.

[77] See:
[New Brunswick] Family Services Act S.N.B. 1980 c. F-2.2 (as amended by 1981 c. 10 s. 5) s. 116(1)(c).
[Ontario] Family Law Act 1986 S.O. 1986 c. 4 s. 34(1)(c).
[Yukon] Matrimonial Property and Family Support Ordinance O.Y.T. 1979 (2d) c. 11 (as amended by 1980 (2d) c. 15 s. 7) s. 30.7(1)(c).

[78] See supra this section pages 59-62.

the support obligation differs as between the provinces.

Each of the provinces and territories of Canada have matrimonial property statutes permitting the courts to reallocate property as between spouses. The term "spouse" in this context may include the parties to a void or voidable marriage but in no province or territory does the matrimonial property statute extend to other cohabitants.[79]

(b) The New South Wales Law Reform Commission

The New South Wales Law Reform Commission[80] felt that the major deficiency in the current law of New South Wales governing property disputes between de facto partners was that it provided no sure means of recognizing substantial, indirect contributions to property by means of contributions (whether financial or otherwise) made to the well being of the other partner or the family. The Law Reform Commission therefore recommended that the law be changed to give the court power: (a) to take into account a wide range of contributions, by either partner, to the acquisition, conservation or improvement of assets and to the welfare of the other partner or the family generally; and (b) to adjust the property rights of the partners where it is just and equitable to do so having regard to these contributions. This

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[79] In 1979 a Bill was introduced into the New Brunswick legislature providing, inter alia, for division of property between cohabitants. This Bill died on the order paper and was passed in the next session in a less controversial form omitting all reference to division of property between cohabitants. See generally, Bala, "Consequences of Separation for Unmarried Couples: Canadian Developments" (1980) 6 Queen's Law Journal 72 at 122, 143-144.

[80] Report on De Facto Relationships L.R.C. 36 1983 pages 135-154.

recommendation has now been enacted.[81]

The Commission, in making these recommendations, referred to the doctrine of the constructive trust as it has been employed in Canada since the Supreme Court of Canada decision in Pettkus v. Becker. The Commission compared the Canadian position with that which pertains in New South Wales. In New South Wales a party who has made an indirect contribution to property standing in the name of another may only obtain a beneficial interest in that property if there is a common actual intention that he or she would do so.[82]

(c) Should Alberta law be amended so that the courts might allocate property between cohabitants quite apart from their ability to do so pursuant to the law of trusts?

Firstly, should the sharing provisions of Alberta's Matrimonial Property Act be extended to cover cohabitants? It is submitted that they should not.

As we have seen earlier[83] most cohabitants have chosen not to marry. Many have chosen not to marry for the very reason that they wish to avoid the legal commitment involved in marriage and reject the traditional marriage contract. Others have chosen not to marry for financial reasons. These people are only too aware of the situation in which they have placed themselves.[84] It

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81 De Facto Relationships Act 1984, No. 147 (N.S.W.) ss. 20-25. See Appendix I.

82 Allen v. Snyder [1977] 2 N.S.W.L.R. 685 discussed in N.S.W.L.R.C. 36 pages 136, 137.

83 Part II of this paper p. 49.

84 Those who are not aware of the true situation in which they have placed themselves e.g. because their marriage is,

seems unwarranted and paternalistic in the extreme to impose on such people rights and obligations inter se that they have sought to avoid. Later in this paper we recommend that legislation be passed enabling cohabitants to "contract into" the Matrimonial Property Act.[85]

We have also seen that the personal commitment involved in a cohabitational relationship is generally less than a marital one[86] and that cohabitants in Alberta tend to keep their property separate from each other to a greater degree than their married counterparts.[87] These are factors that also militate against the appropriateness of extending the sharing provisions of the Matrimonial Property Act to cohabitants.

The technical report commissioned by the Institute is inconclusive on the question of whether the sharing provisions of the Matrimonial Property Act should be extended to cohabitants. The survey showed that a slight majority of respondents expressed the opinion that unmarried couples should have the same rights and responsibilities as married couples in the division of property when there is a break up of the relationship. There

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[84](cont'd) unbeknown to them, void, are protected by present laws. E.g. the Matrimonial Property Act of Alberta applies to certain void marriages. Further, remedies are provided by the tort of deceit, as in Beaulne v. Ricketts [1979] 3 W.W.R. 270 (Alta. S.C.T.D.); the action for breach of promise of marriage (as in Shaw v. Shaw [1954] 2 Q.B. 429 (Q.B.); and Dubenchuk v. Cooke (1985) 48 RFL (2d) 315 (BCSC) the claim for quantum meruit (see Sheaser v. Sheaser [1926] 2 W.W.R. 389 (Alberta Court of Appeal) or by an action for a declaration of trust (see Spears v. Levy (1974) 9 N.S.R. (2d) 340 (C.A.).

[85] See infra pp. 105, 106.

[86] Part II of this paper pages 46-48.

[87] Part II of this paper at pp. 45, 46.

was, however, a substantial proportion of respondents who expressed a contrary opinion.[88]

No Canadian province or territory has yet gone so far as to extend the sharing provisions of its matrimonial property legislation to cohabitants. It is submitted that Alberta should not do so either.

If the sharing provisions of the Matrimonial Property Act are not to be extended to cohabitational relationships should Alberta adopt legislation similar to that in effect in Ontario, New Brunswick and the Yukon permitting the courts to order property transfers between cohabitants? Again, the answer, it is submitted, should be, "no". Such transfers are ordered in the context of applications for support. We have already recommended that the support obligation not be extended to cohabiting couples.[89] Seen outside the context of support the provisions are extremely wide and, it is submitted, should not be adopted in the province of Alberta.

Should Alberta adopt legislation similar to that in place in New South Wales? We submit that it should not. The recommendation of the New South Wales Law Reform Commission was felt necessary because principles of common law and equity, as developed by the courts of that State, did not provide a sure means of recognizing substantial contributions to the well being of the other partner or the family. The doctrine of the constructive trust, as expounded by the Supreme Court of Canada

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88 "Survey of Adult Living Arrangements: A Technical Report" Research Paper no. 15 November 1984, pp. 88, 89.

89 See above A. "Maintenance".

in Pettkus v. Becker[90] and Sorochan v. Sorochan[91] has largely alleviated that problem and permits justice to be done between the parties. Under current Alberta law an indirect contribution to property standing in the name of the other may give the contributor an interest in that property regardless of whether there was a common intention that this be so. It is true that Alberta law does not permit one cohabitant to claim an interest in the other's property by virtue solely of contributions made qua housekeeper or parent.[92] However, we feel that contributions to the other partner or the family made as housekeeper or parent should not give one cohabitant an interest in his or her partner's property. If remedy there is to be it should take the form of a claim for quantum meruit or a claim founded on contract.

ii. Possessory and occupational rights as between cohabitants

(a) Current law

In England the equitable or contractual license has been used to permit one cohabitant occupational rights in property owned by another. The English law on this subject has been explored elsewhere.[93] Suffice it to say that the license,

90 (1980) 19 R.F.L. (2d) 165 (SCC).

91 (1986) 2 R.F.L. (3d) 225 (SCC).

92 A constructive trust is dependent on the contribution being referrable to the property in question: Rathwell v. Rathwell (1978) 1 R.F.L. (2d) 1 at 14 per Dickson J (SCC); Pettkus v. Becker supra at p. 183 per Dickson J, Sorochan v. Sorochan supra at p. 236, 239 per Dickson CJC.

93 McNair, "People Who Live Together Outside of Marriage" November 1980 (at pages 94-103). See also New South Wales Law Reform Commission, "De Facto Relationships" L.R.C. 36 1983 p. 141 and Bala, "Consequences of Separation for

equitable or legal has not been used by the Canadian courts to grant one cohabitant occupation rights in property owned by the other and even in England the ambit and scope of these licenses is far from clear.

Several Canadian provinces now have legislation giving one cohabitant occupation rights in property owned by his or her partner. For example, the Family Services Act of New Brunswick provides that, on application by a spouse (which term includes a cohabitant), the court may order:

> "(d) that one spouse be given exclusive possession of a marital home or part thereof for such period as the court directs;
>
> (e) that a spouse to whom exclusive possession of a marital home is given pay such periodic payments to the other spouse as are prescribed in the order with respect to the use of the marital home;
>
> (f) that the household goods within the marital home or any part thereof, remain in the home for the use of the spouse given possession;
>
> (g) that a spouse assume the obligation to repair and maintain the marital home or to pay other liabilities arising in respect thereof ..."[94]

Ontario has a substantially similar provision.[95]

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[93](cont'd) Unmarried Couples: Canadian Developments" (1980) 6 Queen's Law Journal 72 at 112-116.

[94] See Family Services Act S.N.B. 1980 c. F-2.2 (as amended by 1981 c. 10 s. 5) s. 16(1).

[95] Family Law Act 1986 S.O. 1986 c. 4 s. 24(1) and s. 34. See Orlando, "Exclusive Possession of the Family Home: The Plight of Battered Cohabitees" (1987) 6 R.F.L. (3d) 82. Compare, however, Czora v. Lonergan (1987) 7 R.F.L. (3d) 458 (O.D.C.) where Fleury D.C.J. held that s. 34(1)(d) did not give a cohabitant a right to claim exclusive possession of a matrimonial home as the word "matrimonial" referred only to those legally married.

Manitoba, Nova Scotia and British Columbia also have legislation permitting a court to grant exclusive possession of a home and/or household goods to one cohabitant as against the other.[96]

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[96] B.C. Family Relations Act R.S.B.C. 1979 c. 121 s. 77
(1) "An order under this section is for temporary relief pending determination of the rights to the property of the spouses by agreement or by a court having jurisdiction in those matters.
(2) A court may make an order under this section respecting property that is owned or leased by one or both spouses and is or has been
(a) occupied by the spouses as their family residence; or
(b) personal property used or stored at the family residence.
(3) On application the court may order that one spouse for a stated period
(a) be given exclusive occupancy of the family residence; or
(b) to the exclusion of the other spouse may use all or part of the personal property at the family residence.
(4) An order under subsection (3) does not authorize the spouse to materially alter the substance of the family residence or personal property. A spouse does not acquire a proprietary interest on the making of an order under this section.
(5) Subject to section 78 a right of a spouse to exclusive occupancy or use ordered under this section shall not continue after the rights of the other spouse, or of both spouses, as owner or lessee are terminated ..."
Section 78
"Where an order for exclusive occupancy or use has been made under s. 77 the Supreme Court, on application, may order that the rights of a spouse to apply for partition and sale or to sell or otherwise dispose of or encumber the property be postponed and be subject to the right of exclusive occupancy or use and may, in its order, vary the order made under s. 77."
[Manitoba] Family Maintenance Act S.M. 1978 c. 25/F-20 (as amended by 1985 c. 49 s. 1(2)) s. 10:
(1) "Where ... a court makes an order (that the spouses be no longer bound to cohabit with one another) it may include in the order a provision that one of the spouses has the right to continue occupying the family residence, notwithstanding that the other spouse alone is the owner or lessee of the residence or that both spouses together are the owners or lessees of the residence, for such length of time and subject to such conditions as the court may order.
(2) Where an order made under this Part grants to one spouse the right under subsection (1) to continue occupying the family residence, the court may include in the order a provision that such rights as the other spouse may have as owner or lessee to apply for partition and sale or to sell or otherwise dispose of the residence be postponed subject to the right of occupancy contained in the order.

The definition of the term "spouse" as used in these enactments vary from province to province. The definitions have been set out earlier in this paper.[97]

Part II of the Alberta Matrimonial Property Act[98] permits a court to make an order for exclusive possession of a matrimonial home and/or household goods. The legislation provides for eviction of the other spouse from the home and a restraining order preventing his entering or attending at or near the home. The order for exclusive possession is registrable and takes precedence over an order made under Part I of the Act or a subsequent order for partition and sale. The Alberta Act, however, does not apply to cohabitants.

(b) Should Alberta law be amended so that the courts might order exclusive occupation of the "matrimonial" home and/or exclusive possession of household goods to one cohabitant vis a vis the other?

We should attempt to answer this question in three stages.

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[96](cont'd)
(3) No right of occupancy of a spouse ordered under this section shall continue after the rights of the other spouse as owner or lessee or of both spouses as owners or lessees, as the case may be, are terminated."

[Nova Scotia] Family Maintenance Act S.N.S. 1980 c. 6 s. 7: "Where a judge makes an order under this Act for maintenance of a spouse, notwithstanding that the family residence is owned or leased by one spouse or by one spouse as a joint tenant or as a tenant-in-common, the judge may provide in the order that either spouse has the right to occupy or use the family residence, subject to the conditions imposed by the judge, until the rights of the spouses in the family residence are determined by agreement or by a court having jurisdiction in those matters."

[97] See section 1(c) of the B.C. statutes, s. 11(1) of the Manitoba statute, s. 112(3) of the New Brunswick statute, s. 2(m) of the Nova Scotia statute, s. 29 of the Ontario statute set out in footnote 47 pp. 59, 60 of this paper.

[98] R.S.A. 1980 c. M-9 (as amended by 1983 c. C-7.1) ss. 19-30.

Firstly, it must be decided whether, in principle, such orders be made permissible. Secondly, if the answer to the first part is positive we must define the nature of the relationship that must exist before such orders could be made. Thirdly, should the rights given to cohabitants with respect to occupational or possessory rights equate those given to spouses under Part II of the Matrimonial Property Act or should these rights be something less?

It is submitted that limited rights to occupancy of a matrimonial home and/or possession of household goods should be given to persons living in a cohabitational relationship. It is submitted that these rights should only be given where children are involved. When a relationship abruptly terminates children may be traumatized if suddenly ousted from their home. A limited right in the custodial parent to remain in occupation of the matrimonial home and possession of household goods may be necessary for the well being of such children. It is submitted that such rights of occupancy and possession only be given where the well being of children demand it. In that part of this paper which deals with the allocation of title to property as between cohabitants[99] and that part which deals with maintenance[100] we have advanced reasons which we believe militate against extending rights in these areas to cohabitants. Those reasons, we believe, are, in general, equally applicable here.[101]

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[99] Supra pp. 69-76.

[100] Supra section A of this part.

[101] Those reasons can briefly be summarized as follows: (a) discouragement of dependent relationships; (b) the lack of public and private commitment in cohabitational relationships in contrast with marital relationships; (c) the incongruity of imposing upon people rights and

If limited rights of occupancy and possession are to be given to those caring for children, should the right be limited to those caring for children whether of this relationship or not or should the right be limited to those caring for children of this relationship? It is submitted that the right not extend to all custodial parents living in a cohabitational relationship. If a man (or woman) is to be deprived of the use of his (or her) own property because of the needs of children then surely those children must have some relationship with the person so deprived. Must the relationship be one of blood or adoption or is it sufficient that the property owner stood in loco parentis to the child in question? It is submitted that an in loco parentis relationship should be sufficient to give rise to the right. The right is a limited one, given for the benefit of the child. It would seem wrong in principle for a man to place himself in the position of father and then oust the child from his place of residence. We also feel that the right should be extended to one cohabitant who has care and control of his or her partner's child.

Some of the provincial legislation in this area prescribes a particular period of time during which cohabitation must have endured before occupancy rights apply. Should our law prescribe such a period of time? It is submitted that it should not. We are limiting the right to those having custody of young children, much of the other provincial legislation is not so limited. We think it sufficient that the parties have lived together for a reasonable time in a bona fide domestic relationship.

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[101](cont'd) obligations that they have chosen to avoid.

Thus we suggest that a person have the right to apply for occupation of the matrimonial home and possession of household goods if:

> "The applicant and respondent have lived together for a reasonable period of time in a bona fide domestic relationship and the applicant has care and control of a child 12 years old or less who is either:
>
> a) a natural child born of the relationship between the applicant and respondent; or
>
> b) a child adopted by the applicant and respondent; or
>
> c) a child of either the man or woman who is in the care and control of the other; or
>
> d) a child to whom the respondent stands in loco parentis
>
> and
>
> it is deemed by the court to be in the best interests of the child that such an order be made."

We must next consider whether the occupation rights given to our limited class of cohabitants should equate with those given to spouses under Part II of the Matrimonial Property Act or should these rights be something less?

Part II of the Matrimonial Property Act of Alberta appears as an Appendix to this paper. Section 19 of the Act provides not only for an order for exclusive possession of the matrimonial home by one spouse but also for an order of eviction and/or restraint against the other spouse. Should these orders of eviction and restraint be made available to cohabitant applicants? It is submitted that they should. The right of exclusive occupancy might well be meaningless without the other

attendent rights. Further, several other provinces provide for non-molestation or restraining orders against cohabitants.[102]

Section 21 of the Matrimonial Property Act of Alberta provides that an order under Part II takes effect notwithstanding an order under Part I or a subsequent order for the partition and sale of the matrimonial home.[103] If extended to cohabitants this could mean that the spouse of one cohabitant might be frustrated in exercising his or her rights because of an occupation order in favor of the other cohabitant. It is submitted that section 21 should apply to cohabitants as well as to spouses. The rights given to an occupier under the statute are essentially temporary in nature. The court can make the order subject to conditions, can vary the order on application by a spouse (which could include a spouse of the respondent cohabitant[104]) and is directed to consider various enumerated factors in exercising its powers. It is suggested, however, that an additional factor be added to the list enumerated in section 20 to the effect that the court should consider the position of any spouse of either of the parties.

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102 [Manitoba] Family Maintenance Act S.M. 1978 c. 25/F-20 s. 11(2)
[New Brunswick] Family Services Act S.N.B. 1980 c. F-2.2 s. 128
[Ontario] The Family Law Act 1986 S.O. 1986 c. 4 s. 46.

103 See also section 22 of the Law of Property Act R.S.A. 1980 c. L-8 which allows for proceedings for partition and sale to be stayed pending the disposition of proceedings under the Matrimonial Property Act or whilst an order under the Matrimonial Property Act remains in effect.

104 For purposes of clarity section 19(4) could be amended to provide that a variation application may be brought by a cohabitant as defined in the section or by the spouse of a cohabitant.

Sections 22 and 23 of Part II of the Matrimonial Property Act of Alberta provides for registration of orders for possession. It is submitted that these sections also should extend to cohabitants. This is again because the possession order is essentially temporary in nature and subject to variation. The rights of a spouse of the respondent cohabitant, it is submitted, will be protected if the amendments to sections 19 and 20 suggested in the foregoing paragraph were enacted. It is suggested that section 29 of the Act might also be amended to enable the spouse of a cohabitant, as well as the person against whose property and order is registered, to apply for cancellation of the registration.

Section 25 of the Matrimonial Property Act provides for orders for the exclusive use of household goods and section 26 provides for the registration of such orders. It is submitted that these sections, too, should extend to cohabitants subject to the protections referred to above.

(c) Summary of proposed amendments

Part II of the Matrimonial Property Act of Alberta should be amended in the following manner:

Section 18.1 should precede section 19 and provide as follows:

"s. 18.1(1) An application under this part may be made by a spouse as defined in section 1 of this Act or a cohabitant.

s. 18.1(2) A cohabitant for the purposes of this part is defined as either of a man and a woman who, not being married to each other, have cohabited for a reasonable period of time in a bona fide domestic relationship and the man or woman has care and control of a

child 12 years or less who is either:

a) the natural child born of the relationship between the man and woman; or

b) a child adopted by the man and woman; or

c) a child of either the man or woman who is in the care and control of the other; or

d) a child of either the man or woman to whom the other stands in loco parentis

s. 18.1(3) Where an application for an order under s. 19 or s. 25 is made by a cohabitant then the court may only make such an order if it deems it to be in the best interests of a child of the parties that such an order be made.

s. 18.1(4) A child of the parties for the purposes of s. 18.1(3) is a child 12 years or less who is either:

(a) the natural child born of the relationship between the parties; or

(b) a child adopted by the parties; or

(c) a child of one of the partners who is in the care and control of the other; or

(d) a child of one of the parties to whom the other stands in loco parentis.

Section 19(4) should be amended to provide as follows:

"An order under this section may be varied by the court on application by a spouse, a cohabitant as defined in s. 18.1 or a spouse of a cohabitant."

Section 20 should be extended and the following paragraph added:

"(e) the position of any spouse of either of the parties."

Section 29(1) and (2) of the Act should be amended to read as follows:

"s. 29(1) The person against whose property an order is registered under s. 22 or the spouse

> of that person may apply to the court for an order directing the registrar of titles to cancel the registration.
>
> (2) The person against whose property an order is registered under s. 23 or s. 26 or the spouse of that person may apply to the court for an order cancelling the registration."

The wording of much of Part II would also require amendment to take into account these recommendations.

C. Domestic Contracts

Domestic contracts, (in contrast to contracts of a business nature), between persons who live, have lived or plan to live in a non-marital relationship, generally fall into one of the four following categories:

(a) Contracts entered into in anticipation of cohabitation;

(b) Contracts entered into during the course of cohabitation;

(c) Contracts entered into in anticipation of separation;

(d) Contracts entered into after separation.

We shall denote contracts falling into categories (a) and (b) above as cohabitation agreements and contracts falling into categories (c) and (d) as separation agreements. In searching for a policy to govern domestic contracts in the context of cohabitation we see little point in distinguishing between contracts falling into categories (a) or (b) or in distinguishing between contracts falling into categories (c) or (d). If cohabitation (or separation) commences on January 2nd should it make any difference whether the cohabitation (or separation) agreement was entered into on January the 1st or January the 3rd?

We would suggest not.

i. Current law

The validity of cohabitation agreements is questionable in light of dicta in earlier English cases such as Fender vs St. John Mildmay[105] where Lord Wright said:

> "The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married; or to pay a sum of money, or give some other consideration, in return for immoral association".

Further, the enforcability of separation agreements executed whilst the parties are still cohabiting is, at least in the context of a married couple, doubtful.[106]

Other problems that might hamper the enforcement of a domestic contract (whether a cohabitation contract or a separation agreement) are lack of intention to create legal relations, lack of consideration and undue influence.

Some provinces have now enacted legislation specifically providing for domestic contracts between cohabitants.[107]

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105 [1938] A.C. 1; [1937] 3 All E.R. 402 at 427 (H.L.). However, see Chrispen v. Topham (1986) 28 D.L.R. (4th) 754 (Sask. Q.B.) affd. 9 R.F.L. (3d) 131 (C.A.) where a cohabitation agreement was held to be valid and enforceable. Kindred J. held (at p. 758): "It cannot be argued that the agreement between the plaintiff and the defendant was made for an immoral purpose and, therefore, illegal and unenforceable. Present day social acceptance of common law living counters that argument".

106 See Balfour v. Balfour [1918-19] All E.R. Rep. 860 (C.A.).

107 [British Columbia] Family Relations Act R.S.B.C. 1979 c. 121 s. 74(2).
[New Brunswick] Marital Property Act S.N.B. 1980 c. M-1.1 s. 35-41.
[Newfoundland] Matrimonial Property Act s. Nfld. 1979 c. 32

The statutory provisions of New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon Territory, are largely similar to one another whilst that of British Columbia is somewhat more limited. The New Brunswick provisions are set out as an appendix to this part.

It will be noted that those provisions of the New Brunswick legislation which deal with domestic contracts between married couples have also been reproduced in the Appendix. If Alberta were to adopt provisions akin to that of New Brunswick it would seem advisable to adopt those provisions pertaining to married persons too and not solely with those pertaining to cohabitants.[108]

Under the New Brunswick, Ontario and Prince Edward Island legislation parties may enter into a cohabitation agreement whilst they are cohabiting. This agreement may deal with ownership in or division of property, support obligations and any other matter in the settlement of the parties affairs. The agreement may not, however, deal with the right to custody of, or access to, their children. A contract between married people may deal with exactly the same matters as one between cohabitants.

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[107](cont'd) ss. 32-42.
[Ontario] Family Law Act 1986 S.O. 1986 c. 4 ss. 51-60.
[P.E.I.] Family Law Reform Act R.S.P.E.I. 1974 c. F 2.1 ss. 52-59.
[Yukon] Matrimonial Property & Family Support Ordinance O.Y.T. 1979 (2d) c. 11 (as amended by 1980 (2d) c. 15 s. 14) ss. 36-42.

[108] The Matrimonial Property Acts of Alberta, Saskatchewan, Manitoba and Nova Scotia all provide for contracts between married persons but, except in Nova Scotia, these provisions only relate to contracts with respect to property:
[Alberta] R.S.A. 1980 c. M-9 ss. 37-38.
[Saskatchewan] S.S. 1979 c. M-6.1 ss. 38-42.
[Manitoba] S.M. 1978 c. 24/M45 s. 5.
[Nova Scotia] S.N.S. 1980 c. 9 s. 23 et seq.

However, the marriage contract may precede the marriage, the cohabitation contract may not precede the cohabitation in New Brunswick and Prince Edward Island. Only in Ontario may the cohabitation agreement precede cohabitation.

The legislation of Newfoundland is somewhat more limited than that of New Brunswick, Ontario and Prince Edward Island in that there the marriage or cohabitation agreement may only deal with the ownership and division of property, support obligations and the right to direct the education of children.[109] The Newfoundland legislation lacks that generic clause which permits the parties to contract regarding "any other matter in the settlement of the parties affairs". In the Yukon, on the other hand, the legislation is somewhat wider in that the agreement may relate to any matter in the settlement of the parties' affairs and this, presumably, may include custody and access arrangements. British Columbia, too, permits cohabitants to enter into agreements relating to custody and access.

In Newfoundland and the Yukon, just as in New Brunswick, and Prince Edward Island, the cohabitation agreement may not precede the cohabitation albeit a marriage contract may precede the marriage.

New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon Territory all provide in their legislation for separation agreements that may be made by married couples or cohabitants. In New Brunswick these agreements may precede the separation or succeed it. In the other four jurisdictions the

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[109] In Ontario and Prince Edward Island the right to direct the education and moral training of children is specifically set out as one of the matters the contract may deal with.

parties must have separated before entering into the separation agreements. The separation agreement, in contrast with the cohabitation or marriage contract, may deal with questions of custody and access.[110]

None of the legislation referred to above[111] requires that the agreement (cohabitation, marriage or separation) be witnessed by a lawyer, or that a party receive legal advice. It does, however, require that the agreement be signed by the parties and witnessed by a third party. Provisions relating to children may be set aside or varied if deemed by the court not to be in the best interests of the children. New Brunswick provides that the court may disregard any provision of a domestic contract if, inter alia, the person challenging the agreement had not received independent legal advice and to apply the clause, in the opinion of the court, would be inequitable.[112] Ontario has a provision permitting a court to set aside a domestic contract or a provision in it if there was a failure to disclose significant assets or debts, one party did not understand the nature and consequences of the domestic contract, or otherwise in accordance with the law of contract. Further, in Ontario a separation agreement may be set aside if the court is satisfied that the removal by one spouse of barriers that would prevent the other

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110 As we have seen, it is only in the Yukon and British Columbia that cohabitation and marriage contracts may include provision for custody and access. In those two jurisdictions there is no difference in the permitted contents of cohabitation/marriage contracts on the one hand and separation agreements on the other.

111 I.e. that of New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon.

112 This paragraph is curious in that it would appear only to apply to spouses and not to cohabitants.

spouse's remarriage within that spouse's faith was a consideration in the making of the agreement. Both the Ontario and British Columbia legislation make provision for the variation of a domestic contract by the court. Several provinces also have provisions permitting a court to determine support notwithstanding the domestic contract in certain defined circumstances.[113]

The Prince Edward Island legislation provides that consideration is not a requisite for the validity of a domestic contract.

The legislation of Prince Edward Island, Ontario and the

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[113] [Ontario] Family Law Act 1986 S.O. 1986 c. 4 s. 33(4) provides:

> The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection(1) although the contract or agreement contains an express provision excluding the application of this section,
>
> (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
>
> (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependent who qualifies for an allowance for support out of public money; or
>
> (c) if there is default in the payment of support under the contract or agreement at the time application is made.

The legislation of New Brunswick, Newfoundland, Prince Edward Island and the Yukon Territory are to similar effect. See:

Family Services Act S.N.B. 1980 c. F-2.2 (as amended) s. 115(5)

Maintenance Act R.S. Newfoundland 1970 c. 223 (as amended) s. 8

Matrimonial Property and Family Support Ordinance O.Y.T. 1979 (2d) c. 11 s. 30.5(4).

See also s. 19(4) of the Family Law Reform Act of Prince Edward Island (R.S.P.E.I. 1974 c. F2-1) but this provision only applies to married persons.

Yukon all contain conflict of law provisions.[114]

Ontario and Prince Edward Island make provisions for third party donors to be made parties in certain situations.[115]

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[114] That of Prince Edward Island provides:

> Sec. 57. Contracts made outside Prince Edward Island. The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that
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> (a) a contract for which the proper law is that of a jurisdiction other than Prince Edward Island, is also valid and enforceable in Prince Edward Island if entered into in accordance with the internal law of Prince Edward Island;
>
> (b) subsection 19(4) and section 55 apply in Prince Edward Island to contracts for which the proper law is that of a jurisdiction other than Prince Edward Island; and
>
> (c) a provision in a marriage contract or cohabitation agreement for which the proper law is that of a jurisdiction other than Prince Edward Island respecting the right to custody of or access to children is not valid or enforceable in Prince Edward Island.

Section 19(4) is virtually identical to s. 33(4) of the Ontario legislation and is set out in footnote 116 above. S. 55 of the Prince Edward Island legislation provides:

> Sec. 55. Subject to best interests of child.
>
> (1) In the determination of any matter respecting the support, education, moral training or custody or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.
>
> (2) *Dum casta clauses*. A provision in a separation agreement whether made before or after this section comes into force whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.
>
> (3) *Idem*. A provision in an agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.

[115] The Prince Edward Island legislation provides as follows:

> Sec. 56. Rights of donors of gifts. Where a domestic contract provides that specific

Newfoundland expressly provides in its legislation that cohabitants may "opt in" to the provisions of the Matrimonial Property Act. If the parties decide to do so then the distribution provisions will apply to them as if they were married.[116]

The statutes of New Brunswick, Newfoundland, Ontario and Prince Edward Island all provide that the cohabitation agreement may regulate the respective rights and obligations of the parties during cohabitation, or upon ceasing to cohabit or death. However, it is only the legislation of Newfoundland that specifically provides that a domestic contract that has its effect on the death of one of the parties may be enforced against the estate of the deceased notwithstanding the provisions of the Wills Act.

ii. The New South Wales Law Reform Commission

The New South Wales Law Reform Commission[117] recommended that cohabitation and separation agreements between de facto partners with respect to financial matters arising out of their relationship should be enforceable. The court should, however, have power to override or disregard the agreement insofar as it relates to the custody, guardianship and maintenance of children. The Commission extended its recommendation to contracts entered

[115](cont'd) gifts made to one or both parties by a third party donor are not disposable or encumberable without the consent of the donor, the donor shall be deemed to be a party to the contract for the purpose of the enforcement or any amendment of the provision.

[116] See also s. 36(3) of the Yukon legislation.

[117] 'Report on De Facto Relationships' L.R.C. 36 (1983) p. 203 et. seq.

into prior to cohabitation as well as those entered into after cohabitation had commenced. Thus, under this recommendation cohabitation and separation agreements would be enforceable between the parties as ordinary contracts. These recommendations have been enacted in the De Facto Relationships Act (N.S.W.).[118]

In an earlier part of its report, the New South Wales Law Reform Commission had recommended that the courts have power to make financial adjustments between cohabiting couples by way of orders requiring the transfer of property or payment of maintenance. If the parties, in a domestic contract, intended to negative these powers of financial re-adjustment further safeguards were thought by the Commission to be necessary. In these circumstances the Commission recommended that the contract be in writing, signed by the party against whom it is sought to be enforced and each of the parties must have received independent legal advice before entering the agreement. Each advising solicitor must sign a certificate of similar nature to the acknowledgment provisions contained in section 38 of the Alberta Matrimonial Property Act. Again, this recommendation has been adopted into legislation.[119] As we have not recommended that the Alberta courts have power to order property transfers or the payment of maintenance between cohabitants we feel it needless to explore this part of the New South Wales Law Reform Commission's recommendations further.

iii. Should Alberta enact legislation on the subject of domestic contracts between cohabitants?

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[118] De Facto Relationships Act 1984 No. 147 Part IV. See Appendix I.

[119] Ibid.

This question must be answered in two parts. Firstly, in principle, should such legislation be enacted? Secondly, if the answer to the first part is in the affirmative, what form should this legislation take?

(a) The question of principle

The traditional arguments against the enforceability of domestic contracts between cohabitants are as follows:[120]

(i) Such agreements promote sexual relationships outside marriage and they tend to discourage people from marrying or, put less positively, by equating the status of living together with that of marriage, the law fails to promote marriage.

(ii) To introduce contracts into the realm of close family relationships may indicate an element of distrust and may imperil the success of the relationship.

(iii) Such agreements may contain terms which are inconsistent with the welfare of children.

(iv) One party make take advantage of the other and may persuade him or her to enter into an unfair bargain.

(v) The enforceability of such contracts would place an added burden on the courts.

The responses to each of these points may run as follows:

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120 See New South Wales Law Reform Commission Report No. 36 (1983) "Report on De Facto Relationships" pp. 206-208; Cruickshank, "Living Together Outside of Marriage" (1979) p. 57.

(1) The first argument ignores reality, people today are living together outside of marriage. The law does not penalize people who do so. It is difficult to imagine people choosing cohabitation over marriage simply because the law permits them to regulate their affairs by agreement, especially if married people are also permitted to do so. Further, this argument has little relevance to contracts entered into between people who are already living together or to separation agreements.

(2) As to the second argument, it may be said that the introduction of a contract into the parties' relationship will bring with it a sense of realism. The process of discussing and settling the terms of the agreement will enable the parties to clarify their expectations.[121]

(3) Earlier in this paper we have discussed the legislation of several provinces which provides for the enforcement of domestic contracts. Each of these pieces of legislation provides, further, that the court may put aside or vary any provision of such a contract which relates to children if the court deems that provision not to be in the best interests of the children.

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[121] In an article entitled "Domestic Contracts Between Cohabiting Couples" (1978) 1 Can. J. Fam. Law 477 at 480 Judith Keene states:[T]he second major function performed by contracts [is] their normative and educational aspect. In preparing a contract a couple can come to recognize and to articulate the proposed economic and other aspects of their union. Some useful revelations should emerge from the process and the results may, in effect, be a joint marital "policy statement".

(4) The argument that one party may take advantage of the other and persuade him or her into an unfair bargain is yet another example of the distressingly paternalistic attitude that has pervaded and continues to pervade our family law. Women are not children who are unable to look after themselves or their interests. Married women today enter into separation agreements and matrimonial property agreements with the sanctions of Alberta law. Indeed, the technical report prepared for the Institute[122] showed cohabiting women in Alberta to be more independent from their partners than their married counterparts. However, if protection against unfairness and oppression is deemed appropriate and common law principles relating to duress and undue influence are not seen as providing sufficient protection, then the proposed Alberta legislation could contain a clause similar to section 41 of the New Brunswick legislation, which permits the court to disregard any provision of a domestic contract in certain defined circumstances.

(5) The argument against placing an added burden on the courts is a weak one. It is unlikely that legislation which makes provision for the enforcement of domestic contracts will lead to a plethora of cases coming before the courts. Perhaps, a requirement that the contract be in writing and be witnessed might be imposed so that the courts do not have to deal with

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122 "Survey of Adult Living Arrangements", Research Paper No. 15 (November 1984) referred to earlier in this paper p. 45.

uncertain, inconclusive oral agreements.

Having dealt with the arguments against the enforceability of domestic contracts between cohabitants we shall now pose those in favour of their enforceability.

(i) Disputes between cohabiting couples will be resolved according to their agreement and not by litigation.

(ii) Agreement between the parties involves certainty. Certainty in the sense that during cohabitation the parties know their respective positions; certainty in the sense that on separation the parties know how property etc. is to be allocated and will not need to resort to litigation.

(iii) As we have discussed earlier, parties who live together outside marriage have generally chosen to do so and chosen not to marry. Having chosen to avoid the incidents of marriage they should be free to choose their own methods of arranging matters between themselves.

(iv) The technical report commissioned by the Institute in 1984[123] demonstrated that a considerable percentage of cohabitants feel that agreements concerning child care, property division and arrangements to be made on break up, as well as other matters, be legally binding.

It is submitted that the arguments in favour of the enforceability of domestic contracts between cohabitants outweigh

[123] "Survey of Adult Living Arrangements", Research Paper No. 15 at p. 86-87.

those against their enforceability. We suggest then that Alberta law be amended to so provide.

(b) What form should amending legislation take?

Firstly, we must deal with the form of the contract itself. Should such contracts be recognized as valid leaving their form to be determined according to the ordinary law of contracts? Alternatively, should some formality be required such as the writing and witnessing requirements of Ontario, New Brunswick, Newfoundland, Prince Edward Island and the Yukon, or the more rigorous formal requirements set out in section 38 of the Matrimonial Property Act of Alberta?[124]

It is submitted that it is unnecessary to require rigorous formal requirements such as those set out in section 38 of the Matrimonial Property Act. None of the other provincial enactments require such formalities and the New South Wales Law Reform Commission recommended them only in limited circumstances which are not apposite to our situation. Separation agreements have not generally been required to be signed in the presence of a lawyer and, although many times this will be the case, we do not think it should be essential. Lack of legal advice may well

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[124] This section requires that each spouse or spouse-to-be acknowledge in writing apart from his or her spouse or intended spouse that:
(a) he is aware of the nature and effect of the agreement;
(b) he is aware of the possible claims to property he may have under the Matrimonial Property Act and he intends to give up those claims to the extent necessary to give effect to the agreement; and
(c) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.
This acknowledgment must be made before a lawyer other than the one acting for the other spouse or person.

be a factor that the court should consider in determining whether to disregard any provision of a domestic contract (as in the New Brunswick legislation). However, we do not think that it should necessarily mean that the contract is unenforceable.

Should the Alberta legislation, like that of New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon require that a domestic contract be in writing or be witnessed? We suggest that this be so for the following reasons. Often the contract will involve the disposition of land and (unless there is part performance) the Statute of Frauds imposes a requirement of writing. Without the requirement that domestic contracts be in writing parties might well fall afoul of the Statute of Frauds. Secondly, one of the arguments in favour of the enforceability of domestic contracts is that they bring a sense of realism to the parties' relationship. The process of discussing and settling the terms of the agreement enable the parties to clarify their expectations.[125] Without the requirement of writing it is doubtful that this goal will be met. Finally, we have talked about the benefits of certainty in respect of the parties' respective positions.[126] Certainty is more likely to be found if an agreement is reduced to writing. The conflicting recollections of the parties is unlikely to lead to certainty or to avoid the litigation process.

Let us turn now to the contents of the agreement. We have seen[127] that under the majority of provincial enactments a

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[125] See supra, p. 96.

[126] Supra, p. 98.

[127] Supra, pp. 87-93.

cohabitation agreement may deal with ownership in and division of property, support obligations, the right to direct the education and moral training of children and any other matter in the settlement of the parties affairs. However, the agreement may not deal with the right to custody of or access to children. A separation agreement may deal with all of these matters and may also deal with custody and access. We are of the opinion that Alberta should follow the example of these provinces. We feel that custody and access should not be the subject of agreement between parties who are not contemplating separation. We do not believe that such an agreement is in the best interests of children. Circumstances may change and those circumstances may indicate arrangements be made for the children, arrangements that differ from those set out in the agreement. Further, the position of the person who is not designated custodian in the agreement may be untenable vis a vis the children during cohabitation. Custody and access, however, are clearly matters that should be dealt with in a separation agreement.

Should the permissible contents of domestic contracts be limited (as in the Newfoundland legislation)[128] or should the parties be permitted to contract regarding any matter in the settlement of their affairs? It is submitted that the contents of the domestic contract should not be limited save with regard to custody and access as referred to above. Judith Keene in an article entitled "Domestic Contracts Between Cohabiting

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[128] Under the Newfoundland legislation a marriage or cohabitation agreement may only deal with the ownership and division of property, support obligations and the right to direct the education of children. A separation agreement may also deal with custody and access.

Couples"[129] says that "non-property" clauses (such as those dealing with responsibility for housework etc.), even if not enforceable, have a value. The articulation of such clauses helps to direct the parties' minds to these matters. If breaches do occur then they are likely to be settled informally or through a previously agreed method. Further, it seems that cohabitants themselves are in favour of including in domestic contracts matters other than property and support. 46.6% of the respondents to the survey on adult living arrangements commissioned by the Institute in 1984[130] felt that agreements concerning "any other matter the parties choose" should be legally enforceable as opposed to 23.4% who did not.

Unlike the majority of Canadian enactments, the New South legislation provides that a cohabitation agreement is enforceable even when made prior to cohabitation. We are in agreement with this. Marriage contracts may precede marriage and we see no reason why, when cohabitation commences on January 2nd, an agreement entered into on the 3rd of January will be enforceable whilst one entered into on the 1st of January would not.

Should it be permissible to enter into a separation agreement prior to separation or should separation agreements be restricted to those who have already separated? The significance of this question is really this. Should parties (whether married or not) who have agreed to separate but are still cohabiting be permitted to enter into an agreement relating to the custody or access of their children? Our feeling is that they should be

[129] (1978) 1 Can. J. of Family Law 477 at 480.

[130] Research Paper No. 15 pp. 86,87.

allowed to do so. We do not feel that such an agreement would work against the best interests of the children. We feel that the parties should not be required to actually separate before working out arrangements for their separation.

We have seen that the provincial legislation discussed in this part provides that provisions relating to children may be set aside or varied if deemed by the court not to be in the best interests of the children.[131] We suggest adoption of this principle. Clearly provisions relating to children should not be enforced if not in the best interests of the children.

When otherwise should a court be entitled to disregard provisions of a domestic contract? We suggest adoption of a provision that combines aspects of the Ontario, New Brunswick and New South Wales legislation.[132]

> "(1) A Court may disregard any provision in a domestic contract
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> (a) if the domestic contract was made before the coming into force of this Act and was not made in contemplation of the coming into force of this Act; or
>
> (b) if the spouse or cohabitant who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse or cohabitant; or
>
> (c) if the Court is satisfied that the removal by one party of barriers that will prevent the other party's remarriage within that party's faith was a consideration in the making of all or part of the agreement or settlement;

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131 See supra p. 90.

132 See [Ontario] Family Law Act 1986 S.O. 1986 c. 4 s. 56(5)
New Brunswick Marital Property Act S.N.B. 1980 c. M-1.1 s. 41 (Appendix 3)
[New South Wales] De Facto Relationships Act 1984 s. 49 (Appendix 1)

where the Court if of the opinion that to apply the provision would be inequitable in all the circumstances of the case.

(2) The Court may disregard any provision in a cohabitation agreement (but not a separation agreement) where, in the opinion of the Court, the circumstances of the parties have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were to be enforced."

In an earlier part of this paper[133] we recommended that Part II of the Matrimonial Property Act of Alberta (that part that deals with occupation of the matrimonial home and possession of household goods) be extended to persons living in certain cohabitational relationships. We made this recommendation on the basis that such would be in the best interests of young children who might be traumatized by sudden forced relocation on break up of a relationship. In the case of married couples an order may be made albeit children are not involved. However, such orders are of a temporary nature and generally only granted to alleviate immediate hardship. We are of the view that parties, whether married or not, should be unable to contract out of Part II of the Matrimonial Property Act in a marriage or cohabitation agreement. We feel, however, that parties should be able to contract out of these provisions in a separation agreement because possessory and occupational matters are appropriate subjects for agreement when the parties have separated or are contemplating a separation.

We have set out above the conflict of laws provisions contained in the Prince Edward Island legislation.[134] Ontario

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[133] Above p. 79 et. seq.

[134] Supra, pp. 91-93.

and the Yukon have provisions substantially similar. We would suggest adoption of these provisions. Our only proviso to this would be that for reasons stated in the foregoing paragraph we feel that the Alberta court should have certain powers to disregard terms of a domestic contract, whether it be one that is governed by our law or by that of another state or province.[135]

We would not recommend adoption of the Prince Edward Island provision to the effect that consideration is not a requisite for the validity of a domestic contract. We do not see why the normal principles of contract law should not apply in this context.

The Prince Edward Island and Ontario provisions relating to third party donors[136] are sensible and we would recommend adoption of them by Alberta. Further, we would recommend adoption of the Newfoundland provisions which permit parties to "opt in" to the Matrimonial Property Act. The Matrimonial Property Act of Alberta was enacted because it was felt that marriage was a partnership and the fruits of that partnership should be shared in a just and equitable manner. As we have said

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135 Paragraph (b) of the Prince Edward Island legislation provides that sections 19(4) and 55 apply to contracts other than those for which the proper law is that of Prince Edward Island. Section 55 is unobjectionable in that it provides that the court may disregard provisions in a domestic contract that relate to children if the provisions are not in the best interests of the children. It goes on to invalidate dum casta clauses. Section 19(4), on the other hand, permits the court to make a support order contrary to the terms of a domestic contract in defined circumstances. We would substitute for section 19(4) the provision earlier recommended by us as to when a court may disregard the terms of a domestic contract.

136 Supra pp. 92, 93.

before,[137] cohabitants may well see their relationship inter se differently from married couples and thus the distribution provisions of the Act should not be foisted upon them. If, however, cohabitants do see their relationship as akin to marriage and choose to have their property divided in similar fashion, we see no reason to deny them this right.

The statutes of New Brunswick, Newfoundland, Ontario and Prince Edward Island all provide that the cohabitation agreement may regulate the respective rights and obligations of the parties during cohabitation, or upon ceasing to cohabit or death. The Ordinance of the Yukon Territory provides that the agreement may regulate their respective rights and obligations during cohabitation or upon ceasing to cohabit. The statute of Newfoundland provides that a domestic contract that has its effect on the death of one of the parties may be enforced against the estate of the deceased notwithstanding the Wills Act.

Should any proposed Alberta legislation specifically provide that a domestic contract might regulate the respective rights and obligations of the parties on death? If so, should this provision be subject to the Wills Act or override it? We suggest that parties should not be able to evade the terms of the Wills Act by means of entering into a domestic contract. We are of the opinion that if the particular clause or contract in question is deemed to be a testamentory disposition then it must comply with the Wills Act.

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[137] Supra p. 41 et seq.

It is often desirable that agreements or orders that relate to support enure for the lifetime of the payee and that the obligation not die with the payor. It would seem that a clause in a cohabitation or separation agreement providing that support payments continue beyond the lifetime of the payor would not constitute a testamentory disposition and would not conflict with the Wills Act. We think, further, that such a clause would be enforceable under legislation such as that which is in effect in the Yukon (i.e. we do not believe that such a clause is unenforceable unless the legislation specifically provides that a cohabitation agreement may regulate the respective rights and obligations of the parties on death).

Thus, in our opinion, Alberta legislation should provide that a cohabitation agreement may regulate the respective rights and obligations of the parties during cohabitation and upon ceasing to cohabit. We believe that to provide also that the agreement may regulate the respective rights and obligations of the parties on death brings legislation into potential conflict with the Wills Act (the terms of which we do <u>not</u> believe should be overridden by a domestic contract) and is unnecessary. We believe that this argument is equally applicable to marriage contracts.

iv. <u>Conclusions</u>

We recommend that Alberta law be amended to provide for the enforceability of domestic contracts. In general, we would follow the legislation that is presently in place in New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon, chosing certain clauses from one Act and certain from

another.

Unlike the majority of provincial legislation referred to above we recommend that cohabitation contracts entered into prior to cohabitation be enforceable and that separation agreements entered into in anticipation of separation be likewise enforceable. We would also recommend that parties to a marriage or cohabitation agreement be unable to contract out of Part II of the Matrimonial Property Act.

We now set out the proposed provisions relating to domestic contracts.

DOMESTIC CONTRACTS

Sec. 1. Interpretation.--In this Part,

(a) "cohabitation agreement" means an agreement entered into under section 3;

(b) "domestic contract" means a marriage contract, separation agreement or cohabitation agreement;

(c) "Marriage contract" means an agreement entered into under section 2;

(d) "separation agreement" means an agreement entered into under section 4.

Sec. 2 Marriage contracts.--(1) Two persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their

children; and

(d) any other matter in the settlement of their affairs.

(2) *Rights re matrimonial home excepted.*--Any provision in a marriage contract purporting to limit the rights of a spouse under Part II of the Matrimonial Property Act in respect of a matrimonial home or household goods is void.

Sec. 3. Cohabitation agreements.--(1) A man and a woman who are cohabiting and not married to one another may enter into an agreement before their cohabitation commences or during their cohabitation in which they agree on their respective rights and obligations during cohabitation, or upon ceasing to cohabit including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

(2) Any provision in a cohabitation agreement purporting to limit the rights of a cohabitant under Part II of the Matrimonial Property Act in respect of a matrimonial home or household goods is void.

(3) A cohabitation agreement may adopt the provisions of Parts I and III of the Matrimonial Property Act and upon such adoption that Act applies to the man and woman.

(4) *Effect of marriage on agreement.*--Where the parties to an agreement entered into under subsection (1) subsequently marry, the agreement shall be deemed to be a marriage contract.

Sec. 4. Separation agreements.--A man and woman who cohabited and are living separate and apart or who are cohabiting and agree to live separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,

(a) ownership in or division or property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to custody of and access to their children; and

(e) any other matter in the settlement of their affairs.

Sec. 5. Form of contract.--(1) A domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the persons to be bound and witnessed.

(2) *Capacity of minor*.--A minor who has capacity to contract marriage has capacity to enter into a marriage contract or separation agreement that is approved by the court, whether the approval is given before or after the contract is entered into.

(3) *Agreement on behalf of mentally incompetent*.--The committee of a person who is mentally incompetent or, if the committee is the spouse or cohabitant of such person or, if there is no committee, the Public Trustee may, subject to the approval of the court, enter into a domestic contract or give any waiver or consent under this Act on behalf of the mentally incompetent person.

Sec. 6. Contracts subject to best interests of child.--(1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

(2) *Dum casta clauses*.--A provision in a separation agreement or a provision in a marriage contract to take effect on separation whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.

(3) *Idem*.--A provision in a separation agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.

Sec. 7. Rights of donors of gifts.--Where a domestic contract provides that specific gifts made to one or both parties are not disposable or encumberable without the consent of the donor, the donor shall be deemed to be a party to the contract for the purpose of the enforcement or any amendment of the provision.

Sec. 8. Contracts made outside Alberta.--The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,

(a) a contract for which the proper law is that of a jurisdiction other than Alberta is also valid and enforceable in Alberta if entered into in accordance with the internal law of Alberta;

(b) Section 6 and section 11 apply in Alberta to contracts for which the proper law is that of a jurisdiction other than Alberta; and

(c) a provision in a marriage contract or cohabitation agreement respecting the right to custody of or access to children is not valid or enforceable in Alberta.

Sec. 9. Application of Act to existing contracts. --- (1) A domestic contract validly made before the day this Act comes into force shall be deemed to be a domestic contract for the purposes of this Act.

(2) *Contracts entered into before coming into force of Act*. --- If a domestic contract was entered into before the day this Act comes into force and the contract or any part would have been valid if entered into on or after that day, the contract or part is not invalid for the reason only that it was entered into before that day.

(3) *Idem*.--Where pursuant to an understanding or agreement entered into before this Act comes into force by spouses or cohabitants who are living separate and apart, property is transferred betweeen them, the transfer is effective as if made pursuant to a domestic contract.

Sec. 10. *Terms of domestic contract prevail*.--Subject to subsection 6(1) and section 11 where there is a conflict between a provision of this Act and a domestic contract the domestic contract prevails.

Sec. 11. [Discretionary powers of court].--- (1) A Court may disregard any provision of a domestic contract

(a) if the domestic contract was made before the coming into force of this Act and was not made in contemplation of the coming into force of this Act; or

(b) if the spouse or cohabitant who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse or cohabitant; or

(c) if the Court is satisfied that the

removal by one party of barriers that would prevent the other party's remarriage within that party's faith was a consideration in the making of all or part of the agreement or settlement;

where the Court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case.

(2) The Court may disregard any provision in a cohabitation agreement (but not a separation agreement) where, in the opinion of the Court, the circumstances the parties have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were to be enforced.

D. Distribution on Death

The principal questions to be faced in this section of our report are as follows:

(a) Should cohabitants be numbered amongst the class of persons entitled to succeed on the intestacy or partial intestacy of their partners?

(b) Should cohabitants be included in the list of dependants entitled to claim relief under the Family Relief Act of Alberta?

(c) In the event that the answer to either (a) or (b) above is affirmative how should the term "cohabitant" be defined for the purposes of the question?

The respondents to the survey of adult living arrangements commissioned by the Institute[138] showed little concensus on the question of whether cohabitants should have a right to claim on intestacy or whether he or she should be able to claim under the

[138] Research Paper No. 15 pp. 76-89.

Family Relief Act. It seems that the duration of the non-marital relationship was critical to the average response. Such rights, it seems, should only be accorded, in the minds of many of the respondents, if the non-married partners had been cohabiting for some significant period of time.[139]

i. Intestate succession

(a) The present law

The rules relating to succession on intestacy in Alberta can be summarized as follows:[140]

(i) If there is a surviving spouse but no issue the surviving spouse takes all.

(ii) If there is a surviving spouse and one child the spouse takes $40,000 and half the residue. The child takes the other half.

(iii) If there is a surviving spouse and more than one child the spouse takes $40,000 and one-third of the residue. The children share the remaining two-thirds.

(iv) If there is no surviving spouse, the issue share all.

(v) If there is no surviving spouse or issue the estate is distributed amongst next of kin according to the scheme set out in the Act.

The term "spouse" does not include a cohabitant.

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[139] Ibid. p. 78.

[140] See R.S.A. 1980 c. I-9 set out in Appendix 4.

Illegitimate children are, however, provided for.[141] None of the other provinces or territories of Canada make provision for the succession on intestacy of one cohabitant vis a vis the other.

(b) The New South Wales Law Reform Commission

The New South Wales Law Reform Commission outlined the purposes of the intestacy laws as follows[142]:

(i) The rules have the virtue of certainty and thereby avoid disputes and delays in distribution.

(ii) The rules ensure that immediate relatives benefit from the estate in preference to more distant relatives.

(iii) The rules are intended to reflect community views on the way in which a spouse's estate should be distributed.

(iv) The rules are designed to reflect the deceased's assumed wishes.

The Law Reform Commission recommended that parties to defined cohabitational relationships should be included in the list of persons entitled to succeed on an intestacy. The Law Reform Commission was of the opinion that such inclusion was in the spirit of the purposes of the intestacy rules outlined above. Persons living in cohabitational relationships often see themselves, and are seen by others, as members of a family unit, as members of the immediate family of a deceased partner.

[141] See ss. 13 and 14 of the Act.

[142] Report on De Facto Relationships L.R.C. 36 1983 pp. 225-226.

Inclusion will often reflect the deceased cohabitant's wishes in that people who live together are often unaware of the precise legal consequences of their relationship and may fail to provide for their partner by will, not by design, but simply as a result of misunderstanding, ignorance of the law or procrastination.

The New South Wales Law Reform Commission distinguished between two situations:

(i) Firstly where the deceased is survived by a de facto partner and by a spouse or children of the marriage or of a former relationship.

(ii) Secondly, where the deceased is survived by a de facto partner (and possibly children of the de facto relationship) but has neither a spouse nor children of any other relationship.

In the former situation, extension of the intestacy rules to enable the de facto partner to share in the intestate estate would lead to a corresponding diminution in the rights of the spouse or children or both. Accordingly, only where cohabitation of the deceased with his spouse has come to an end and the de facto relationship has demonstrated some degree of stability and permanence should the de facto partner be entitled to share in the intestacy. The Commission felt that cohabitation for 2 years or more demonstrated the necessary stability and permanence.

In the second situation the Commission recommended that the surviving cohabitant should be able to succeed on intestacy without having fulfilled a specific period of cohabitation by way of precondition. Such a solution accords with both societal

expectations and the assumed wishes of the deceased. If there are no children of the relationship, nor a spouse or children of another relationship, then the cohabitant will succeed at the expense of parents, brothers and sisters and more remote next of kin. Arguably a person cohabiting with the deceased at the time of his death will be seen by the deceased and others as closer, as being a part of the deceased's more immediate family, than these other relatives. Again, where the deceased dies leaving a de facto partner and children of his relationship with that partner, it might be assumed that society and the deceased himself would expect that cohabitant to take on intestacy and, in the case of larger estates share with the children of that relationship.

Thus the recommendations of the New South Wales Law Reform Commission were as follows:

(i) Where a person dies intestate and is survived by both a spouse and a de facto partner, the de facto partner should be entitled to the spouse's share on intestacy to the exclusion of the spouse if the de facto partner lived with the deceased for a period of at least 2 years before his or her death. However, even where this condition is fulfilled, the de facto partner should not be entitled to take the spouse's share if the court is satisfied that the deceased lived with his or her spouse during any part of that 2 year period.

(ii) Where the deceased is survived by a de facto partner and children of another relationship the de facto partner should be entitled to the spouse's share on

intestacy if she or he had lived with the deceased for a period of at least 2 years before the death.

(iii) Where a person dies intestate leaving a de facto partner but neither a spouse or children of another relationship the de facto partner of the deceased, if living with the deceased at the time of his death, should be entitled to take the spouse's share on intestacy.

The recommendations of the New South Wales Law Reform Commission have now been enshrined in legislation.[143]

(c) Should Alberta law be amended to enable a cohabitant to share in the intestate estate of his or her deceased partner?

We are of the opinion that Alberta law should be so amended. This is so for the reasons given by the New South Wales Law Reform Commission in that such an amendment accords with the spirit of the fourfold purposes of the intestacy rules which purposes are set out above.[144]

The New South Wales Law Reform Commission's recommendations should be compared with legislation in place in South Australia. There, a "putative spouse"[145] is entitled on intestacy to share

[143] Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984 No. 159.

[144] Supra p. 114.

[145] A "putative spouse" is defined by s. 11(1) of the Family Relations Act 1975 (S.A.) as follows:
"A person is, on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife de facto of that other person and-
(a) he-
(i) has so cohabited with that other person continuously for a period of 5 years immediately

equally with any surviving legal spouse of the deceased.[146]

Legislation of both South Australia[147] and New South Wales[148] provide that cohabitants may make application under family relief type legislation. For reasons stated below we would not extend the Family Relief Act of Alberta to cohabitants.[149] The New South Wales Law Reform Commission felt that in cases where a cohabitant had not satisfied the two-year cohabitation requirement recommended by the Commission, or where the deceased has cohabited with his or her spouse intermittently during the two-year period, the cohabitant would not suffer undue hardship in that recourse could be had to the family relief legislation. That "safety net" would not be available to a cohabitant under our recommendation. Nonetheless, we prefer the solution recommended by the New South Wales Law Reform Commission to that adopted in South Australia. We agree with the New South Wales Law Reform Commission which rejected the South Australian approach. The view of the Commission was that, since most estates are fairly small, equal division was unlikely to provide adequately for the needs of either spouse and smacked of

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[145](cont'd) preceding that date;
or
(ii) has during the period of 6 years immediately preceding that date so cohabited with that other person for periods aggregating not less than 5 years;
or
(b) he had had sexual relations with that other person resulting in the birth of a child.

[146] See s. 72(h)(2) of the Administration and Probate Act 1919-75 (S.A.).

[147] Inheritance (Family Provision) Act 1972-75 (S.A.) ss. 4, 6.

[148] Family Provisions Act 1982 (N.S.W.) s. 6(1).

[149] Infra, pp. 122, 123.

arbitrariness.[150] Further, if the estate was small and inadequate to provide for the needs of both spouse and cohabitant, resort could be had to the Family Relief Act by the spouse but not by the cohabitant. This does not seem to us to be equitable.

It is therefore our recommendation that the Intestate Succession Act be amended to enable a cohabitant to share in the intestate estate of his or her partner in the circumstances recommended by the New South Wales Law Reform Commission set out above.[151] We further recommend that the phrase "*de facto partner*" be defined as meaning a person of the opposite sex to the deceased who, at the time of the deceased's death was living with the deceased on a bona fide domestic basis. This definition accords with recommendations we make below in this paper.

Section 15 of the Intestate Succession Act provides as follows:

> A surviving spouse who had left the intestate and was living in adultery at the time of the intestate's death shall take no part in the intestate's estate.

This section should be amended to provide that in the event of such a situation the deceased's estate should be distributed as if the deceased died leaving no spouse. This would enable the person who, at the time of the deceased's death, had cohabited with him for less than 2 years, to take the spouse's share; assuming, that is, that there are no children of the deceased born of another relationship.

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[150] See L.R.C. 36 (N.S.W.) p. 232.

[151] Supra, pp. 116, 117.

Rule 2 of the Surrogate Rules sets out the priority of right to a grant of administration where the deceased dies wholly intestate. A person cohabiting with the deceased at the time of his death is not included in that list. We would recommend that these rules be amended to include such a person.

ii. Family relief

(a) The present law

Pursuant to the Family Relief Act of Alberta[152] a dependant of the deceased may apply to the court for relief if (a) the deceased died testate without making in his will adequate provision for the maintenance and support of that dependant, or, (b) if the deceased died intestate and the share under the Intestate Succession Act of that dependant is inadequate for his or her maintenance and support. The word "dependant" in the Act is defined as meaning a spouse or child of the deceased.[153]

In Ontario, British Columbia, Prince Edward Island, the Northwest Territories and the Yukon Territory legislation is in place which permits a defined class of cohabitants the right to apply for relief under family relief type legislation.[154]

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152 R.S.A. 1980 c. F-2.

153 An adult child is only included within the meaning of the definition if he is unable by reason of mental or physical disability to earn a livelihood.

154 [British Columbia] Estate Administration Act R.S.B.C. 1979 c. 114 provides that a "common law spouse" may apply for relief in case of intestacy. "Common law spouse" includes "a person who has lived or cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding the intestate's death" (s. 85).
[Ontario] Succession Law Reform Act R.S.O. 1980 c. 488. Family relief may be applied for on testacy or intestacy by a "common law spouse". 'Common law spouse' inter alia

Similarly, in England and some of the Australian states cohabitants may claim under family relief type legislation.[155]

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[154](cont'd) includes: "either of a man and a woman who, not being married to each other, had been cohabiting immediately before the death of one of them,
(i) continuously for a period of not less than 5 years, or
(ii) in a relationship of some permanence where there is a child born of whom they are the natural parents" (s. 57(b)).
[P.E.I.] Dependants of a Deceased Person Relief Act R.S.P.E.I. 1974 c. D-6. 'Dependants' may claim family relief upon either testacy or intestacy. The term 'dependent' includes:
"a person of the opposite sex to the deceased not legally married to the deceased who, for a period of at least 3 years immediately prior to the date of death of the deceased, lived and cohabited with the deceased as a spouse of the deceased and was dependent upon the deceased for maintenance and support" s. 1(d).
[N.W.T.]Dependant's Relief Ordinance R.O.N.W.T. 1974 c. D-4 s. 2. Application for relief may be made by a dependent on testacy or intestacy. Dependant is defined so as to include
(i) a woman who cohabited with the deceased for 1 year immediately preceding his death and was dependent upon him for her maintenance and support,
(ii) a woman who at the time of the death of the deceased was cohabiting with him and by whom the deceased had one or more children, or
(iii) a woman who at the time of the death of the deceased was acting as a foster mother of the children of the deceased in his household and who was dependent upon him for her maintenance and support.
[Yukon] Dependant's Relief Ordinance R.O.Y.T 1976 c. D-3. Application for relief can be made on testacy or intestacy by a dependent. 'Dependant' includes "any person who satisfies the court of a moral claim to participate in an estate..." (s. 2(1)).

[155] [England] Inheritance (Provision for Family and Dependants) Act 1975 c. 63 (discussed by Naresh in (1980) 96 L.Q.R. 534).
[South Australia] The Inheritance (Family Provision) Act 1972-1975.
[New South Wales] Family Provision Act 1982.
[West Australia] Inheritance (Family Dependants Provision) Act 1972.

(b) Should Alberta law be amended to include cohabitants in the list of dependants entitled to claim relief under the Family Relief Act?

The philosophy of family relief legislation was explored in a previous report of the Institute.[156] The report concluded that the fundamental purpose of the legislation is to provide maintenance for dependants of the deceased. The authors of the report concluded that reform of the Family Relief Act should start from the premise that, in general, it is only the legal support obligation that exists during the lifetime that should be preserved after death. Dependency in itself should not give a person a right to apply for relief.

It should be noted that most, but not all, of the jurisdictions that have legislation permitting a cohabitant to claim relief under family relief type legislation also have legislation permitting a cohabitant to claim support during his or her partner's lifetime.[157]

To allow a claim for maintenance to be made during the payor's life and a claim for maintenance to be made after his death under family relief legislation is consistent, if, as the Institute in its earlier report concluded, "[O]ur conception of the Family Relief Act [is] as a statute which transfer the legal support obligation owed by a deceased during his lifetime over to his estate".[158] In this report, however, we have recommended

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156 Report No. 29 "Family Relief" (June 1978) p. 20 et seq.

157 P.E.I., the Northwest Territories, West Australia and England do not permit cohabitees to claim support from their partners during their joint lifetime.

158 See Report No. 29 p. 48.

against extending the support obligation to cohabitants during their joint lifetime.[159] We conclude that for the very same reasons set out in that earlier part of the report a claim for maintenance by one cohabitant against the estate of the other should not be allowable. Accordingly, we recommend that Alberta law not be amended to include cohabitants in the list of dependants entitled to claim relief under the Family Relief Act. We believe this recommendation to be consistent with our earlier recommendation concerning maintenance between cohabitants and with the Institute's proposals concerning family relief contained in Report No. 29.

2. Those Areas of Law Involving Rights and Obligations as Between Cohabitants and Third Parties

A. The Children of Cohibating Couples

We have seen in Part III of this paper[160] that a number of statutes "deal with" illegitimate children. Some of these statutes deal with the relationship between the child and one or both of his parents, (such as the Family Relief Act[161] and the Maintenance and Recovery Act[162]). Some deal with the relationship between the child and a third party, (for example, the Fatal Accidents Act[163]). Some deal with the status of the child itself, (for example, the Legitimacy Act[164]). For

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159 Supra, pp. 63-68.

160 Supra., p. 53.

161 R.S.A. 1980 c. F-2.

162 R.S.A. 1980 c. M-2.

163 R.S.A. 1980 c. F-5.

164 R.S.A. 1980 c. L-11.

convenience we shall deal with the position of the child of a cohabiting couple here, whether our concern is with his relationship with his parents, with third parties or with his very status.

In 1976 The Institute of Law Research and Reform published a report entitled, "Status of Children".[165] The authors of the report recommended, "that there be one status for all children; that the legal relationship between child and parent be dependent on their biological relationship; that, with the exception of parental guardianship, all rights and obligations of the child born out of wedlock, of a parent, or of any other person be determined in the same way as if the child was born in wedlock...".[166]

The status of legitimacy (and consequently that of illegitimacy) has been abolished in Ontario, Manitoba, New Brunswick, Prince Edward Island and the Northwest and the Yukon Territories.[167] Section 11.2(1) of the Manitoba statute provides:

> "For all purposes of the law of Manitoba a person is the child of his parents, and his status as their child is independent of

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165 Report No. 20 reissued in updated form November 1985 (Report No. 45).

166 Report No. 20, p. 2, Report No. 45, pp. 4,5.

167 [Ontario] Children's Law Reform Act, R.S.O. 1980 c. 68.
[Manitoba] Family Maintenance Act, S.M. 1978, c. 25/F20 (as amended by S.M. 1982-83-84, c. 54 s. 14) Part II.
[New Brunswick] Family Services Act, S.N.B. 1980 c. F-2.2 Part VI.
[PEI] Child Status Act, S.P.E.I. (1987) c. 8 (not yet proclaimed).
[NWT] Child Welfare Ordinance, R.O.N.W.T. 1974 c. C-3 (as am. by 1987(1) c. 31) Part III.1.
[Yukon] Children's Act SYT 1984 c. 2 Part I.

whether he is born inside or outside marriage".

Section 1(2) of the Ontario statute, s. 96(1) of the New Brunswick statute, s. 1(1) of the Prince Edward Island statute, s. 77.1(1) of the N.W.T. Ordinance and s. 6 of the Yukon Ordinance are all to like effect. These statutes go on to provide for presumptions and declarations of parentage, for the construction of instruments and enactments, for rights to custody and access and for child support.[168]

Once the child born outside wedlock is treated legislatively in the same way as the child born within marriage many of the legal concerns relating to the child's relationship with his parents and with third parties disappear. We would recommend adoption of legislation similar to that enacted in Ontario, New Brunswick, Manitoba, Prince Edward Island and the Yukon and Northwest Territories and to that recommended by the Institute of Law Research and Reform of Alberta in 1976.

B. Agency of Necessity

Introduction[169]

In discussing agency of necessity it is necessary to distinguish between three agency situations:

(a) the presumption of agency arising from cohabitation;

(b) agency by estoppel;

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168 In Ontario maintenance is dealt with in the Family Law Act 1986 S.O. 1986 c. 4.

169 See generally Davies, "Family Law in Canada" (1984) pp. 115-122 and Hardingham, "A Married Woman's Capacity to Pledge Her Husband's Credit for Necessaries" (1980) 54 Aust. L.J. 661.

(c) the separated wife's agency of necessity.

The first type of agency, that presumed as a result of cohabitation, enables a tradesman who has supplied necessaries to a cohabitant to sue the partner of that cohabitant for the cost of the necessaries. This type of agency is not dependent upon the cohabitants being married to one another or, for that matter, on the agent being female. Being a species of implied agency, the principal will not be liable if he has forbidden his partner from pledging his credit or has notified the tradesman that he will not be liable for necessaries supplied to the partner.

The second type of agency, that arising by estoppel, is a species of apparent authority. A person supplying goods to a cohabitant may sue his or her partner if the alleged principal has held his cohabitant out as having the authority to pledge the principal's credit. Here cohabitation per se is not sufficient to constitute a holding out. The authority will be terminated if notice is given to the tradesperson that the principal will not be liable for goods supplied to the agent but a private prohibition given to the agent will not, of itself, terminate the apparent authority.

The third type of agency, the separated wife's agency of necessity, is the most controversial of the three. This species of agency is peculiar to married woman (it does not apply to cohabitants and the agent may only be female). It was developed at a time when a married woman's property vested in her husband. A wife was dependent on her husband to provide her with the necessaries of life, and it was his duty to so provide so long as she had not forfeited her right to be supported as, for example,

by deserting him or committing adultery. This right to support, however, was not directly enforcible as the common law did not permit actions between husband and wife. The wife could enforce his right to support indirectly by pledging her husband's credit for necessaries for herself and their children.[170] Today, in Alberta, a wife living apart from her husband, may pledge his credit for necessaries so long as she has not committed a matrimonial offence and has not adequate means of her own. A prohibition by the husband to the tradesman or to the wife will not revoke this type of agency. The Domestic Relations Act[171] section 12 provides that after a judgment of judicial separation a spouse is not liable in respect of any contract the other enters into. Section 18 provides that when an interim or permanent order for alimony is subsisting and payment is not in arrears the defendent is not liable for necessaries supplied to the plaintiff. Apart from these statutory modifications the common law rules relating to the wife's agency of necessity subsist in Alberta.

Statutory Innovations

The first two forms of agency referred to above are little more than examples of established agency principles. They are not dependent on marital status or the agent being of a particular sex and, as was stated in an earlier report prepared for the Institute:[172] "It is not harmful and might as well continue".

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[170] See Re Nowe and Nowe (1986) 25 D.L.R. (4th) 105 (N.S.C.A.)

[171] R.S.A. 1980 c. D-37.

[172] Report No. 27, "Matrimonial Support" (March 1978) p. 173.

The third type of agency referred to above, that of the separated wife's agency of necessity, is a different matter. It was a useful and necessary tool at the time it was developed, but today, when our courts can give speedy relief in the form of maintenance to separated spouses of either sex it can be said to have outlived its usefulness. Having said this we must ask the question, should the wife's agency of necessity simply be abolished or should it be "modernized"?

The Institute in its earlier report[173] recommended abolition of the wife's right to pledge her husband's credit for necessaries. Saskatchewan, by recent legislation, abolished the wife's agency of necessity.[174] Ontario, Prince Edward Island, New Brunswick and the Yukon Territory have each supplanted the common law rules by which a wife could pledge her husband's credit with new rules.[175]

The statutory provisions enacted in Ontario apply to cohabitants as well as married persons.[176] The legislation of

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[173] Report No. 27 referred to above, at p. 174.

[174] The Equality of Status of Married Persons Act S.S. 1984-85 c. E-10.3 s. 5 which provides: "A husband or wife does not, merely because of his or her status as a spouse, have authority to pledge the credit of the other spouse for necessaries or to act as agent for the other spouse for the purchase of necessaries".

[175] [New Brunswick] Family Services Act S.N.B. 1980 c. F-2.2 s. 127
[Ontario] Family Law Act 1986 S.O. 1986 c. 4 s. 45.
[P.E.I.] Family Law Reform Act 1978 (P.E.I.) c. 6 s. 33(4).
[Yukon] Matrimonial Property and Family Support Ordinance O.Y.T. 1979 (2d) c. 11 s. 30.24.

[176] 'Spouse', for the purposes of the provision includes "either of a man and woman who are not married to each other and cohabited,
(a) continuously for a period of not less than 3 years, or
(b) in a relationship with some permanence, if they

Ontario and Prince Edward Island is identical whilst that of New Brunswick and the Yukon differs only slightly. The Ontario and Prince Edward Island provisions read as follows:

> Sec. 45. Pledging credit for necessities. -- (1) During cohabitation, a spouse has authority to render himself and his or her spouse jointly and severally liable to a third party for necessities of life, unless the spouse has notified the third party that he or she has withdrawn the authority.
>
> (2) Liability for necessities of minor. -- If a person is entitled to recover against a minor in respect of the provision of necessities for the minor, every parent who has an obligation to support the minor is liable for them jointly and severally with the minor.
>
> (3) Recovery between persons jointly liable. -- If persons are jointly and severally liable under this section, their liability to each other shall be determined in accordance with their obligation to provide support.
>
> (4) Common law supplanted. -- This section applies in place of the rules of common law by which a wife may pledge her husband's credit.

This provision alters the common law in a number of ways. Firstly, it only applies during cohabitation. Thus, the separated spouse cannot pledge his or her partners credit. Secondly, the authority is terminated once the third party is notified that authority is withdrawn. A private prohibition to the agent is insufficient to terminate authority, however. The provision is, in this respect therefore wider than the common law agency implied from cohabitation (where a private prohibition to the agent is sufficient to terminate authority) and narrower than the separated wife's agency of necessity (where prohibition to either agent or third party will not terminate the agent's

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[176](cont'd) are the natural or adoptive parents of a child". See also the definition of "spouse" contained in section 30.1 of the Yukon Ordinance.

authority). Thirdly, the section talks of joint and several liability. At common law the presumption was that the wife contracted as agent for her husband and was not herself jointly liable. Fourthly, the section is asexual and treats both spouses alike. Finally, it makes the parents of a minor liable for necessaries provided to that minor.[177] At common law a child has no authority to pledge the credit of his parents, and, in the absence of agency created in one of the normal ways, a parent is no more liable then a stranger for debts incurred by a child without his authority.

We are generally of the view that the present rules relating to agency implied from cohabitation and ostensible authority arising from a holding out are unobjectionable and there is no need to alter these well established agency principles by legislation. In this respect we would endorse the recommendations made in the Institute's Report No. 27. We are also in agreement with Report No. 27 that the separated wife's agency of necessity should be abolished. This would be in line with the recent legislation of Saskatchewan and also with that of Ontario, Prince Edward Island, New Brunswick and the Yukon.

We would not recommend the enactment of specific rules relating to the agency of cohabitants as have been enacted in Ontario. This we believe to be unnecessary. The common law rules relating to agency arising from cohabitation and apparent authority do not simply apply to married persons. The former type of agency is presumed from cohabitation - not marriage, and a non-married cohabitants of either sex may be implied to have

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[177] The New Brunswick provision has no equivalent to s. 45(2).

such authority.[178] Likewise, apparent authority arises from a holding out and is not restricted to the holding out of one married person by another.

Thus, the only change in the law that we would recommend in this area is to abolish the separated wife's agency of necessity. In this respect we endorse the recommendation made in report no. 27.

C. Fatal Accidents

i. The current law

At common law a person who has suffered economic loss as the result of the death of another cannot sue the wrongdoer in tort for that loss.[179] Fatal accidents legislation marks an exception to this rule. The Fatal Accidents Act of Alberta permits a defined list of relatives to sue in respect of loss incurred by them as a result of a death.[180] The action must be brought within 2 years of the death.[181] Only one action may be brought and it is to be brought in the name of the executor or administrator.[182] It is a condition precedent to the action that the deceased himself would have been entitled to bring action

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178 See Hardingham, "A Married Woman's Capacity to Pledge her Husband's Credit for Necessaries", (1980) 54 Aust. L.J. 661 at 662 and authorities therein cited.

179 Baker v. Bolton (1808) 170 E.R. 1033, 1 Camp 493 at 493: "In a civil court the death of a human being could not be complained of as an injury", per Lord Ellenborough.

180 See Fatal Accidents Act R.S.A. 1980 c. F-5 reproduced in Appendix 5.

181 Limitation of Actions Act R.S.A. 1980 c. L-15 s. 54.

182 If the executor or administrator fails to bring the action within 1 year of the death then action may be brought by and in the name of all or any of the specified relatives.

against the defendant had he not died of his injuries. (Thus, no recovery will be permitted to the relatives if the deceased's claim would have been barred by a defence such as consent. Similarly, the relative's claim will be reduced according to the deceased's contributory negligence).

Until recent amendments to the Fatal Accidents Act the statute permitted only compensation for a claimant's reasonable expectation of pecuniary benefit.[183] The benefit must have derived from the relationship and not from a commercial or other cause.[184] Thus, in the case of a breadwinner, the court would calculate the amount he or she would have spent on the specified relatives and the amount of time these benefits would have endured. The court would make adjustments for contingencies and for benefits accruing to the claimant or accelerated as a result of the death.[185] The resulting sum would be capitalized and divided between the relatives according to their respective losses.[186]

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183 Funeral expenses were, however, a permitted head of recovery.

184 The classic case on this point is Burgess v. Florence Nightingale Hospital [1955] 1 Q.B. 349 where a husband and wife were dancing partners. The wife died. The husband was unable to recover in respect of the diminution in his own earnings which he suffered through loss of his dancing partner because such loss did not derive from the familial relationship but from a business relationship he had with the deceased. He could, however, recover in respect of his reasonable expectation that she would have given him some part of her own earnings had she not died for such expectation derived from their familial (rather than business) relationship.

185 Pursuant to section 6 of the Act no deduction is to be made by virtue of insurance monies paid or payable as a result of the death.

186 For a more detailed analysis of the fatal accidents legislation see texts on torts for example Fleming, "The Law of Torts" (6th ed) (1983) p. 624 et. seq.

Compensation for a reasonable expectation of pecuniary benefit is still the primary basis for making an award under the Fatal Accidents Act. However, in 1978 the Act was amended to permit recovery for bereavement.[187] An award in a specific amount can be claimed by specified relatives and the damages will be awarded without reference to any other damages that may be awarded and without evidence of damage. This new provision resulted from a report of the Institute of Law Research and Reform dated April 1977.[188] The report simultaneously recommended abolition of an estate's claim for loss of expectation of life, for loss of amenities and for pain and suffering.[189]

We have talked of a list of specified relatives who may recover for loss of reasonable expectation of pecuniary benefit. We have also spoken of those relatives who may claim damages for bereavement. What relatives are comprised in these lists?

The claim for loss of reasonable expectation of pecuniary benefit can be made by the wife, husband, parent, child, brother or sister of the deceased. The term 'child' includes a son, daughter, grandson, granddaughter, stepson, stepdaughter or illegitimate child. The term 'parent' includes a father, mother, grandfather, grandmother, stepfather and stepmother.

Damages for bereavement may be awarded to a more limited class of relatives. Such damages may be awarded only to a spouse

187 S.A. 1978 c. 35.

188 Report No. 24, "Survival of Actions and Fatal Accidents Act Amendment".

189 These recommendations were implemented in the Survival of Actions Act. See now R.S.A. 1980 c. S-30 s. 5.

and to the minor children of a deceased person or to the parents of a minor child. The extended definition of a 'child' and 'parent' does not apply to the claim for bereavement.

ii. The other Canadian jurisdictions

Each of the other Canadian jurisdictions has fatal accident's legislation. Only in Ontario and Prince Edward Island, however, are cohabitants included within the specified list of relatives entitled to claim for damages.

In Ontario the Family Law Act 1986[180] includes "spouse" within the list of specified relatives. 'Spouse' is defined as including:

> "either of a man and woman who are not married to each other and have cohabited
>
> (a) continuously for a period of not less than 3 years, or
>
> (b) in a relationship of some permanence if they are the natural or adoptive parents of a child"

The Ontario statute permits only recovery for pecuniary loss. No damages for bereavement are recoverable.

In Prince Edward Island the list of specified relatives includes

> "(a) the widow or widower of the deceased
>
> (b) a person of the opposite sex to the deceased not legally married to the deceased who lived and cohabited with the deceased as the spouse of the deceased and was dependent upon the deceased at the time of his death for maintenance and support or who was entitled to maintenance or support under any contract, order or judgment of any court

[180] S.O. 1986 c. 4 s. 61.

in this province or elsewhere, and

(c) any other person who for a period of at least 3 years immediately prior to the death of the deceased was dependent upon the deceased for maintenance and support."[191]

Prince Edward Island, like Ontario but unlike Alberta, limits recovery to pecuniary losses. Damages for bereavement are not recoverable. Thus, in those two provinces, there is but one list of specified relatives not, as there is in Alberta, a list of those who can claim for pecuniary loss and another, a narrower list, of those entitled to claim damages for bereavement.

It should be noted in Prince Edward Island that it is not enough that one cohabited with the deceased as his or her spouse to fall within the specified list of relatives. A state of dependency is also required. In Ontario, on the other hand, if one has cohabited for the specified period of time one is brought within the list of relatives entitled to claim. Falling within the specified list of relatives, of course, does not entitled one to damages. One must also prove loss of pecuniary benefit or reasonable expectation of pecuniary benefit.[192]

iii. The position in England

In England a cohabitant is included within the list of specified relatives on whose behalf an action for loss of pecuniary benefit can be brought.[193] Such a claimant is defined

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[191] Fatal Accidents Act S.P.E.I. 1978 c. 7 s. 1.

[192] Certain other pecuniary losses are also recoverable, such as funeral expenses. See S.P.E.I. 1978 c. 7 s. 6(3); S.O. 1986 c. 4 s. 61(2).

[193] Fatal Accidents Act 1976 c. 30 (as amended by Administration of Justice Act 1982).

by the legislation as follows:

> "any person who
>
> (i) was living with the deceased in the same household immediately before the date of death; and
>
> (ii) had been living with the deceased in the same household for at least 2 years before that date; and
>
> (iii) was living during the whole of that period as the husband or wife of the deceased"

Section 3(4) of the legislation cautions that where damages fall to be assessed payable to a cohabitant as defined above, "there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together".

The English legislation, as does its Alberta counterpart, permits specified relatives to recover damages for bereavement. Again, the list of specified relatives so entitled is more limited then that of those entitled to claim for loss of pecuniary benefit. Under the English statute the claim for damages for bereavement shall only be for the benefit of the spouse of the deceased or the parents of a minor child.[194]

iv. The position in Australia

In the state of Victoria the persons on whose behalf an action for loss of pecuniary benefit can be brought are defined simply as, "dependants".[195] "Dependants" are defined as persons

[194] If the child is illegitimate only his mother can recover.

[195] Wrongs (Dependants) Act 1982 No. 9856 amending Wrongs Act

"who were wholly, mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent". Thus, a dependent cohabitant would fall within the definition. No specific provisions enable a relative or dependant to claim for bereavement.

In the Australian Capital Territory and in the Northern Territory of Australia the list of specified relatives on whose behalf an action for loss of pecuniary benefit can be brought includes:

> "a person who, although not legally married to the deceased person, was immediately before the death of the deceased person living with the deceased person as wife or husband, as the case may be, on a permanent and bona fide domestic basis".[196]

The legislation of the Australian Capital Territory does not contain a provision enabling a relative or dependant to claim for bereavement. In the Northern Territory specified relatives may seek damages for solatium. The class that may claim such damages is no wider or narrower than that which may claim damages for loss of pecuniary benefit.

In South Australia an action for loss of pecuniary benefit can be brought on behalf of specified relatives.[197] A putative spouse is included within the list. A putative spouse is defined

[195](cont'd) 1958 Part III.

[196] [ACT] Compensation (Fatal Injuries) Ordinance 1968 s. 4(2). [Northern Territories] Compensation (Fatal Injuries) Act (as amended by No. 89 of 1982). In the Northern Territory a husband, wife or cohabitant may also claim for loss or impairment of consortium.

[197] Wrongs Act 1936-75.

as follows:

> "A person is on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife de facto of that other person and
>
> (a) he
>
> (i) has so cohabited with that other person continuously for the period of 5 years immediately preceding that date;
>
> or
>
> (ii) has during the period of 6 years immediately preceding that date so cohabited with that other person for periods aggregating no less than 5 years,
>
> or
>
> (b) he has had sexual relations with that other person resulting in the birth of a child."[198]

Damages for solatium can be awarded to specified relatives under the South Australia statute too. As in Alberta and England, the relatives who can claim damages for solatium comprise a more limited class then that which can claim damages for loss of pecuniary benefit. It comprises only a surviving spouse and the surviving parents of an infant child. The term "spouse" in this context includes a putative spouse as defined above.

The South Australia statute anticipates actions for both loss of pecuniary benefit and for solatium being brought by both a legal and a putative spouse. Where the claim is one for solatium the damages awarded may be apportioned between the putative and legal spouse but the total amount awarded may not

[198] Family Relations Act 1975 No. 115 s. 11(1).

exceed that which could have been awarded if the deceased had been survived by a single spouse. The Act makes provision for the claim of a putative spouse, be it either for loss of pecuniary benefit or for solatium, to be recognized and dealt with by the court, even if not raised at the commencement of the proceedings so long as the claim is raised before the proceedings are finally determined. Finally, the legislation permits the court to allow or require a person to be represented in an action for loss of pecuniary benefit in all respects as if he was a separate party. This provision could clearly be useful if both a putative and legal spouse sought damages for loss of pecuniary benefit.

In 1978 the Law Reform Commission of Western Australia published a report on that state's Fatal Accidents Act. The Commission recommended that a cohabitant should be able to claim damages under the Fatal Accidents Act if he or she:

> "(a) was immediately before the death of the deceased living with the deceased as wife or husband, as the case may be, on a permanent and bona fide domestic basis, if the deceased leaves a child who is the child of the union between the deceased and that person, or
>
> (b) had lived with the deceased on a permanent and bona fide domestic basis continuously for a period of at least 5 years immediately preceding the death of the deceased, if the deceased does not leave any such children".[199]

In 1980 the Law Reform Commission of Tasmania made a similar recommendation.[200]

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[199] Law Reform Commission of Western Australia, "Report on Fatal Accidents" (1978) Project No. 66 para. 3.32.

[200] Law Reform Commission of Tasmania, "Working Paper on Compensation for Personal Injuries Arising Out of Tort" (1980) p. 23.

In 1983 the Law Reform Commission of New South Wales recommended that the Compensation to Relatives Act of that state be extended to encompass cohabitants.[201] It recommended that a surviving de facto partner who was living with the deceased on a bona fide domestic basis on the date of death should be included within the list of relatives on whose behalf an action can be brought for loss of pecuniary benefit. The Commission also foresaw the situation anticipated by the South Australia legislation. That is, that both a putative and legal spouse might seek benefits and that their respective interests might conflict. Thus, the New South Wales Law Reform Commission recommended that where the deceased is survived by both a legal and a de facto spouse and each claim benefits under the Act they should be separate parties to the action.

On these points the recommendations of the Law Reform Commissions of Western Australia, of Tasmania and of New South Wales have not yet been enacted.

The New South Wales Compensation to Relatives Act does not provide for the recovery of damages for bereavement. However, another New South Wales's statute does provide, inter alia for the recovery of damages by certain specified relatives (parents, husband, wife) for nervous shock whether or not that relative witnessed the accident causing death. Other relatives may recover damages for nervous or mental shock but only if the accident occurred within their sight or hearing. A de facto spouse is not included within that list.[202] The New South Wales

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201 Report on De Facto Relationships, L.R.C. 36 p. 241 et. seq.

202 Law Reform (Miscellaneous Provisions) Act 1944.

Law Reform Commission recommended that the de facto partner of the deceased be included within the list of relatives entitled to sue for nervous shock whether or not the accident was witnessed by them. That is, the Commission recommended that the de facto partner be put on a par with the parent or spouse of the deceased.

v. Should Alberta law be amended so as to include cohabitants within the list of specified relatives under the Fatal Accidents Act?

We shall address this question in three parts:

(a) Should cohabitants be included within the list of specified relatives on whose behalf an action can be brought under the Fatal Accidents Act for loss of pecuniary benefit?

(b) Should cohabitants be included within the more limited class of specified relatives entitled to claim under the Fatal Accidents Act for damages for bereavement?

(c) If the answer to either or both the above questions is in the affirmative how should the term, "cohabitant" be defined for this purpose?

(a) Should cohabitants be included within the list of specified relatives on whose behalf an action can be brought under the Fatal Accidents Act for loss of pecuniary benefit?

In the first part of this report we emphasized that most persons living in a cohabitational relationship did so out of choice and often to avoid the incidents of marriage. We said that to impose rights and obligations akin to marriage on

cohabiting parties inter se not only limited their freedom of choice but re-enforced that dependency that the institution of marriage had done much to encourage. Accordingly, we recommended against extending maintenance and property rights to cohabitants.[203] The position of cohabitants in the context of Fatal Accidents Act claims is, however, different. We are no longer talking of rights and obligations between the cohabitants inter se. Rather, we are talking of rights and obligations between a surviving cohabitant and a third person. Should a third person who has caused loss to the plaintiff be able to rely on the nature of the relationship that the plaintiff had with the deceased to escape liability? Further, when a plaintiff claims for loss of pecuniary benefit he does not have to rely on his having been in a state of dependency vis a vis the deceased. So, for example, a husband can receive compensation for the loss of his deceased wife's domestic services or for the loss of her financial contribution to household expenses.[204] Thus, the Fatal Accidents Act cannot be seen as a statute that creates or encourages dependency and, indeed, it is not itself founded on dependency.

The basic purpose of the Fatal Accidents Act is to provide compensation to a family unit that has suffered economic hardship as a result of the death of one of its members.[205] The purpose of the Workers' Compensation Act is largely similar and in that

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[203] Supra pp. 59-76. We did, however, recommend extending certain possessory rights to cohabitants (see supra pp. 79-86).

[204] See texts on torts, for example, Fleming, "The Law of Torts", (6th ed) (1983) p. 631.

[205] The purpose of the bereavement provisions are, of course, somewhat different.

context a cohabitant can receive compensation under Alberta law.[206] A cohabitant can be as much a part of a family unit as a legal spouse and consequently as needing of compensation. The majority of claims that are made under the Act arise out of motor vehicle accidents. Thus, in the vast majority of Fatal Accidents Act actions an insurer stands behind the defendant. The cost of adding cohabitants to the list of relatives entitled to claim for loss of economic benefit would therefore be born by the general body of policy holders.

In light of all the foregoing reasons we would recommend that cohabitants be included within the specified list of relatives on whose behalf an action can be brought under the Fatal Accidents Act for loss of pecuniary benefit.

(b) Should cohabitants be included within the more limited class of specified relatives entitled to claim under the Fatal Accidents Act for damages for bereavement?

The Institute's recommendation that damages be recoverable for bereavement was made simultaneous with its recommendation that damages no longer be recoverable by an estate for loss of amenities of life, loss of expectation of life and pain and suffering.[207] Similarly, in England, the Pearson Report

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[206] The fact that the Workers' Compensation Act allows of recovery by a cohabitant should not per se mean that the Fatal Accidents Act should do likewise. Two factors of significance distinguish the two situations: (a) Insurance under the Workers' Compensation Act is compulsory; this is not so under the Fatal Accidents Act. (b) The philosophy of workers compensation is that "the blood of the workman is part of the price of the product". This philosophy is hardly pertinent in the Fatal Accidents Act context. [See Law Reform Commission of Western Australia, "Report on Fatal Accidents", Project No. 66 (1978) para. 3.34.]

[207] Report No. 24, "Survival of Actions and Fatal Accidents Act

[208] linked its recommendation that damages be recoverable for bereavement or loss of society to the fact that it was simultaneously recommending that an estate no longer be able to recover damages for loss of expectation of life. In the mind of both bodies was the situation of the deceased child. Where a child is the victim of an accident and death occurs within a short time thereof little or no damages are recoverable for loss of pecuniary benefit under the Fatal Accidents Act. Similarly, if damages for loss of expectation of life are irrecoverable little or nothing can be claimed by the estate under survivorship legislation. The truision that is is generally cheaper to kill than to maim is seen with its greatest force in the case of young children. It is primarily with these facts in mind that damages for bereavement (or loss of society) were recommended in England and Alberta.

In general, the spouse and minor children of a deceased person will be able to recover damages under the Fatal Accidents Act for loss of pecuniary benefit. Damages for bereavement do not, therefore, represent the sole sum recoverable as is often the case for the parents of a deceased minor child. Nonetheless, the Institute recommended the action be available to spouses and to minor children as well as to parents of minor children and this recommendation is now enshrined in legislation.[209] Cohabitants, like spouses, will generally be able to recover damages for loss of pecuniary benefits under the Fatal Accidents

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[207](cont'd) Amendment" (April 1977).

[208] Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd. 7054-i) (1978) pp. 96-97.

[209] R.S.A. 1980 c. F-5 s. 3(2).

Act if our recommendations in this regard are accepted. Thus, as is the case with widows and widowers, an award for bereavement is not likely to represent the sole amount recoverable in the case of a wrongfully caused death.

Nonetheless we see little reason to distinguish between cohabitants and spouses in the context of damages for bereavement. Both are likely to suffer stress and grief after the death of a partner and therefore should be able to recover the relatively small sum specified in the statute for bereavement. As is the case in South Australia, we would recommend that where a deceased is survived by both a lawful spouse and a cohabiting partner both may claim damages for bereavement. However, the total awarded should not exceed the amount that could have been awarded had the deceased been survived by a single spouse or single cohabitant. Apportionment between the two claimants should be made by the court in whichever manner it deems fit.

(c) How should the term "cohabitant" be defined for the purposes of extending rights under the Fatal Accidents Act as recommended above?

Our preliminary question here must be this. Should "cohabitant" be defined in terms of dependency or solely in terms of relationship? In Prince Edward Island, for example, in order to fall within the list of relatives entitled to claim, the cohabitant must (a) have lived and cohabited with the deceased as his spouse (i.e. stand in a cohabitational relationship with him); and (b) have been dependent on the deceased at the time of his death for maintenance and support... (i.e. stand in a

position of dependency to him). In the Australian state of Victoria, too, a person may make a claim under the Fatal Accidents Act if he was wholly, mainly or in part dependent on the deceased at the time of the deceased's death. It is submitted that dependency should not form part of the definition of those entitled to claim under the Fatal Accidents Act. Firstly, in Alberta the relatives on whose behalf a claim for loss of pecuniary benefit can presently be brought do not have to be dependent on the deceased. It is enough that they have suffered financial loss. In an example we have given before[210] a husband may recover in respect of the death of his wife for the value of her lost housekeeping services and for her contribution to the household from her earnings. He need not prove a dependency on her. Why should cohabitants be treated differently? Secondly, the court will only award damages in respect of a relative falling within the specified list if he or she can prove financial loss or loss of financial benefits. To require a cohabitant to prove dependency and then also require him or her to prove a financial loss from the death seems both draconian and unnecessary. Thirdly, the difficulty of proving a "dependency" should not be overlooked. The English equivalent to our Family Relief Act[211] provides that relief may be claimed (inter alia) by "a person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased". The English cases decided under that section show, if nothing else, that it is a difficult and convoluted question as to whether one person is being "maintained wholly or partly" at a

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[210] Supra p. 142.

[211] [England] Inheritance (Provision for Family and Dependents) Act 1975.

particular time.[212] Finally, in the context of bereavement, dependency is of little or no relevance. Surely, here one is compensating for grief for loss of society rather than grief for loss of financial support.

If, therefore, we are to define our cohabitant in terms of the relationship he or she had with the deceased what definition can be used? Must there have been cohabitation for a period of time? Must there have been a child born of the relationship? Is it simply sufficient that the parties were cohabiting at the time of death?

In Ontario, England and South Australia cohabitation must have endured for a particular number of years before the cohabitant falls within the specified class. In Ontario the period is 3 years, in England it is 2 and in South Australia it is 5 years. If a child has been born of the relationship then the specified period of cohabitation is not necessary in Ontario and South Australia.[213] In the Australian Capital Territory and Northern Territory of Australia a person may fall within the list of specified relatives if immediately before the death of the deceased he or she was living with the deceased as husband or

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[212] See Naresh, "Dependents' Applications under the Inheritence (Provision for Family and Dependents) Act 1975 (1980) 96 L.Q.R. 534.

[213] In Ontario a person may fall within the prescribed class if he or she has cohabited with the deceased in a relationship of some permanence and they are the natural or adoptive parents of a child. In South Australia a person may fall within the prescribed class if the parties have had sexual relations resulting in the birth of a child. See also the recommendations of the Western Australia and Tasmania Law Reform Commissions set out above where the five-year cohabitation period need not be satisfied if the parties have cohabited as husband and wife on a bona fide domestic basic and there is a child of the union.

wife on a bona fide domestic basis, no time period is specified.[214]

We are of the view that it is not necessary to define a cohabitant in relation to either a specified time of cohabitation or in reference to the birth or adoption of a child. We are of the view that since a person seeking damages representing loss of precuniary benefit must establish that loss, the ephemeral (or otherwise) nature of the relationship will be taken into account by the court at that stage. Arbitrary time periods may serve as a useful yardstick where no other measure is available. However, this is not so in this context. In the case of damages for bereavement again we would not recommend the imposition of a time limit. We admit that here there is not the same check as is the case in a suit for loss of pecuniary benefit. However, the damages awarded for loss of bereavement are relatively modest. If the deceased was not survived by a legal spouse there is little reason why a person cohabiting with the deceased at the time of death should not take the spousal share. If the deceased did leave a legal spouse the bereavement sum could be apportioned between cohabitant and spouse as in South Australia and the ephemeral (or otherwise) nature of the cohabitational relationship could be taken into account by the court in making the apportionment.

Finally, if our cohabitant is to be defined in terms of the cohabitational relationship itself and not bounded by a specified number of years or the birth of a child, some words must be used

[214] See also New South Wales Law Reform Commission which recommended that a surviving de facto partner who was living with the deceased on a bona fide domestic basis on the date of death should be included within the list of relatives.

to distinguish the cohabitational from the casual relationship. Prince Edward Island, England, the Australian Capital Territory and the Northern Territory of Australia specify in their respective enactments that the parties have cohabited "as husband and wife" or as "spouses".[215] It is submitted that this is unnecessarily confusing terminology. If the parties are not husband and wife, do not pretend to be husband and wife, and do not hold each other out as husband or wife, can they be said to be cohabiting as husband and wife? If not, then should those whited sepulchres who hold themselves out to neighbors and friends as married, knowing full well that they are not, be rewarded for their hypocracy at the expense of their more honest brethren? We would suggest that a more straight-forward test is that recommended by the New South Wales Law Reform Commission. This is that a surviving cohabitant may be included within the list of relatives specified under the Fatal Accidents Act if he or she was living with the deceased on a bona fide domestic basis on the date of death.

(d) Ancillary matters

We believe that if, as proposed above, Alberta legislation is modified so as to permit a cohabitant to recover under the Fatal Accidents Act for both loss of pecuniary benefit and for bereavement certain ancillary matters should be addressed.

Firstly, provision should be made for the separate representation of cohabitant and legal spouse where both claim under the Fatal Accidents Act. Presently, the action is brought

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[215] South Australia uses the term, cohabiting "as husband or wife de facto".

in the name of the executor or administrator. In the action the court may give to the persons for whose benefit action has been brought those damages the court considers appropriate to the injury resulting from death. The Act goes on to say that only one action lies in respect of the same subject matter of complaint. Clearly, there may be a conflict of interest between an alleged cohabitant and legal spouse and we would suggest adoption of provisions similar to those adopted in South Australia. These provisions have been referred to above.[216]

Secondly, provision should be made for apportment of damages between legal spouse and cohabitant where both claim for bereavement. Again, we would recommend adoption of provisions similar to those in place in South Australia in this regard.[217]

vi. Conclusions

We would recommend that the Fatal Accidents Act of Alberta be amended in the following manner:

Section 1 should be amended to add the following after subparagraph (b):

> "1(c) "cohabitant" means a person of the opposite sex to the deceased who, at the time of the deceased's death, was living with the deceased on a bona fide domestic basis."

Section 3(1)(a) should be amended so as to include the word "cohabitant" after the word "husband" and before the word "parent".

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[216] Supra pp. 138, 139.

[217] Referred to supra pp. 138, 139.

Section 4.1 should follow section 4 and precede section 5. Section 4.1 should read:

> "4.1(1) Where a deceased person is survived by a spouse and a cohabitant, the action shall, subject to this section, be brought for the benefit of both.
>
> (2) Where the court considers it appropriate that any person for whose benefit an action lies under this section should present an independent claim for the benefit of an action under this section, it may permit or require that person to appear or be represented in the proceedings in all respects as if he were a separate party to the proceedings.
>
> (3) No action lies against the executor or administrator for failing to bring an action for the benefit of a cohabitant if he brings the action without notice of the claim of the cohabitant but the interest of any such cohabitant in the action shall be recognized by the court if application for recognition is made to the court before the proceedings are finally terminated."

Section 8(2) should be amended so that paragraph (a) is repealed and replaced by the following:

> "8(2)(a) $3,000 to the spouse or cohabitant of the deceased person."

Section 8(2.1) should immediately follow paragraph 8(2). Paragraph 8(2.1) should read as follows:

> "8(2.1) Where the deceased person is survived by a spouse and a cohabitant, they may both claim damages for bereavement under this section, but the total amount awarded by way of damages for bereavement in any such case shall not exceed the amount that could have been awarded if the deceased had been survived by a single spouse or single cohabitant."

Paragraph 8(2.2) should immediately follow paragraph 8(2.1).

Paragraph 8(2.2) should read as follows:

> "8(2.2) Where in any proceedings under this section a spouse and a cohabitant both claim damages for bereavement, such damages awarded by the court shall be apportioned between the claimants in such manner as the court thinks fit and just."

Paragraph 8(2.3) should immediately follow paragraph 8(2.2). Paragraph 8(2.3) should read as follows:

> "8(2.3) In any proceedings by a spouse for damages for bereavement it is not necessary for the court to inquire if the deceased was also survived by a cohabitant, but any such cohabitant may, at any time before the proceedings are finally determined, apply to the court to be joined as a party to the proceedings."

D. Workers' Compensation

Workers' Compensation involves a scheme whereby benefits are paid to workers who are disabled as a result of their employment. The scheme also covers benefits payable to dependants of a deceased worker where that death resulted from the worker's employment. The Workers' Compensation scheme itself is outside the scope of this paper.[218] Here we are only concerned with situations in which benefits become payable to someone other than the worker himself. Basically, this may occur in three situations:

(i) where the worker is *prima facie* entitled to receive benefits under the Workers' Compensation Act but the Board is satisfied that a dependant or dependants of

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[218] See generally Ison, "Workers' Compensation in Canada" (1983).
In Alberta see the Workers' Compensation Act 1981 RSA c. W-16. Hereinafter called "the Act".

the worker are not being adequately provided for;

(ii) where the worker is prima facie entitled to receive benefits under the Act but is suffering from some disability or incapacity so that it is inappropriate that the benefits be paid directly to the worker;

(iii) where the worker dies as a result of the accident and benefits become payable to his dependants.

We shall deal with each of these situations in turn:

i. Where the worker is prima facie entitled to receive benefits under the Workers' Compensation Act but the Board is satisfied that a dependant or dependants of the worker are not being adequately provided for

Section 44 of the Act provides:

> If the Board is satisfied
>
> (a) that a spouse or child dependent on the worker and residing in Alberta is without adequate means of support and is or is likely to become a charge on the Government or on the municipality where the spouse or child resides or on private charity, or
>
> (b) that a spouse or child dependent on the worker and residing in or out of Alberta is not being supported by the worker and an order has been made against him by a court for maintenance of the spouse or child or for alimony,
>
> the Board may pay the compensation payable to the worker in whole or in part to the spouse or child.

The term "spouse" is defined by section 1(3) so as to include:

> ... "[A] common law spouse who cohabited with

the worker for

(a) at least the 5 years immediately preceding the workers' death,

or

(b) at least the 2 years preceding the workers' death, if there is a child of the common law relationship."

It is doubtful as to whether the extended definition of spouse contained in section 1(3) applies to section 44. The five and 2 year "qualifying periods" must immediately precede the workers' death. If the worker is not yet dead it seems impossible for a cohabitant to satisfy the qualifying period.

Should the Act be amended so that a common law spouse falls within the definition of spouse for the purposes of section 44? In other words, should the Board be enabled to pay all or part of a workers' compensation to his dependent common law spouse where that spouse resides in Alberta and is likely to become a public charge or a charge on private charity? Should the Board be enabled to pay all or part of a workers' compensation to his dependent common law spouse where the dependant lives in or outside Alberta and an order has been made against him by a court for maintenance of that common law spouse? Alternatively, should section 44 be repealed or otherwise amended?

It is significant to note that section 44 is permissive rather than mandatory. Thus, if the criteria set out in paragraphs (a) or (b) are satisfied the Board may (not must) redirect the worker's compensation to his spouse or child. We understand that compensation is rarely redirected under section 44. Insofar as paragraph (a) is concerned, we do not feel that

the Workers' Compensation Board should be given wide powers to, in effect, protect the coffers of the Department of Social Services. If a spouse or child is in need and is likely to become a public or private charge the proper course would appear to be for the applicant to apply to the court for maintenance against the worker. Alternatively, the spouse and/or child could apply for welfare and the Department of Social Services could either require the spouse to seek maintenance from the worker or the Director of Maintenance and Recovery could bring an application against the worker for maintenance.[219]

Insofar as paragraph (b) of section 44 is concerned, again we do not feel that the Workers' Compensation Board should be given a wide discretionary power to determine whether all or part of a worker's compensation should be redirected to satisfy a court ordered maintenance obligation. The proper course would appear to be to amend the terms of the Maintenance Enforcement Act[220] to make clear that its coverage extends to workers' compensation payments. Under the Maintenance Enforcement Act maintenance orders made by Alberta courts or registered under the Reciprocal Enforcement of Maintenance Orders Act[221] may be filed with the Director of Maintenance Enforcement and enforced through his office. (Orders made after December 31, 1986 are automatically filed with the Director and enforced through his office unless the creditor "opts out" of the scheme.) Where the payor is delinquent the Director of Maintenance Enforcement may

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[219] See Domestic Relations Act R.S.A. 1980 c. D-37 Part IV and Maintenance and Recovery Act R.S.A. 1980 c. M-2 Part III.

[220] S.A. 1985 c. M-0.5.

[221] R.S.A. 1980 c. R-7.1.

obtain (inter alia) an order of continuing attachment requiring an employer to redirect wages and salary to the Director. It is submitted that any redirection of a worker's compensation payments to satisfy a maintenance order should be done under the new maintenance enforcement scheme and not under the discretionary powers set out in the Workers' Compensation Act. It should be noted that the Maintenance Enforcement Act applies to all maintenance orders made by Alberta courts or registered under the Reciprocal Enforcement of Maintenance Orders Act. Thus, it is not limited to orders in favour of spouses and children (as is section 44 of the Workers' Compensation Act). A maintenance order in favour of a cohabitant made by the court of another province would, therefore, be enforced under the Maintenance Enforcement Act if registered under the Reciprocal Enforcement of Maintenance Orders Act.

In light of the foregoing it is recommended that section 44 of the Workers' Compensation Act be repealed and the Maintenance Enforcement Act be amended to make clear that worker's compensation payments are attachable under that Act. This recommendation would also involve an amendment to section 135 of the Workers' Compensation Act which provides as follows:

> "Except as otherwise provided in this Act, no sum payable as compensation or by way of commutation of any periodical payment in respect of it, is capable of being assigned, charged or attached, unless the Board gives its approval".

ii. Where the worker is prima facie entitled to receive benefits under the Act but is suffering from some disability or incapacity so that it is inappropriate that the benefits be paid directly to the worker

Section 45 of the Act provides:

> The Board may, instead of making a payment to the worker or dependant, pay the money to some other person for the benefit of the worker or dependant or direct that the payment by applied in a manner that it considers to be for the best advantage of the worker or dependant if it is satisfied that the worker or dependant is under the age of 18 years, that he suffers from some other disability or incapacity or that for some other reason the money should not be paid directly to the worker or dependant.

Under this provision payments can be made to "some other person" for the benefit of the worker or dependant. That person may be the worker's spouse, cohabitant or someone else. We see no reason to qualify the term "some other person" in this context. Thus, we recommend no change in section 45.

iii. Where the worker dies as a result of the accident and benefits become payable to his dependants

Section 64(1) of the Act provides:

> "If a worker dies as a result of an accident and leaves a dependent spouse, a pension is payable to the dependent spouse in an amount equal to the pension the worker would have received had he lived and been permanently disabled".

The Act goes on to provide an elaborate scheme of payments. The thrust of the scheme is as follows: Upon the spouse becoming self-sufficient (or when it is deemed that he or she should have achieved self-sufficiency) the pension becomes payable for a 5 year term. Over the five year term the amount of the pension decreases annually so that in the fifth year the spouse is receiving only 20% of the full pension. In the sixth year the

spouse receives nothing. The scheme also makes provision for compensation to be paid for the benefit of dependent children of the deceased. The word "child" is defined so as to include an illegitimate child. If the only dependant of a deceased worker is a person other than a dependent spouse or child the Board shall pay compensation to that dependant in such amount as it considers reasonable and proportionate to the pecuniary loss caused to him by the death subject to certain permissible maximum limits.[222] The current Workers' Compensation Act came in to force January 1st, 1982. There are certain transitional provisions dealing with deaths occurring prior to that date. We shall not concern ourselves with these provisions.

Section 1(3) of the Act provides as follows:

> For the purposes of this Act, "spouse" includes a common law spouse who cohabited with the worker for
>
> (a) at least the 5 years immediately preceding the worker's death, or
>
> (b) at least the 2 years immediately preceding the worker's death, if there is a child of the common law relationship,
>
> but if, at the time of the worker's death there is also a legal spouse of the worker, then
>
> (c) if the legal spouse is a dependent legal spouse, that spouse is the dependent spouse for the purposes of a pension under section 64,
>
> (d) if the legal spouse is not a dependent legal spouse, the common law spouse is the dependent spouse for the purposes of a pension under section 64, and
>
> (e) nothing in this subsection affects the rights under this Act of dependent

[222] Workers' Compensation Act s. 70(1).

children of either relationship.

The term "dependant" is defined as meaning:[223]

> "a member of the family of a worker who is wholly or partially dependent on his earnings at the time of his death or who, but for the death or disability due to the accident, would have been so dependent, but a person is not a partial dependant of another person unless he was partially dependent on contributions from that other person for the provision of the ordinary necessaries of life;"

Unlike other sections of this report we shall not here debate the fundamental issue of whether cohabitants should be included within the definition of spouse and so be accorded benefits under the Workers' Compensation Act. Cohabitants have been granted benefits under Workers' Compensation legislation in Alberta since 1952. We feel that a debate as to whether they should now be denied such benefits would be impracticable.

Further, we are aware that our mandate is to make recommendations relating to the law as it applies to cohabitants. To that extent only shall we recommend changes in the Workers' Compensation Act. Accordingly, we shall not evaluate the principle of the Act that only "dependent" persons are entitled to claim a pension on the death of a worker under section 64 of the Act.

In light of the foregoing we shall restrict ourselves to dealing with two somewhat narrow issues. Firstly, should the definition of "common law spouse" as set out in section 1(3) of the Act be amended? Secondly, where the deceased leaves both a

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[223] Workers' Compensation Act s. 1(1)(f).

spouse and a common law spouse are their respective entitlements balanced fairly under the current legislation? Let us deal with each of these questions in turn:

(a) Should the definition of "common law spouse" as set out in section 1(3) of the Act be amended?

To qualify as a spouse under section 1(3), the cohabitant must have cohabited with the deceased for 5 years immediately preceding the death or for 2 years if there is a child born of the relationship. The 5 and 2 year terms are clearly abritrary periods which it is thought denote a degree of permanence in a relationship between cohabitants.

To qualify for a pension under section 64(1) the would-be recipient must not only fall within the definition of "spouse" but must also have been dependent on the deceased at the time of his death. It may well be suggested that to impose a qualifying term of 5 or 2 years and as well require the cohabitant to establish dependency is unnecessarily draconian. The dependency being established, should it not be sufficient for the cohabitant to show that he or she lived with the deceased on a bona fide domestic basis at the time of death?

What is the approach taken in other jurisdictions?

i. The other Canadian provinces and territories

Most other Canadian jurisdictions have a two-tiered system similar to Alberta in that to fall within the definition of "spouse" for the purposes of Workers' Compensation legislation the cohabitants must have lived together for a certain number of

years if no children are born of the relationship, for a lesser number of years if a child has been born to them. In Quebec, Manitoba, British Columbia, the Yukon and the Northwest Territories the cohabitation period is 3 years or one year.[224] Cohabitants in Saskatchewan need only show 2 years of cohabitation, this period is no less if a child is born of the relationship.[225] Nova Scotia has a 6 and 1 year period.[226] Alberta is joined by Prince Edward Island in having a 5 and 2 year formula.[227] Ontario currently requires five years or, where there are children, a "relationship of some permanence".[228] Newfoundland uses 7 years and 2 years.[229] New Brunswick makes no specific provision for cohabitants although a section corresponding to section 70(1) of the Alberta Act does provide for dependants other than a surviving legal spouse or child.[230]

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224 See the following:
(a) Quebec Workers' Compensation Act, R.S.Q. 1977 c. A-3; am. S.Q. 1978 c. 57.
(b) Manitoba Workers' Compensation Act, R.S.M. 1970 c. W-200; am. S.M. 1985 c. 47 s. 41.
(c) British Columbia Workers' Compensation Act, R.S.B.C. 1979 c. 437 s. 17.
(d) Yukon Workers' Compensation Ordinance, R.O. 1971 c. W-5; re-en. O.Y.T. 1973 (3d) c. 6; am. O.Y.T. 1977 (2d) c. 10 s. 10.
(e) Northwest Territories Workers' Compensation Ordinance, R.O. N.W.T. 1974 c. W-4; re-en. O.N.W.T. 1977(1) c. 7.

225 Saskatchewan Workers' Compensation Act, R.S.S. 1978 c. W-17; re-en. S.S. 1979 c. W-17.1.

226 Nova Scotia Workers' Compensation Act, R.S.N.S. 1967 c. 343; am. S.N.S. 1970-71 c. 66 s. 4.

227 Prince Edward Island Workers' Compensation Act, R.S.P.E.I. 1974 c. W-10; am. S.P.E.I. 1978 c. 24 s. 40.1.

228 Ontario Workers' Compensation Act, R.S.O. 1980 c. 539; am. S.O. 1984 c. 58 s. 7.

229 Newfoundland Workers' Compensation Act, R.S. Nfld. 1970 c. 403.

230 New Brunswick Workers' Compensation Act, R.S.N.B. 1973 c. W-13; am. S.N.B. 1981 c. 80.

Some provinces, like Quebec, impose the additional requirement that the parties be known in the community in which they live as "consorts" or as "husband and wife".[231]

ii. The Australian States

The Australian states take different approaches. For example, Western Australia requires 3 years of cohabitation before a common law partner falls within the definition of spouse. If there is a child of the relationship, however, it is only necessary to demonstrate that the couple lived "on a permanent and bona fide domestic basis immediately before the death...".[232] Queenland includes in its definition of "dependants" all members of the deceased's family including a dependent person who "has lived in a connubial relationship with the worker for a continuous period of 3 years at the least, terminating on the worker's death...".[233] Victoria, does not specifically deal with cohabitants. Death benefits however are available to dependants - a term which means: "such persons as were wholly, mainly or in part dependent upon the earnings of the worker at the time of his death or who would, but for the incapacity due to the injury, have been so dependent".[234] The states of New South Wales and South Australia have legislation akin to that which we favour. In South Australia, "husband" and "wife" are defined to include couples living together "on a

231 See Quebec Workers' Compensation Act, supra note 219.

232 Western Australia Workers' Compensation and Assistance Act, 1981 S.W.A. 1981 c. 86.

233 Queensland Workers' Compensation Act, 1916-1980, as amended Q.S. 1982 No. 9 s. 3.

234 Workers' Compensation Act 1958 V.S. 6419 s. 3 (as amended by V.S. 1965 no. 7292).

permanent domestic basis" as "de facto" husband and wife.[235] In New South Wales, a "de facto" partner is entitled to death benefits provided he or she lived with the deceased prior to the accident on a permanent and bona fide domestic basis.[236]

iii. Conclusions

We recommend that section 1(3) be amended so as to provide that a common law spouse is one, who, immediately preceding the worker's death, lived with the deceased on a bona fide domestic basis. We make this recommendation because we feel that to require a cohabitant to establish the lengthy cohabitation period set out in the current statute and as well show dependency on the deceased at the time of death is unnecessarily onerous. Those whose relationship to the deceased was purely ephemeral should clearly not be awarded benefits under the Act. However, we feel that dependency plus the fact that the parties lived together on a bona fide domestic basis at the time of death is sufficient safeguard in this respect. The aim of the current legislation is to encourage self-sufficiency on the part of dependants. Those who have in fact developed a dependency should be able to claim this allowance whether or not they have cohabited for a specific number of years.

There is another reason why we feel that the term "common law spouse" be defined as one who, immediately preceding the worker's death, lived with the deceased on a bona fide domestic basis. The reason is this. If a worker is killed in a workplace

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[235] South Australia Workmans' Compensation Act, 1971-74 S.A.S. 1837-1975, s. 8.

[236] New South Wales Workers' Compensation Act, 1926 (as amended).

accident his dependent spouse is restricted to her rights under the Workers' Compensation Act. She cannot bring a claim under the Fatal Accidents Act.[237] Presently a dependent common law spouse has no right to sue under the Fatal Accidents Act; whatever compensation she may recover must be recovered under the Workers' Compensation Act. However, under our earlier proposal a common law spouse would be included in the list of relatives entitled to sue under the Fatal Accidents Act. Thus, if our recommendations relating to the Fatal Accidents Act are accepted and the definition of common law spouse under the Workers' Compensation Act remains unchanged, a dependent cohabitant who has not lived with the deceased worker for the requisite 5 or 2 year period might well be able to bring suit under the Fatal Accidents Act, though not under the Workers' Compensation Act. A person who has lived with the deceased for the requisite 5 or 2 year period would, however, be restricted to her rights under the Workers' Compensation Act; she would not be able to sue under the Fatal Accidents Act. The measure of relief available under the Fatal Accidents Act is markedly different for that available under the Workers' Compensation Act and in certain cases may well be higher. It does not appear to us to be equitable that a person's right to sue under the Fatal Accidents Act in respect of a work related death should depend on her having lived with the deceased for a maximum (as opposed to minimum) number of years. I.e., for less than 5 or 2 years.

Further, employers contribute to the Workers' Compensation fund with the understanding that their liability in respect of work related accidents will be restricted to claims under that

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[237] Workers' Compensation Act ss. 16, 17, 18.

Act. If a certain group of dependants (namely cohabitants who had lived with the deceased worker for less than the five or 2 year specified period) could bring action under the Fatal Accidents Act then employers would have to take out liability insurance accordingly.

It is submitted that from the point of view of the public, the employer and the dependant it is important that the definition of a common law spouse under the Workers' Compensation Act be identical with that under the Fatal Accidents Act and we so recommend.

(b) Where the deceased leaves both a spouse and a common law spouse are their respective entitlements balanced fairly under the current legislation?

Section 1(3) provides

> ... "if at the time of the worker's death there is also a legal spouse of the worker, then
>
> (c) if the legal spouse is a dependent legal spouse, that spouse is the dependent spouse for the purposes of section 64, and
>
> (d) if the legal spouse is not a dependent legal spouse, the common law spouse is the dependent spouse for the purposes of a pension under section 64...".

No apportionment is possible under this provision. If the legal spouse is dependent (and the definition given to this word has already been set out above)[238] she takes precedence over the common law spouse. Perhaps some form of apportionment would be better. Certainly it would be more flexible. Let us see how the other provinces deal with this problem.

i. The approach of the other provinces

Four provinces of Canada allow for apportionment between the legal and common law spouses. These are the provinces of British Columbia, Nova Scotia, Quebec and Saskatchewan. Nova Scotia simply gives the Board discretion to apportion between the legal and common law spouses.[239] Saskatchewan provides that the Board may apportion according to what is reasonable and proportionate

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238 See supra p. 159.

239 Workers' Compensation Act, C.S.N.S. 1979 c. W-10 s. 30A(2).

to the pecuniary loss or loss of valuable services suffered.[240] Quebec legislation provides for equal apportionment between a dependent legal (or divorced) spouse and a common law spouse. However, the Board has the power to vary the apportionment where the worker wholly supported some dependants and others only partially.[241] Under British Columbia legislation the legal spouse generally takes precedence. However, where the deceased and the legal spouse were separated before the death then the widow's entitlement is restricted to that which she was receiving under the terms of the separation. The common law spouse may, in such a case, be paid the difference between that which the legal spouse actually receives and that to which she would have been entitled under the Act had there been no separation.[242]

ii. Some Australian jurisdictions

A sampling of Australian jurisdictions indicates receptiveness to apportionment. In the state of Victoria the Board allocates the pension between dependants of the deceased.[243] In South Australia apportionment is to be made by the Industrial Court as it deems reasonable and proportionate to the degree of dependency.[244] In Western Australia apportionment is made by the Board according to the financial loss

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240 Workers' Compensation Act, S.S. 1979 c. W-17.1 s.s. 88 and 90.

241 La loi des accidents du travail, R.S.Q. 1977 c. A-3 s.s. 2, 34 (as amended by S.Q. 1978 c. 57).

242 Workers' Compensation Act, R.S.B.C. 1979 c. 437 s. 17.

243 Workers' Compensation Act, 1958 V.S. 6419 (as amended) s. 9.

244 Workers' Compensation Act, (1971-74) s. 49.

sustained.[245]

iii. Conclusions

It is submitted that under the present Alberta legislation the respective entitlements of a dependent common law spouse and a dependent legal spouse are not balanced fairly. Rather the legislation imposes a rigid system of priority.

The thrust of the death provisions of the Statute appears to be the compensation of dependants until self-sufficiency is or should be achieved. Surely this result can best be achieved by apportioning the pension between the dependent legal and common law spouse in proportion to their respective dependencies. We would accordingly recommend that an amendment to the Alberta legislation be made that reflects the corresponding legislation of Saskatchewan, South Australia and Western Australia and permits of apportionment. We recommend that section 1(3) of the Alberta Workers' Compensation Act be amended by deleting that portion of the subsection that follows subparagraph (b) and substituting therefore,

> "if at the time of the worker's death there is a dependent common law spouse of the worker and, as well, a dependent legal spouse of the worker, then
>
> (a) for the purposes of a pension under section 64 the Board shall apportion the payments between the dependent legal spouse and the dependent common law spouse according to what is reasonable and proportionate to the degree of dependency.
>
> (b) nothing in this subsection affects the

[245] Workers' Compensation and Assistance Act, 1981 S.W.A. c. 86 Schedule 1.

rights under this Act of dependent children of either relationship.

iv. Our proposal for an amendment to the Workers' Compensation Act

It is our recommendation that section 1(3) of the Workers' Compensation Act be repealed and the following enacted in its place:

(a) For the purposes of this Act, "spouse" includes a common law spouse. A common law spouse is one, who, immediately preceding the worker's death, lived with the worker on a bona fide domestic basis.

(b) If, at the time of the worker's death there is a dependent common law spouse of the worker and, as well, a dependent legal spouse of the worker, then, for the purposes of a pension under section 64, the Board shall apportion the payments between the dependent legal spouse and the dependent common law spouse according to what is reasonable and proportionate to the degree of dependency.

(c) Nothing in this subsection affects the rights under this Act of dependent children of either relationship.

We further recommend that section 44 of the Act be repealed and that section 135 be amended to read:

"Except as otherwise provided in this Act or in the Maintenance Enforcement Act of Alberta, no sum payable as compensation or by way of commutation of any periodical payment in respect of it, is capable of being assigned, charged or attached, unless the Board gives its approval."

We further recommend that the Maintenance Enforcement Act be amended to make clear that worker's compensation payments are attachable under that Act.

E. Insurance

Two particular areas of the Insurance Act of Alberta[246] will concern us in this part. These are:

(i) The question of insurable interest.

(ii) The question of death benefits in automobile insurance.

A third aspect of the Insurance Act, that of exemption from seizure by creditors of certain life insurance monies, will be examined in part F of this paper: Exemptions.

i. Insurable interest

In those parts of the Act dealing with life insurance and with accident and sickness insurance, it is provided as a general rule that a contract is void if, at the time the contract would otherwise take effect, the insured had no insurable interest.[247]

Both parts of the Act provide as a limited exception to the rule that a contract is not void for lack of insurable interest if (a) the contract is one of group insurance, or (b) the person insured has consented in writing to the insurance.[248] Section 248 (dealing with life insurance) and Section 362 (dealing with accident and sickness insurance) are substantially similar. Section 362 provides:

> "Without restricting the meaning of the expression 'insurable interest', a person has an insurable interest in his own life and

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246 R.S.A. 1980 c. I-5

247 s. 247(1) (life insurance) and s. 363(1) (accident & sickness insurance)

248 s. 247(2) (life insurance) and s. 363(2) (accident & sickness insurance)

well being and in the life and well being of

(a) his child or grandchild,

(b) his spouse,

(c) any person on whom he is wholly or in part dependent for, or from whom he is receiving, support or education,

(d) his officer or employee, and

(e) any person in whom he has a pecuniary interest"

Should the term 'spouse' in paragraph (b) above be extended to cover cohabitants in Section 362 and Section 248? It is submitted that it should not. The general rule is that where a person, who effects an insurance on the life of another, is so related to that other as to have against him a claim for support enforceable by law, the relationship gives an insurable interest. However, natural love and affection does not, by itself, do so; and unless there is some pecuniary interest enforceable by law, one relative cannot validly insure the life of another. [249]

Unlike a legal spouse, a cohabitant has no legally enforceable claim for support against his or her partner. If the insured is wholly or partially dependent upon his or her partner then there will be an insurable interest pursuant to paragraph (c) above. If the person insured consents in writing to the insurance then it is not necessary to establish insurable interest. [250]

It should be noted that Alberta's legislation corresponds with that of other Canadian jurisdictions in providing that an

[249] Colinvaux, "The Law of Insurance" (5th ed.) (1984) pp. 340,341.

[250] See note 248 above.

insured has an insurable interest in the life and well being of his spouse. In this context, the term 'spouse' is not in any Canadian jurisdiction defined so as to include a cohabitant.[251]

ii. Death benefits in automobile insurance

Section 313(2) provides:

> "The insurer shall pay death benefits on the death of an insured person based on the age and status of the deceased insured person at the date of the accident in a household where the head of the household or the spouse or dependent relative of the deceased survive..." (emphasis provided)

The section goes on to provide the rate of such benefits.

Section 313(11) provides:

> "If a deceased insured leaves no surviving spouse and it is established to the satisfaction of a court that
>
> (a) for the 5 year period immediately preceding the death the deceased insured cohabited with a common law spouse, or
>
> (b) for the 2 year period immediately preceding his death the deceased insured cohabited with a common law spouse by whom he had one or more children,
>
> the benefits to which a spouse would have been entitled under this section shall be paid to that common law spouse.

The term "common law spouse" is defined in Section 313(10) as

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[251] British Columbia Insurance Act R.S.B.C. 1979, c. 200; Manitoba, Insurance Act R.S.M. 1970, c. I40; New Brunswick Insurance Act, R.S.N.B. 1973, c. I-12; Newfoundland Accident and Sickness Insurance Act, R.S.Nfld. 1970, c. 2, re-en, S.Nfld. 1971, No. 6; Nova Scotia Insurance Act, R.S.N.S. 1967, c. 148; Ontario Insurance Act, R.S.O. 1980, c. 218; Prince Edward Island Insurance Act, R.S.P.E.I. 1974, c. I-5; Saskatchewan Insurance Act, R.S.S. 1978, c. S-26; Yukon Insurance Ordinance R.O.Y.T. 1971 c. I-2, re-en. O.Y. 1977 c. 1; Northwest Territories Insurance Ordinance R.O.N.N.T. 1974 c. I-2, re-en. O.N.W.T. 1975 c. 5.

meaning:

> "...[A]ny man or woman who, although not legally married to a person lives and cohabits with that person as the spouse of that person and is known as such in the community in which they have lived."

We are again concious that it is not for us to recommend reform of the Insurance Act per se. We are only concerned to examine whether rights given by the Act should be extended to cohabitants, the extent of such possible extension and the type of cohabitational relationship that should benefit from any possible extension. Thus, we shall not comment on the premise that benefits under Section 313 are to compensate members of a "household". The "household" concept has been the subject of litigation and indeed the subject of judicial criticism.[252] Suffice it to say that Alberta is not alone in its use of the insured deceased's household as the unit to receive automobile insurance compensation.[253]

Further, we do not intend to debate the issue of whether cohabitants should be eligible to receive compensation under Section 313. The present provisions, Section 313(10) and (11), which permit cohabitants to claim benefits in certain defined circumstances were enacted in 1977.[254] We do not feel that it would be a practical exercise to debate whether such rights should now be taken away. We are also conscious of the fact that

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[252] See, for example, the remarks of Haddad J. in The Public Trustee for the Province of Alberta v. Lermen [1982] I.L.R. 5571 at 5575 (Alta.C.A.)

[253] e.g. [N.S.] Insurance Act R.S.N.S. 1967 c. 148 Sched. A. [Ont.] Insurance Act R.S.O. 1980 c. 218 Sched. C. [P.E.I.] Insurance Act R.S.P.E.I. 1974 c. I-5 Sched. B.

[254] S.A. 1977 c. 76

all the other provinces and territories which have provisions corresponding to Section 313 include cohabitants within the class entitled to collect benefits under that provision.[255] Accordingly, we shall restrict our field of debate to two somewhat limited questions:

(a) Given that in some circumstances "common law" spouses should be entitled to claim benefits under Section 313, in what circumstances should this be allowed?

(b) How should the term "common law spouse" be defined for the purposes of Section 313?

(a) Given that in some circumstances "common law" spouses should be entitled to claim benefits under Section 313, in what circumstances should this be allowed?

Under existing Alberta legislation a "common law spouse" can only claim benefits under Section 313 if the deceased leaves no surviving spouse. Even if the deceased is separated from his legal spouse so that he or she is no longer a member of the deceased's household and thus unable to claim benefits under

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255 [Nova Scotia] Insurance Act, R.S.N.S. 1967 c. 148;
[Ontario] Insurance Act, R.S.O. 1980 c. 218;
[Prince Edward Island] Insurance Act, R.S.P.E.I. 1974 c. I-5;
[New Brunswick] Insurance Act, R.S.N.B. 1973 c. I-12;
[Saskatchewan] Automobile Accident Insurance Act, R.S.S. 1978 c. A-35;
[Manitoba] Public Insurance Corporation Act, S.M. 1970 c. A-180;
[British Columbia] Insurance (Motor Vehicle) Act, R.S.B.C. 1979 c. 200;
[Quebec] Automobile Insurance Act, R.S.Q. 1977 c. A-25 (as amended by 1982 (Que.) c. 59)
[Yukon] Insurance Ordinance, R.O.Y.T. 1971 c. I-2 (re-en O.Y. 1977 c. 1)
[N.W.T.] Insurance Ordinance, R.O.N.W.T. 1974 c. I-2 (re-en O.N.W.T. 1975 c. 5).

Section 313, the common law spouse cannot benefit.[256] This would seem to us to be wrong in principle. If a legal spouse is not entitled to benefits under Section 313 because he or she was not a member of the deceased's household at the time of the accident, then surely it is only sensible that a common law spouse who was then a member of that household should be able to claim those benefits and we so recommend.

The Other Canadian Provinces

Nova Scotia, Ontario and Prince Edward Island are all provinces which, like Alberta, use "the household" as the basic unit for compensation. In each of these three provinces the term 'spouse' is defined so as to include a party to a cohabitational relationship. Thus, one who qualifies as a party to a cohabitational relationship and who was living in the deceased's household at the time of the accident will qualify for benefits under the Act whereas a legal but separated spouse will not.[257]

British Columbia, Quebec, Manitoba and Saskatchewan do not use the household as the basic unit of compensation. Thus, a dependant, separated spouse may qualify for benefits. The first three of these provinces make provision for division of benefits between legal and common law spouse.[258] The fourth,

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256 Even if the deceased was legally responsible for the payment of maintenance to his legal spouse, that spouse could not claim benefits under S. 313. See the definition of "dependent" relative" in Alta. Reg. 352/72.

257 [N.S.] Insurance Act, R.S.N.S. 1967 c. 148 Sched. A.
[Ont.] Insurance Act, R.S.O. 1980 c. 218 Sched. C.
[P.E.I.] Insurance Act, R.S.P.E.I. 1974 c. I-5 Sched. B.

258 [B.C.] Insurance (Motor Vehicle) Act, Revised Regs. (1984) 447/83 s. 94.
[Quebec] Automobile Insurance Act, R.S.Q. 1977 c. A-25

Saskatchewan, provides that where there is no eligible legal spouse the common law spouse can benefit.[259]

Although the division of benefits between legal and common law spouse might, in fact, be the most equitable solution, we do not feel it to be a solution that we can consider whilst the underlying premise of the Alberta legislation remains that of compensating members of the deceased's household. We would therefore recommend adoption of a scheme such as that applied in the other provinces discussed. That is, that if a legal spouse is a member of the deceased's household at the date of the accident he or she should succeed to the benefits. If there is no eligible legal spouse (i.e. if the legal spouse was not a member of the deceased's household at the relevant time) then a common law spouse who was then a member of the household should benefit.

(b) How should the term "common law spouse" be defined for the purpose of Section 313?

In order to claim a benefit under Section 313 a cohabitant must presently satisfy the court that he or she:

(a) lived and cohabited with the deceased as the spouse of that person and was known as such in the community in which they lived;

and

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[258](cont'd) (am. 1982 (Que.) c. 59) s. 1,36,37. [Man.] Public Insurance Corporation Act, Regs. 333/74 (as am.).

[259] [Sask.] Automobile Accident Insurance Act R.S.S. 1978 c. A-35 ss. 2(m) and 27(1).

(b) cohabited with the deceased for the 5 years immediately preceding his death;

or

(c) cohabited with the deceased for the 2 year period immediately preceding his death and had one or more children by him.

Other Canadian Jurisdictions

In the other Canadian jurisdictions the criteria that a cohabitant must satisfy in order to qualify for benefits under legislation corresponding to Section 313 are various. In Nova Scotia, for instance, a man or woman who, not being married to one another, have lived together for at least 1 year immediately preceding the occurance giving rise to the claim, qualifies.[260] In Ontario and Prince Edward Island the definition of spouse includes either of a man and woman not being married to each other who have cohabited

(i) continuously for a period of not less than 5 years, or

(ii) in a relationship of some permanence where there is a child of whom they are the natural parents,

and have so cohabited within the year preceding the occurence giving rise to the claim.[261]

In Quebec "spouse" includes a man and a woman who are living together as husband and wife and, at the time of the accident,

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[260] [N.S.] Insurance Act, R.S.N.S. 1967 c. 148 Sched. A.

[261] [Ont.] Insurance Act R.S.O. 1980 c. 218 Sched. C.
[P.E.I.] Insurance Act, R.S.P.E.I. 1974 c. I-5 Sched. B.

(i) have been living together for 3 years or for 1 year if a child has issued from that union, and

(ii) have been publicly represented as spouses.[262]

In British Columbia spouse is defined to include "...a person not married to the insured, who lived with the insured as a husband or wife of the insured for a period of not less than 2 years immediately preceding the date of the accident for which a claim is made and manifests an intention to continue to live so indefinitely".[263]

In Saskatchewan the term "husband and wife" includes a person who, at the time of death of the insured and during the 2 years immediately preceding the accident out of which the claim arose, lived and manifested an intention of continuing to live together permanently with the insured as husband and wife even though they were not married.[264]

In Manitoba the term 'husband' and the term 'wife' includes persons who, being unmarried at the time of the accident, have lived and cohabited in the same dwelling with a member of the opposite sex to the exclusion of all others, continuously for a period of at least 2 years.[265]

Our Recommendation

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262 [Que.] Automobile Insurance Act, R.S.Q. 1977 c. A-25 s. 1.

263 [B.C.] Insurance (Motor Vehicles) Act, Revised Regs. (1984) 447/83 s. 78.

264 [Sask.] Automobile Accident Insurance Act, R.S.S. 1978 c. A-35 s. 2(m)

265 [Man.] Public Insurance Corporations Act, Regs. 333/74 (as am.) s. 4(1)

Firstly, we are of the view that it should not be part of the definition of a common law relationship that the parties were known as spouses within the community in which they lived. We have said before[266] that cohabitants who have not married but hold themselves out as married are in fact practicing a falsehood. We do not believe that such couples should be rewarded for their hypocrisy at the expense of their more honest brethren.

Secondly, we feel that the 2 and 5 year cohabitation periods specified in the present legislation are too long. We feel that if the claimant was living with the insured on a bona fide domestic basis at the date of the accident he or she should be able to claim benefits under Section 313. This recommendation would be in line with our earlier recommendation relating to Workers' Compensation legislation and Fatal Accidents legislation, statutes which, like Section 313, provide for the payment of compensation to members of a deceased's family. In the context of Section 313 our recommendation would not lead to a new class of cohabitants receiving benefits at the expense of legal wives. In ordinary circumstances a person can be a member of only one household.[267] If the deceased was cohabiting on a bona fide domestic basis with the claimant at the date of the accident it would follow that the claimant and not the legal spouse was a member of the deceased's household at that time and vice versa.

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[266] Supra p. 149.

[267] Wawanesa Insurance Co. v. Bell [1957] S.C.R. 581; Public Trustee for Alberta v. Lermen [1982] I.L.R. 5571 (Alta.C.A.)

Accordingly, it is our recommendation that Section 313 be amended so as to delete Subsections (10) and (11) thereof and substituting therefore the following:

> (10) In this section "survivor" means spouse or dependent relative.
>
> (11) If a deceased insured does not have a legal spouse at the time of his death who has an enforceable claim for benefits under this section the benefits to which a spouse would have been entitled under this section shall be paid to a person of the opposite sex to the insured who, at the time of the accident causing death, was living with him on a bona fide domestic basis.

F. Exemptions

In this section we shall examine three areas:

(i) Exemption from seizure of goods used or needed by the debtors family. Here we shall be concerned with possible amendments to The Exemptions Act.[268]

(ii) Exemption from attachment by garnishee where the creditor seeks to garnishee wages or salary of the debtor. Here we are concerned with possible amendment of Rule 483 of the Alberta Rules of Court.

(iii) Exemption from execution or seizure of the proceeds of certain insurance policies. Here we are concerned with possible amendments to the Insurance Act.[269]

i. The Exemptions Act

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[268] R.S.A. 1980 c. E-15.

[269] R.S.A. 1980 c. I-5.

Pursuant to the Exemptions Act certain real and personal property of an execution debtor is exempt from seizure under a writ of execution. The list is extensive and includes items such as food and clothing required by the debtor and "his family". We see no reason to recommend any change in this part of the statute. The word "family" does not appear to restrict the exemption to a legal wife and children and would appear to encompass a family unit comprising cohabitants. The list of exempted property under this statute is under review by the Institute.[270]

If the execution debtor dies his property that was exempt from seizure under the Act remains so, so long as the property is in the use and enjoyment of his surviving spouse and/or minor children and it is necessary for their support and maintenance.[271] It might be asked if this exemption should be extended to a surviving cohabitant, so that on the death of the execution debtor exempt goods would remain exempt so long as

(a) they are in the use of a surviving spouse, cohabitant and/or minor children of the deceased, and

(b) the goods are necessary for the support and maintenance of any of them.

We are of the opinion that the statute should not be extended in this way. Before outlining our reasons for this we shall briefly refer to the corresponding legislation of the other

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[270] See Institute of Law Research and Reform of Alberta Working Paper on Exemptions from Execution & Wage Garnishment (Jan. 1978).

[271] R.S.A. 1980 c. E-15 s. 15. See also s. 6.

provinces.

The corresponding legislation of other provinces is not consistent. The maritime provinces do not extend exemptions beyond the lifetime of the debtor.[272] The legislation of Saskatchewan is similar to that of Alberta in that an exemption extends beyond the life of the debtor to his surviving spouse and/or children.[273] In Ontario, the Yukon and the Northwest Territories the exemption extends beyond the debtor's lifetime to his surviving spouse and, if there is no surviving spouse, to his "family".[274] In Manitoba on the death of the debtor the exemption passes to his dependants.[275] In British Columbia on the death of the debtor the exemption passes to his personal representative.[276]

The reasons for our belief that the Exemptions Act should not be amended to provide that an exemption extend beyond the life time of the debtor for the benefit of a surviving cohabitant are as follows.

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272 See Judicature Act S.N.S. 1972 c. 2; Memorial & Executions Act R.S.N.B. 1973 c. M-9 (am. S.N.B. 1977 c. M-11.1 and S.N.B. 1980 c. 31); Judicature Act R.S.Nfld. 1970 c. 187; Judgment & Executions Act R.S.P.E.I. 1974 c. J-2 (am. S.P.E.I. 1983 c. 23).

273 Exemptions Act R.S.S. 1978 c. E-14 (as am.) s. 6.

274 Execution Act R.S.O. 1980 c. 146 s. 5; Exemptions Ordinance R.O.Y.T. 1971 c. E-7 (am. O.Y.T. 1984 c. 22 and O.Y.T. (No.2) c. 45) s. 7; Exemptions Ordinance R.O.N.W.T. 1974 c. 32 s. 7. (Both Ont. & N.W.T. use the term "widow" rather than "surviving spouse".)

275 Executions Act C.S.M. c. E-160 s. 31.

276 Court Order Enforcement Act R.S.B.C. 1979 c. 75 ss. 64,65. See also Homestead Act R.S.B.C. 1979 c. 173

Generally a creditor who has gone to judgment has a fundamental moral and legal right to be repaid his debt. That right must, in limited circumstances, give way to the public interest that debtors not be deprived of the means of making a livelihood nor that their families be deprived of the basic necessaries of life.[277] Exemption legislation thus marks an encroachment into a creditor's rights and should not be extended lightly. In order to warrant such an extension there should be some sound justification. Is there any? We think that there is not. It has been said earlier in this paper that marriage has encouraged dependency on the part of women and we do not believe that any laws relating to cohabitation should do likewise. There is presently no legal obligation of support as between cohabitants and we have recommended that this situation continue. We see no reason why the creditor of one cohabitant should forego his basic right to recoup his debt because the other cohabitant requires support and maintenance. If the debtor himself has no obligation of support to his surviving cohabitant why then should his creditor?

Certainly there may be cases where a dependency has, in fact, grown up between cohabitants and denial of the exemption from the survivor may cause hardship. It must be remembered, however, that if the cohabitants had minor children then the children will be entitled to the exemption if the property is necessary for their support and maintenance. In other cases it might well be asked why the deceased's creditor should bear the cost of the cohabitant's dependency rather than society as a

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[277] See Institute of Law Research and Reform of Alberta, Working Paper on Exemption from Execution & Wage Garnishment, Jan. 1978 pp. 6-8.

whole.

It is accordingly our recommendation that there be no change in the provisions of the Exemptions Act.

ii. Rule 483 of the Rules of Court

Rule 483(1) provides as follows:

> **483** (1) Where the debt due to an employee is for wages or salary the following portion thereof is exempt from attachment by garnishee for each month in respect of which the wages or salary is payable:
>
> (a) if the debtor is a married person, the sum of $700, or
>
> (b) if the debtor is a married person with dependent children
>
> (i) in his or her custody, or
> (ii) under his or her control, or
> (iii) in respect of whom he or she is paying maintenance,
>
> $700 plus $140 for each child, or
>
> (c) if the debtor is a widow, widower, unmarried mother or divorced person with dependent children
>
> (i) in his or custody, or
> (ii) under his or her control, or
> (iii) in respect of whom he or she is paying maintenance,
>
> $525 plus $140 for each child, or
>
> (d) if the debtor is an unmarried person $525.

Two questions arise in connection with this rule:

(a) Should Rule 483(1) paragraphs (a) and (b) be amended so as to accord cohabitants the same monetary exemption as married persons?

(b) Should Rule 483(1) be amended in any other respect?

(a) Should Rule 483(1) paragraphs (a) and (b) be amended so as to accord cohabitants the same monetary exemption as married persons?

It is submitted that cohabitants should not be accorded the same monetary exemption as married persons. Our reasons for saying this are fundamentally the same as those advanced in recommending no change to the Exemptions Act. These reasons are as follows:

(a) a creditor has a right to be repaid his debt. This right, in limited circumstances, must give way to the public interest that debtors not be deprived of the means of making a livelihood nor that their families be deprived of the basic necessaries of life. This extraordinary encroachment into the creditor's right should not be extended lightly.

(b) the law should not encourage a dependency between cohabitants; nor should it assume such a dependency.

(c) there is no legal obligation on one cohabitant to support the other. To extend the married exemption to cohabitants would, in effect, compel a creditor to support his debtor's cohabitant.

Having said this we should draw to the reader's attention the fact that in the majority of provinces wherein wage garnishment is permissable[278] the monetary exemption from attachment depends upon whether the debtor has 'dependants'

[278] In N.B. wage garnishment was abolished by S.N.B. 1971 c. 36.

regardless of the marital status of those 'dependants'. In Manitoba, British Columbia and the Yukon Territory 70% of an employee's wages are exempt from attachment by garnishment with a certain minimum monthly amount free from attachment, less in the case of a person without dependants, more in the case of one with dependants.[279] In the Northwest Territories there is a basic monthly exemption of $300 which increases by $100 with each dependant.[280] In Prince Edward Island the monetary amount of exemption from wage garnishment is at the prothonotary's discretion who will exercise it according (inter alia) to the number of the debtor's dependants.[281] In Nova Scotia the amount of exemption depends on whether the debtor is "supporting a family" or not.[282] Only in Saskatchewan and Newfoundland is "dependant" defined so as to include a spouse but exclude a cohabitant.[283]

(b) Should Rule 483(1) be amended in any other respect?

We recommend that Rule 483(1) be amended in one respect. We recommend that the word "parent" in paragraph (c) be substituted for the word "mother". We feel that the present terminology

279 See Garnishment Act C.S.M. c. G-20; Court Order Enforcement Act R.S.B.C. 1979 c. 75 (as am.); Garnishee Ordinance O.Y. 1980 c. 12.

280 See Exemptions Ordinance R.O.N.W.T. 1974 c. 32 (am. by O.N.W.T. 1980 c. 6) s. 8.1.

281 See Garnishee Act R.S.P.E.I. 1974 c. G-2 and regulations passed thereunder.

282 See Rule 53.05 N.S. Rules of Practice.

283 Attachment of Debts Act R.S.S. 1978 c. A-32 (as am.); Attachment of Wages Act R.S.Nfld. 1970 c. 16 (the Nfld. Statute provides a basic wage exemption for a married person and his spouse which increases according to the number of dependents).

discriminates against a man who has custody or control of his child or who is supporting that child. It is inexcusably sexist and should be amended accordingly.

iii. The Insurance Act

Section 265(1) of the Insurance Act[284] provides as follows:

> **265**(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and the contract are exempt from execution or seizure.

Section 265 deals with life insurance. A corresponding provision, Section 374, deals with accident and sickness insurance. These provisions have been examined in an earlier report of the Institute.[285] In the earlier report it was stated:

> "The policy in favour of this very generous exemption has been traced to a concern for the protection of the family of a debtor. This policy originated at a time when insurance policies were written in a fairly simple form and were solely concerned with protecting the dependants of the insured in the event of his death. However, life insurance may now often represent a substantial investment for the insured, in addition to a protection for his dependants."

Accordingly, it was suggested that the insurance exemption should

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[284] R.S.A. 1980 c. I-5.

[285] Institute of Law Research and Reform of Alberta, Working Paper on "Exemptions from Execution & Wage Garnishment" (Jan. 1978) pp. 34-37.

either be abolished or limited to provide reasonable protection for those who are dependent on the insured.

Sections 265 and 374 of the Insurance Act have their conterparts in all the other common law jurisdictions in Canada. The Ontario Law Reform Commission examined the corresponding Ontario provisions in its report on "The Enforcement of Judgment Debts and Related Matters".[286] In contrast with the recommendations of the Alberta Institute, the Ontario Commission felt that the principle reflected in Ontario's counterpart to Section 265(2) was a sound one but should be broadened in its scope to include designations in favour of (inter alia) common law spouses. In New South Wales the Law Reform Commission recommended that a statutory provision there be extended from spouses and children to include de facto partners.[287]

For the reasons enumerated above in relation to the Exemptions Act and the garnishment provisions of the Alberta Rules of Court, we do not recommend that sections 265(2) and 374(2) of the Insurance Act be amended so as to include policies wherein there is a designation in favour of a cohabitant.

G. Pensions

Most pension plans subject to Alberta legislation fall under one of the following statutes or groups of statutes:

1. The Employment Pension Plans Act.[288]

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286 1981, Part II pp. 104,105.

287 N.S.W.L.R.C. Report No. 36 "Report on De Facto Relationships" (1983) pp.301,302.

288 S.A. 1986 c. E-10.05.

2. Those pension statutes falling under the Pension Fund Act.[289]

3. The Alberta Government Telephone Act.[290]

4. The Teachers Retirement Fund Act.[291]

Under these Acts the position of the cohabitant comes to the fore in two particular ways:

1. On retirement an employee may select (or may be deemed to have selected) a pension option which involves payments being made to a beneficiary after the employee's death. If no beneficiary is designated by the employee (or if designation is not permissible) should payment be made to a cohabitant? If so, how should the term "cohabitant" be defined for this purpose?

2. If an employee dies before retirement death benefits may be payable to his beneficiary. If no beneficiary is designated by the employee (or if designation by the employee is not permissible) should payments be made to a cohabitant? If so, how should the term "cohabitant" be defined for this purpose?

Before answering the above questions let us outline briefly the present situation under each of the above mentioned statutes or groups of statutes. We shall deal with the pension plans

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289 R.S.A. 1980 c. P-3.1.

290 R.S.A. 1980 c. A-23.

291 R.S.A. 1980 c. T-2.

chronologically, moving from the oldest toward the more modern.

i. Teachers Retirement Fund Act

This Act and the regulations passed thereunder establish a pension plan for teachers. The term "spouse" is not defined in the Act or regulations and so does not include a cohabitant.

Prior to retirement a teacher can choose amongst various types of pensions. If, according to the terms of the pension, benefits are to continue beyond his lifetime, the teacher may designate to whom those payments are to be made.[292] In the absence of such designation then payment will be made to one or more from persons listed in the regulations at the Board's discretion. The list includes the surviving spouse of the teacher, but not a cohabitant.

If the teacher dies before retirement, in certain circumstances a pension or premium refund is payable to his beneficiary. That beneficiary may be someone designated by him. In the absence of designation the Board shall pay the pension or refund to anyone of a number of persons listed in the regulations. That list includes a surviving spouse but not a cohabitant.[293]

ii. The Alberta Government Telephone Act

This Act provides for the establishment of a pension plan for employees of Alberta Government Telephones.

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[292] Teachers Retirement Fund Reg. 179/73 s. 22 as amended by Alberta Reg. 466/78.

[293] Teachers Retirement Fund Reg. 179/73 s. 47 as amended by Reg. 273/77.

Under the plan the term "spouse" is defined in the following way:

> ". . . . the person who at the date of death of a member
>
> i. was married to that member,
>
> ii. has been held out publicly by the member as his or her spouse for a period of not less than 3 years before the member's death and whom the member was prohibited from marrying by reason of a previous marriage of either party, or,
>
> iii. was not married and has been residing with an unmarried person and who has been held out publicly by the member as his or her spouse for at least 1 year before the date of death of the member;"

Prior to retirement an employee can choose amongst various types of pension. If, according to the terms of the particular pension, benefits are to continue beyond his lifetime, the employee may designate to whom those payments are to be made.

If the employee dies prior to retirement, in certain circumstances a pension is payable to his beneficiary. If he dies leaving a spouse then that spouse in the first case is entitled to the payments. (I.e. not a designated beneficiary.)

iii. Those statutes falling under the Pension Fund Act

The six statutes falling under the Pension Fund Act are funded partly through employee contributions and partly though general revenue. They comprise:

(a) The Local Authorities Pension Plan Act.[294]

[294] S.A. 1985 c. L-28.

(b) The Universities Academic Pension Plan Act.[295]

(c) The Public Service Pension Plan Act.[296]

(d) The Public Service Management Pension Plan Act.[297]

(e) The Special Forces Pension Plan Act.[298]

(f) The Members of the Legislative Assembly Pension Plan Act.[299]

The six statutes were substantially revised in 1985. The principle purposes of the revision were twofold:

(a) To clarify Acts that had become obscure through the process of time and of numerous amendments, and,

(b) to reflect the fact that henceforth the Acts would be administered through one Board, the Treasury Board, rather than as heretofore under separate Boards.

Of particular interest to this study is the protective approach that was taken in the new legislation. The Acts all contain provisions for "spousal protection". These provisions mean that on retirement an employee with a spouse cannot select a form of pension that would endure for his life alone. If he does not select a pension that will endure for the joint lives of himself and his spouse then his selection is invalid. Only where

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295 S.A. 1985 c. U-6.1.

296 S.A. 1984 c. P-35.1.

297 R.S.A. 1980 c. P-34 R & S 1984 c. P-34.1.

298 S.A. 1985 c. S-21.1.

299 S.A. 1985 c. M-12.5.

the spouse agrees to waive this protection or where there is a matrimonial property order in place can this protection be lost. Further, under the new legislation, if an employee should die before retirement then certain death benefits are payable to his surviving spouse. The employee cannot displace the rights of his spouse to these death benefits by designating another beneficiary in his or her place.

The term "spouse" is defined in all six statutes in the following way:

> ""spouse" means
>
> (i) a person who, at the relevant time, was married to a participant or former participant and
>
> (A) was not judicially or otherwise separated from him, or
>
> (B) if so separated, was wholly or substantially dependent on him,
>
> (ii) if there is no person to whom subclause (i) applies, a person of the opposite sex who
>
> (A) lived with the participant or former participant
>
> (I) for the 5-year period immediately preceding the relevant time, or
>
> (II) for the 2-year period immediately preceding the relevant time if there is a child born to that person and the participant or former participant, and
>
> (B) was, during that period, held out by the participant or former participant in the community in which they lived as his consort, or
>
> (iii) if there is no person to whom subclause (i) or (ii) applies, a person who was married to but separated from the participant or former participant and not dependent on him at the relevant time;"

Let us look firstly at the statutes in relation to post retirement survivor benefits (spousal protection).

All six pension Acts contain provisions relating to spousal protection. The form of protection offered in the Local Authorities Pension Plan Act, the Universities Academic Pension Plan Act and the Public Service Pension Plan Act is virtually identical. It is to the effect that a person who is to receive a pension and who has a spouse at the time he chooses or should choose the form of his pension, is deemed, for the purposes of the plan, to have chosen a form of joint life pension with that spouse as a designated nominee. The form of joint life pension specified is one that is payable during the joint life of the pensioner and his nominee and which, after the death of one, continues to be paid in the amount of two thirds of it to the survivor for his or her life.

The form of spousal protection offered in the three remaining statutes, the Members of the Legislative Assembly Pension Plan Act, the Special Forces Pension Plan Act and the Public Service Management Pension Plan Act is somewhat different. In these statutes the spousal protection is only afforded to a spouse to whom the participant was married or with whom he lived for at least 5 years before the commencement of the pension. If the participant has such a spouse at the time he chooses or should choose his form of pension then he is deemed to have chosen a normal pension. A normal pension endures for the life of the participant unless, at the time of his death, he leaves a surviving spouse to whom he was married or with whom he lived for 5 years preceding the death. In such events, the said spouse

receives a pension during her life. Thus, under the Members of the Legislative Assembly Pension Plan Act, the Special Forces Pension Plan Act and the Public Service Management Pension Plan Act in order to receive spousal protection the spouse must not only satisfy the definition of "spouse" set out in the statute but must also be married to the participant or have lived with him for 5 years preceding the relevant date.

Under all six statutes the spousal protection provisions apply unless there is filed with the Minister either a statutory declaration whereby the spouse acknowledges she is aware of her rights and is willing to waive them, or a matrimonial property order.

Let us now turn to pre-retirement survivor benefits (death benefits).

Each of the six statutes listed provide for death benefits. That is they provide that a beneficiary is entitled to unreturned employee contributions and, in certain cases, to other payments. The unreturned contributions are payable to a surviving spouse and, in the absence of such, to the person entitled to receive benefits on the employee's death. The other payments go to the surviving spouse or, in some cases, dependent minor children. An employee spouse cannot displace the rights of the surviving spouse to death benefits by designating another, different beneficiary.

iv. The Employment Pension Plans Act

The Employment Pension Plans Act replaces the Pension

Benefits Act[300] and came into force January the 1st 1987. This Act was passed in the spirit of uniformity. It is anticipated that most of the other provinces of Canada will enact the same or similar legislation.

The Employment Pensions Plans Act governs most private pension schemes that are subject to Alberta jurisdiction. It specifically excludes from its scope, however, pension schemes established under the eight statutes referred to above.[301]

The Employment Pension Plans Act defines "spouse" as follows:

> "1(1)(hh) spouse means in relation to another person,
>
> (i) a person who, at the relevant time was married to that other person and was not living separate and apart from him, or
>
> (ii) if there is no person to whom subclause (i) applies, a person of the opposite sex who lived with that other person for the 3 year period immediately preceding the relevant time and was during that period held out by that other person in the community in which they lived as his consort"

Under the new Act (s. 32) a member who has a spouse at the

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[300] R.S.A. 1980 c. P-3 repealed and replaced by Employment Pension Plans Act S.A. 1986 c. E-10.05.

[301] I.e.: The Alberta Government Telephone Act R.S.A. 1980 c. A-23; The Teachers Retirement Fund Act R.S.A. 1980 c. T-2.; The Public Service Management Pension Plan Act R.S.A. 1980 c. P-34 R & S 1984 c. P-34.1; The Public Service Pension Plan Act S.A. 1984 c. P-35.1; The Universities Academic Pension Plan Act S.A. 1985 c. U-6.1; The Special Forces Pension Plan Act S.A. 1985 c. S-21.1; The Members of the Legislative Assembly Pension Plan Act S.A. 1985 c. M-12.5; The Local Authorities Pension Plan Act S.A. 1985 c. L-28. These schemes are excluded by virtue of Alta. Reg. 364/86 s. 41.

time of retirement has no choice as to the type of pension he will receive. That pension is to be a joint pension payable during the joint lives of the former member and his spouse and which, after the death of either, continues to be payable to the survivor for life. Deviation from this scheme is permissible only if either (a) the spouse signs a statement declaring that she knows of her rights and is voluntarily waiving them, or (b) there is a matrimonial property order affecting the pension.

If a member dies prior to retirement death benefits are payble to his surviving spouse. Only in the event of there being no surviving spouse can a designated beneficiary receive the benefits (s. 31).

v. Our recommendations

Under the new legislation freedom of choice (both with respect to plan options and choice of beneficiary) has given way to spousal protection. We express no opinion on this policy decision. We do, however, feel that the various pension statutes should be uniform in their definition of "spouse". The Employment Pension Plans Act seeks to bring private plans into line with those of other Canadian jurisdictions. Uniformity facilitates portability which is so important in today's mobile society. We accordingly recommend that the definition of spouse adopted in the Employment Pension Plans Act be adopted for the purposes of pensions falling under the following statutes:

(1) The Alberta Government Telephone Act

(2) The Teachers Retirement Fund Act

(3) The Public Service Management Pension Plan Act

(4) The Public Service Pension Plan Act

(5) The Universities Academic Pension Plan Act

(6) The Special Forces Pension Plan Act

(7) The Members of the Legislative Assembly Pension Plan Act

(8) The Local Authorities Pension Plan Act

We recommend that this definition apply for purposes of benefits accruing to a surviving spouse after the death of a retired employee as well as where the employee dies before retirement. We further recommend that if a cohabitant falls within the above referred to definition of "spouse" he or she should be entitled to the spousal benefits. A common law spouse should not be required to establish the additional 5 year cohabitation requirement that is presently required under the Members of the Legislative Assembly Pension Plan Act, the Special Forces Pension Plan Act and the Public Service Management Pension Plan Act.

3. Those Areas of Law Which Involve Relations Between Cohabitants and the State

A. Spousal Competency, Compellability and Privileged Communications

Rules of competency determine if a witness is capable of testifying at trial. Rules of compellability determine whether he can be compelled to testify. Different statutory rules govern spousal competence and compellability in criminal prosecutions,

civil cases and in provincial prosecutions. The statutory provisions pertinent to criminal prosecutions are found in section 4 of the Canada Evidence Act.[302] The statutory provisions pertinent to civil cases and provincial prosecutions are found in sections 3-10 of the Alberta Evidence Act.[303] Section 4(2) and section 8 of the Alberta Statute provide as follows:

> Section 4(2)
>
> "The husbands and wives of the parties... are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of any of the parties"
>
> Section 8
>
> "A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage"

The Federal/Provincial Task Force on Uniform Rules of Evidence reported in 1982.[304] Its recommendations were, in large part, accepted by the Uniform Law Conference of Canada. These recommendations, as amended by the Uniform Law Conference, formed the basis of a Uniform Evidence Act which was introduced in the Senate in 1982.[305] As well, the recommendations, as amended by the Uniform Law Conference, formed the basis for the new Provincial Evidence Act proposed by the Institute of Law Research

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302 R.S.C. 1970 c. E-10.

303 R.S.A. 1980 c. A-21.

304 Report of the Federal/Provincial Task Force on Uniform Rules of Evidence prepared for the Uniform Law Conference of Canada (1982).

305 Bill S-33.

and Reform in 1982.[306]

The Task Force examined spousal competence and compellability in all three contexts (i.e. in relation to criminal prosecutions, civil cases and provincial prosecutions). The Task Force recommended that the same rules of spousal competence and compellability apply to criminal and provincial offences. It recommended that one spouse be competent to give evidence against the other on behalf of the Crown and in certain circumstances be compellable too. It further recommended that, except where both spouses are jointly tried, a spouse should be compellable at the instance of the accused spouse.[307] These recommendations were accepted by the Uniform Law Conference and by the Institute of Law Research and Reform of Alberta in their draft Uniform Evidence Acts.[308]

The Task Force explored the question of whether, for the purposes of competence and compellability, the status of spouse be accorded to cohabitants. By a majority, the Task Force concluded that the status of spouse not be accorded to cohabitants for these purposes. Their reasons were as follows:[309]

> "The extension of incompetency beyond legal marriage would create difficult problems of statutory definition and proof. While other

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306 Report No. 37A.

307 Federal/Provincial Task Force Report supra n. 304 at pp. 250-263.

308 See Appendix 4 to the Report of the Federal/Provincial Task Force supra n. 304 and s. 89-93 of Report No. 37A (Institute of Law Research and Reform of Alberta).

309 Report of the Federal/Provincial Task Force Supra n. 304 at p. 254.

> statutes may recognize less formal domestic relationships, an Evidence Act should be simple and practical. It should avoid posing complex factual questions for judges. If such a definition were enacted and the Crown called a witness, to whom the accused objected as being within the definition and therefore incompetent, the proceedings would bog down in potentially lengthy voir dire. Legal marriage is a convenient point at which to draw the line."

The Commissioners on Uniformity and the Institute of Law Research and Reform in Alberta adopted this recommendation and neither Uniform Act extends the definition of spouse to include cohabitants. We see no reason to differ from these conclusions.

Insofar as civil proceedings are concerned, the Task Force unanimously recommended that the present rules of spousal competency and compellability be retained.[310] This recommendation is carried forward in the Uniform Evidence Act accepted by the Conference on Uniformity and by the Institute of Law Research and Reform. Since then, spouses occupy no special status generally with regard to competence and compellability in civil proceedings, (save that which will be referred to below) no question arises as to extension of that status to cohabitants.

The remaining question relates to the spousal privilege conferred by Section 8 of the present Act.[311] A majority of the Task Force recommended that the privilege for marital communications be abolished in all cases.[312] This recommendation

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[310] Report of the Federal/Provincial Task Force supra n. 304 at p. 263.

[311] This provision is mirrored in s. 4(3) of the Canada Evidence Act R.S.C. 1970 c. E-10.

[312] Report of the Federal/Provincial Task Force supra n. 304 at p. 413.

was not adopted by the Uniform Law Conference nor by the Institute of Law Research and Reform of Alberta in their proposed Uniform Evidence Acts. Bill S-33 and the Uniform Act proposed by the Institute of Law Research and Reform contain provisions conferring a privilege on confidential spousal communications.[313]

The Uniform Law Conference, however, determined that the privilege not be extended to cohabitants for similar reasons articulated by the Task Force in relation to competence and compellability. *Viz* - "(1) extension to de facto marriages would create difficult problems of statutory definitions and proof and (2) society does not have the same interest in protecting the harmony of non legal marriages when this protection is weighed against the loss of admissible evidence and the danger that the parties will live together to suppress evidence".[314]

Conclusions

It is our recommendation that neither the present Evidence Act nor the Uniform Evidence Act proposed by the Institute in its Report No. 37A be amended to extend the definition of spouse for the purposes of the rules relating to competence, compellibility and privileged communications. The question of such extension was examined by the Federal Provincial Task Force on Uniform Rules of Evidence and its recommendation in this regard was carried forward in the Uniform Evidence Act proposed at both the Federal and Provincial level. We have no reason to disagree with the conclusion of the Task Force on this matter. Further, we

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313 Report No. 37A at p. 101; Bill S-33 ss. 166-174.

314 Research Memorandum to Delegates to Uniform Law Conference from M. Shone, Counsel, Institute of Law Research and Reform of Alberta (May 22, 1981).

feel that it would be inherently wrong to tamper with a uniform bill of such recent origin.

B. Criminal Injuries Compensation

i. Introduction

The Criminal Injuries Compensation Act of Alberta [315] provides for the payment of compensation in respect of injury or death occasioned as a direct result of certain specified crimes ("Schedule 1 crimes") or as a direct result of the victim attempting to prevent the commission of a criminal offence. Compensation is payable to, inter alia, "any one of the dependants of the victim".[316] The word "dependant" is defined as meaning"

> "... a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent on the income of the victim at the time of his death..."[317]

The interpretation of this statutory definition is not altogether clear. Does the phrase, "who was in whole or in part dependent on the income of the victim at the time of his death" qualify "spouse, child or other relative" or only "other relative", or even "child or other relative"? In other words, it is not clear whether a spouse need establish actual dependency as well as establishing that he or she falls within the definition of the term 'spouse'. Peter Burns in his book, "Criminal

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[315] R.S.A. 1980 c. C-33. Set out in Appendix 6 below.

[316] Supra s. 2(2)(c).

[317] Supra s. 1(1)(c).

Injuries Compensation"[318] appears to assume that a spouse is only a dependant within the meaning of the statutory definition if he or she establishes actual dependency. However, the punctuation of the provision does not fully support this opinion.

The word 'spouse' is defined as including:

> "... a common law spouse who cohabited with the victim for
>
> (a) at least the 5 years immediately preceding the victim's application for compensation, or
>
> (b) at least the 2 years immediately preceding the victim's application for compensation, if there is a child of the common law relationship".[319]

If the victim is killed as a direct result of the commission, by another person, of the crimes of criminal negligence in the operation of a motor vehicle, dangerous driving or impaired driving ("Schedule 2 crimes"), then the victim's spouse may be paid compensation. In the case of these particular crimes it is not necessary for the spouse's recovery that he or she was dependent on the deceased at the time of his death. The term "spouse" is given the extended meaning referred to above.[320]

It should be noted that the extended definition of "spouse" refers to those who cohabited with the victim for a defined period immediately preceding the victim's application for compensation. If the victim is killed as a result of the crime he is unlikely to have commenced an application of compensation

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[318] (Butterworths)(1980) at pp. 239,240.

[319] Supra s. 1(2).

[320] Supra s. 9(4).

himself. Does this mean that in such a situation a surviving cohabitant does not fall within the definition of the term "spouse" and is therefore not entitled to compensation under the Act? If this is indeed the case then the extended definition is a hollow mockery and does not extend to cohabitants the principle benefits conferred on spouses by the Act.

The basis of compensation in respect of death under the Act is very similar to that under the Fatal Accidents Act. Basically, the Act compensates dependants and spouses in respect of pecuniary loss suffered by the plaintiff as a result of the victim's death.[321] Any amount received under Workers' Compensation legislation is deducted from the plaintiff's award[322] and if monies are recovered under the Fatal Accidents Act, then the plaintiff must reimburse the Crown for compensation paid under the Criminal Injuries Compensation Act. [323]

ii. Definition of the term "spouse"

(a) The other provinces

A cohabitant is included amongst those entitled to apply for compensation under Criminal Injuries Compensation legislation of several other provinces. In Manitoba a spouse includes a cohabitant who lived with the victim as man and wife, is known as such in the community and (a) the relationship is of some permanence and (b) a legal impediment exists to their

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[321] Supra s. 9.

[322] Supra s. 11.

[323] Supra s. 15(1).

marriage.[324] In British Columbia the term "spouses" includes cohabitants who lived together as husband and wife for a period of not less than 2 years.[325] In Ontario the term "spouses" includes cohabitants who, immediately prior to the death, cohabited continuously for 5 years or in a relationship of some permanence where there is a child born of the relationship.[326] In Nova Scotia "spouse" includes one who cohabits as man and wife, is known in the community as such and the relationship is of some permanence.[327] In the Yukon and Northwest Territories a cohabitant may be entitled to compensation if he or she cohabited with the victim for 1 year or more preceding the occurrence or was cohabiting with him at the time of the occurrence and had one or more child by the victim.[328]

(b) Should the definition of "spouse" in Section 1(2) of the Alberta statute be amended?

We see the Criminal Injuries Compensation Act as fulfilling a role similar to the Workers' Compensation Act[329] and the Fatal

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[324] Criminal Injuries Compensation Act, S.M. 1970 c. 56 (as am.) s. 1(2).

[325] Criminal Injuries Compensation Act R.S.B.C. 1979 c. 83 s. 1(2). See also Family Relations Act R.S.B.C. 1979 c. 121 (as am.).

[326] Compensation for Victims of Crime Act R.S.O. 1980 c. 82 s. 1(2).

[327] Compensation for Victims of Crime Act S.N.S. 1975 c. 8 am. S.N.S. 1980 c. 57.

[328] Compensation for Victims of Crime Ordinanace O.Y. 1976 (1st) c. 2 s. 2(1); Criminal Injuries Compensation Ordinance R.O.N.W.T. 1974 c. C-23 am. O.N.W.T. 1976 (2d) c. 1 (the N.W.T. Ordinance only provides for compensation to female cohabitants).

[329] R.S.A. 1980 c. W-16.

Accidents Act.[330] All provide compensation to family members in respect of loss suffered as a result of death.[331] In the context of Workers' Compensation and Fatal Accidents we have recommended that the word "spouse" or "common law spouse" be defined so as to include a person of the opposite sex to the deceased who, at the time of the deceased's death, was living with the deceased on a bona fide domestic basis. In the context of the Fatal Accidents Act we said that we felt it unnecessary to define a cohabitant in relation to either a specified time of cohabitation or in reference to the birth or adoption of a child. We felt that since the person seeking damages representing loss of pecuniary benefits must establish that loss, the ephemeral (or otherwise) nature of the relationship would be taken into account at that stage. This argument is pertinent in the context of Criminal Injuries Compensation too. Moreover, under the Criminal Injuries Compensation Act a wide discretion is given to the Crimes Compensation Board in determining whether to award compensation and the amount thereof. The Board, in making its decision, is to consider and take into account all the circumstances it considers relevant to the making of an order.[332] Thus, the Board can well determine if the claimant's relationship with the deceased was too ephemeral to warrant his or her compensation. Additionally, given the wide discretion reposed in the Board it can weigh the merits of claims made by a legal as well as by a common law spouse. (There being no practical reason for saying that both

330 R.S.A. 1980 c. F-5.

331 The Workers' Compensation Act and the Criminal Injuries Compensation Act also provide compensation to living victims. However, our concern in this context is with those "relatives" who can recover when the victim dies.

332 Criminal Injuries Compensation Act s. 8(1).

might not be compensated if both have suffered economic loss as a result of the death.)

Finally, we believe that the term "spouse" should not be defined solely in reference to the victim's application for compensation but should be defined also in terms of the victim's death. This would make the definition consistent with the definition of "dependant" (which uses the victim's death as a yardstick). It would also make it clear that a cohabitant can claim compensation in respect of financial loss occasioned as a result of the victim's death.

For the foregoing reasons we recommend that Section 1(2) of the Criminal Injuries Compensation Act be amended to read:

> "For the purposes of this Act "spouse" includes a person of the opposite sex to the victim who, at the time of the victim's application for compensation or, in the event of the victim's death, his death, was living with the victim on a bona fide domestic basis."

iii. Ancilliary matters

Section 9 subsections 1-3 of the Act sets out the basis of compensation under the Act. Basically it provides for compensation in respect of pecuniary losses suffered. In 1982 the Act was amended and the words "under Section 2" were inserted into the first part of the Section so that it now reads:

> "Compensation may be awarded by the Board under Section 2 in respect of any one or more of the following matters:... (italics added)"

The effect of this amendment is to remove the statutory

guidelines for compensating a person whose spouse has been killed as a result of dangerous or impaired driving (Schedule 2 crimes). The right of the spouse to recover in such circumstances is given by Section 9(4). We would recommend that Section 9(4) be amended so that it is clear that compensation, in this situation too, is in respect of pecuniary loss resulting from the victim's death.

We would further recommend that the definition of the term "dependant" be clarified and that a spouse need not be required to establish an actual dependency in order to recover compensation. If the basis of compensation under the Act is pecuniary loss suffered then why should a spouse who has sustained such loss be refused recovery because he or she was not "in whole or in part dependent on the income of the victim at the time of death"? Unlike the Fatal Accidents Act, the Criminal Injuries Compensation Act does not specify the relatives who can make a claim under the Statute other than spouse and child. Perhaps, then, dependency is an appropriate way of denoting more remote relatives who can claim under the Act.[333] It appears to us, however, to be unnecessarily onerous to require a spouse to establish the relationship, a dependency and, as well, compensatable pecuniary loss. We would further point out that there is some incongruity in requiring a widow or widower to establish actual dependency when the victim was killed as a result of a Schedule 1 crime (which includes murder, kidnapping and arson) but not in respect of a Schedule 2 crime (which comprises driving offences).

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[333] It may also be an appropriate way of distinguishing between children being supported by their parent and those who are independent.

iv. Conclusions

We recommend that the following amendments be made to the Criminal Injuries Compensation Act. Section 1(1)(c) should be repealed and replaced by the following:

"Section 1(1)(c) "dependant" means,

(i) a spouse of the victim,

(ii) a child of the victim born after his death,

(iii) a child of the victim who was, in whole or in part, dependent on the income of the victim at the time of his death,

(iv) any other relative of the victim who was, in whole or in part, dependent on the income of the victim at the time of his death"

Section 1(2) should be repealed and replaced by the following:

"Section 1(2) For the purposes of this Act "spouse" includes a person of the opposite sex to the victim who, at the time of the victim's application for compensation or, in the event of the victim's death, his death, was living with the victim on a bona fide domestic basis".

Section 9(4) should be amended by adding to the end thereof the following words:

"Compensation may be awarded by the Board under this Subsection in accordance with the principles set out in subsections(1) and (3) of this section except where clearly inapplicable."

C. Fatality Inquiries

The Fatality Inquiries Act[334] came into force in 1976. It resulted, in large part, from the Kirby Board of Review which recommended the abolition of the coroner system in the province and its replacement by a medical examiner system. The gist of the Act is basically as follows: If a person dies in any one of a number of specified circumstances a medical examiner must be notified and he must carry out an investigation into the death. If a medical examiner believes an autopsy should be carried out he may authorize one. Each medical examiner is to provide the Chief Medical Examiner with a record of each investigation. The Chief Medical Examiner is to notify the Fatality Review Board if circumstances exist which may make a review of the investigation desirable. If the Fatality Review Board believes a review to be desirable then it is to so recommend to the Attorney General. The Attorney General may then order that a judge conduct a public inquiry.

Provision is made in the Act for notices to be given to, or for the limited participation of, members of the deceased's family. These provisions are as follows:

> (a) The Chief Medical Examiner may order a body to be disinterred for the purposes of an investigation. Copies of an order for disinterrment shall be sent, inter alia, to a spouse or a common law spouse or in the absence of either, any other adult next of kin resident in Alberta.[335]

334 R.S.A. 1980 c. F-6.

335 Supra s. 29.

(b) On completion of an investigation or public inquiry and on the receipt of a request from any adult next of kin or the personal representative of the deceased, the Chief Medical Examiner shall complete and send a report to the person making the request.[336]

(c) The next of kin of a deceased may request that the Fatality Review Board review the investigation.[337]

(d) Normally a public inquiry shall be open to the public. Any of the deceased's next of kin may, however, apply for all or part of the inquiry to be held in camera.[338]

(e) Any one of the next of kin of the deceased may appear at a public inquiry, either personally or through legal counsel, and may cross examine witnesses and present arguments and submissions.[339]

A further provision affecting the deceased's family is section 27. This provision permits the removal of pituitary glands from the bodies of deceased people to be used for therapeutic purposes, medical education or scientific research. Removal may take place notwithstanding the absence of the consents that would normally be required pursuant to the Human Tissues Gift Act.[340] However, removal is not permitted if the

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336 Supra s. 31.

337 Supra s. 33(1).

338 Supra s. 40.3.

339 Supra s. 43.

340 R.S.A. 1980 c. H-12.

medical examiner or person carrying out the autopsy had reason to believe that the deceased prior to his death objected, or his next of kin or personal representative objects.

How, then, does the Act define "common law spouse" and "next of kin"? Common law spouse is defined as meaning:

> "...A man or woman who, although not legally married to the deceased, lived and cohabited with the deceased immediately prior to the deceased's death as the deceased's spouse and was known as such in the community in which they lived.[341]

Next of kin is defined as follows:

> "[T]he mother, father, children, brothers, sisters, spouse and common law spouse of a deceased person, or any of them".

It is interesting to note that the term "common law spouse" in the Fatality Inquiries Act is not defined in terms of a number of years cohabitation or by the birth of a child. In other Alberta statutes the term "common law spouse" is defined in terms of years cohabitation (generally 5 years or 2 years if a child is born of the union). The difference in definition is not altogether surprising given the relatively limited rights conferred on a common law spouse under the Fatality Inquiries Act.

Earlier in this paper we criticized those definitions of "common law spouse" which required the parties to be known or held out in the community as 'spouses'. We said that such a definition encouraged people to practice a deceit.[342] We

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[341] The Fatality Inquiries Act s. 1(e).

[342] See supra pp. 149, 179.

reiterate that view here. Further, in order to make the statutory definition of common law spouse consistent with our earlier proposals, we would re-define it to mean "a person of the opposite sex to the deceased who, at the time of the deceased's death, was living with the deceased on a bona fide domestic basis". We recommend that section 1(e) of the Fatality Inquiries Act be amended accordingly.

D. Human Tissues

Part II of the Human Tissues Gift Act[343] provides for post mortem gifts for transplants and other uses. Consent for a person's body or part thereof to be used for therapeutic purposes, medical education or scientific research may be given by the person himself. If no consent has been given by the person in question then consent may be given by certain specified relatives. The specified relatives are set out in section 5(1) of the Act. This section provides:

> 5(1) When a person of any age who has not given a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and his death is imminent,
>
> (a) his spouse of any age, or
>
> (b) if none, or if his spouse is not readily available, any one of his adult children, or
>
> (c) if none, or if none is readily available, either of his parents, or
>
> (d) if none, or if neither is readily available, any one of his adult brothers or sisters, or
>
> (e) if none, or if none is readily available, any other of his adult next of kin, or

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[343] R.S.A. 1980 c. H-12.

> (f) if none, or if none is readily available, the person lawfully in possession of the body other than, where he died in hospital, the administrative head of the hospital,
>
> may consent...to the body or the part or parts of it specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

Section 5(2) goes on to provide:

> (2) No person shall give a consent under this section if he has reason to believe that the person who died or whose death is imminent would have objected to it.

All the common law provinces have similar provisions.[344]

The Human Tissues Gift Acts are presently under consideration by the Uniform Law Conference of Canada. We feel that it would be premature for us to make recommendations on this subject at this time. Accordingly, we make no proposals for change in the Human Tissues Gift Act of Alberta.

E. Welfare

In the greater part of this paper we have been concerned to see whether rights should be extended to cohabitants. In this part we are concerned with cohabitation in a somewhat different context. Pursuant to the Social Development Act[345] the Minister

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[344] [Ontario] Human Tissue Gift Act, R.S.O. 1980 c. 210; [Manitoba] Human Tissue Gift Act, R.S.M. 1970 c. H-180 (as amended); [Nova Scotia] Human Tissue Gift Act, S.N.S. 1973 c. 9; [British Columbia] Human Tissue Gift Act, R.S.B.C. 1979 c. 187; [Prince Edward Island] Human Tissue Gift Act, R.S.P.E.I. 1974 c. H-14 (as amended); [Newfoundland] Human Tissue Gift Act, S.Nfld. 1971 c. 66 (as amended); [New Brunswick] Human Tissue Gift Act, R.S.N.B. 1973 c. H-12 (as amended); [Saskatchewan] Human Tissue Gift Act, R.S.S. 1978 c. H-15 (as amended).

[345] R.S.A. 1980 c. S-16.

of Social Services and Community Health is responsible for the provision of social assistance to those in need. The amount of an allowance payable under the Act depends on need and that need may depend, in turn, upon whether the person claiming social assistance is being supported by a cohabitant.

When can it be justly said that a claimant's social allowance should be reduced because she is living with another person? Is the fact that the claimant and his or her cohabitant are of opposite sexes sufficient or even significant? Must financial support by the one of the other be proved or can it be presumed from the relationship itself?

i. The position in Alberta

The pertinent provisions of the Social Development Act are section 12(1) and (2) which read as follows:

> "12(1) Subject to the regulations, when the Director considers that a person is in need of assistance he is responsible while the person is in Alberta for the provision of a social allowance to or in respect of that person in an amount that will be adequate to enable the person to obtain the basic necessities for himself and his dependants.
>
> (2) In determining the amount of social allowance that a person requires the Director shall have regard to the full resources of the person and, subject to any exemptions prescribed by the regulations, of any other person living in the same residence.

Regulations passed under this section provide:

> 2.1 For the purposes of section 12(2) of the Act, the resources of any person living in the same residence as an applicant for social allowance or a recipient of social allowance are exempt if that person

(a) is not cohabiting in a common law relationship with the applicant or recipient, and

(b) is contributing a reasonable monthly payment for room and board or room rental to the applicant or recipient.[346]

The policy manual of the Department of Social Services and Community Health contains these paragraphs.[347]

Common Law Unions

For the purpose of administering social allowance, common law unions are considered in the same way as marriage unions.

A man and woman are considered to be living in a common law relationship when they are not legally married to each other and when they live together as man and wife by mutual arrangement, understanding or agreement.

Determination of Common Law Unions

When a social worker suspects or receives information that a client is living in a common law union and the client has not revealed the common law relationship to the social worker, the social worker must complete an investigation. Typical aspects of the investigation would include:

1. Reviewing of the client's file to obtain all relevant information.

2. Determining from the client's landlord who is paying the rent, obtain a copy of the rental agreement and cancelled cheques used to pay the rent and any other pertinent information relevant to the living situation of the client.

3. Contacting services companies that provide utilities and telephone to determine who pays the accounts.

4. Determining the registered owner of the vehicle utilized by the client.

5. Conducting other enquiries that might reveal the

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346 Alta. Reg. 129/78 as am. by Reg. 345/83.

347 See "Social Services: Income Security Programs", Gov't. of Alta., Department of Social Services and Community Health pp. 53,140-141.

common law relationships.

> The social worker must interview the client, questioning living and financial arrangements. In all instances where the social worker has concrete information supporting the likelihood of a common law union and/or financial support from a common law spouse, and the common law spouse has sufficient funds to support the family, the file must be closed. If the common law spouse has insufficient funds to support the family, he may apply for social allowance benefits as head of the family. A request for follow-up investigation must be done by completing form SSCH 37, Request for special Investigation. The recipient must be advised of his right to appeal the decision.

ii. The position in other provinces

The social allowance payable to a claimant is effected if he or she has "a spouse". The term spouse is defined variously throughout the country. In several provinces it is defined so as to include a person with whom the claimant lives as if they are husband and wife.[348]

In Saskatchewan the term 'spouse' includes "a person with whom the recipient lives as husband and wife, sharing accommodation, physical and emotional love and domestic interdependence regardless of whether either person has denied financial responsibility for the other person".[349]

In New Brunswick 'spouse' includes "a person who resides with the unit head, who shares the responsibilities of the unit, and who benefits economically from the sharing of food, shelter

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348 [Nova Scotia]Social Assistance Act S.N.S. 1970 c. 16 Regs. 1975
[Prince Edward Island] Welfare Assistance Regs. 1976 (E.C. 865/76) s. 2(w)
[Manitoba]Social Allowance Act R.S.M. 1970 c. S-160 s. 5(5).
See also [B.C.] Guaranteed Available Income for Need Regs. (B.C.Reg. 479/76).

349 Saskatchewan Assistance Act Amendment Regs. (S.R. 20/86) s. f.1.

or facilities".[350]

In Ontario Regulations under the Family Benefits Act[351] and the General Welfare Assistance Act[352] defined spouse to include "a person who, although not legally married to another person, lives with that other person as if they are husband and wife". The term "single person" excluded someone who was "living with another person as husband or wife". In several cases when a person was denied social assistance because it was said by the Department that she was not living as a "single person", appeals were taken to the courts. In a number of cases the Ontario Divisional Court and the Ontario Court of Appeal allowed appeals and ordered that benefits be reinstated.[353] In 1986 the Women's Legal Education & Action Fund launched two court challenges to these regulations claiming that they were contrary to the Charter of Rights.[354] These cases were settled out of court and the government promised to change the regulations. On November 1,

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350 Social Welfare Act R.S.N.B. 1973 c. S-11 Regs. 227/82.

351 R.R.O. 1980 Reg. 318.

352 R.R.O. 1980 Reg. 441.

353 See:
Re Proc and Minister of Community and Social Services (1975) 6 O.R. (2d) 624 (Div.Ct.); Re Warwick & Minister of Community and Social Services (1978) 21 O.R. (2d) 528 (C.A.); Re Ellis & Ministry of Community and Social Services (1980) 28 O.R. (2d) 385 (Div.Crt.); Willis v. Minister of Community and Social Services (1983) 40 O.R. (2d) 287 (Div.Crt.); Manone v. Director of Family Benefits (1984) 3 O.A.C. 222 (Div.Crt.); Chartier v. Income Maintenance Branch of the Ministry of Community and Social Services (Ont.), Director of (1984) 7 O.A.C. 322 (Div.Crt.); Dowlut v. Commissioner of Social Assistance (1985) 8 O.A.C. 136 (Div.Crt.); Pitts v. Ontario (1985) 9 O.A.C. 205 (Div.Crt.); Burton v. Minister of Community and Social Services (1985) 10 O.A.C. 263 (Div.Crt.); Szuts v. Commissioner of Social Services (1986) 13 O.A.C. 200 (Div.Crt.).

354 The cases of Sheila Beaudette of Ottawa and Brenda Horvath of London.

1986 new regulations came into force in Ontario.[355] These regulations now define 'spouse' so as to include:

> "a person of the opposite sex who is ordinarily resident with the applicant or recipient and who is providing an economic contribution to the applicant or recipient or a dependant child or children of the applicant or recipient and the relationship between the person and the applicant or recipient is of a social or familial nature"
>
> "In determining whether or not a person is a spouse within the meaning of this regulation, sexual factors shall not be investigated or considered".

In introducing the changes, Ontario Social Services Minister, John Sweeney said, "It is time to move away from intrusive investigation into private conduct towards a system which looks at the objective needs of sole support parents".[356]

iii. Our recommendations

We recommend that Alberta law be changed in similar respects to that of Ontario. A person's financial needs should determine her eligibility for welfare. The fact that someone of the opposite sex lives with the claimant does not mean that he is supporting her financially. We have noted in the earlier part of this paper that our empirical study demonstrates a greater financial independance of cohabitants than is the case with married couples.[357] Further, we have recommended that there be no obligation of support as between cohabitants.[358] We do not

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355 O. Regs. 638/86 and 639/86.

356 Edmonton Journal, Friday Sept. 19, 1986, Globe and Mail Sept. 24, 1986.

357 Supra pp. 45, 46.

358 Supra pp. 63-68.

feel that a presumption of financial support should arise by virtue of cohabitation and we condemn the guidelines to social workers provided by the Department of Social Services and Community Health[359] as intrusive and demeaning.

We accordingly recommend that regulation 2.1[360] be amended to read:

> "2.1(a) For the purposes of section 12(2) of the Act, the resources of any person living in the same residence as an applicant for social allowance or a recipient of social allowance are exempt if that person is not providing an economic contribution to the applicant or recipient or a dependant child or children of the applicant or recipient.
>
> (b) If a person living in the same residence as an applicant for social allowance or a recipient of social allowance is providing an economic contribution to the applicant or recipient or a dependant child or children of the applicant or recipient his resources are exempt for the purposes of section 12(2) of the Act if his relationship with the applicant or recipient is not of a social or familial nature.
>
> (c) In determining whether a person's resources are exempt for the purposes of section 12(2) of the Act sexual factors shall not be investigated or considered".

We further recommend that those provisions of the policy manual of the Department of Social Services and Community Health that relate to common law unions and have been quoted above[361] be deleted.

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359 Supra note 347.

360 See Supra note 346.

361 See pp. 217, 218.

APPENDIX 1

De Facto Relationships Act 1984 No. 147

NEW SOUTH WALES

TABLE OF PROVISIONS

PART I--Preliminary

PART II--Jurisdiction

PART III--Proceedings for Financial Adjustment

Division 1--*Preliminary*

Division 2--*Adjustment of interests with respect to property*

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the "De Facto Relationships Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Interpretation.

3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires-

"applicant" includes a cross-applicant;

"appointed day" means the day appointed and notified under section 2(2);

"de facto partner" means-

(a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her;

"de facto relationship" means the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other;

"financial resources", in relation to de facto partners or either of them, includes-

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in

or used or applied in or towards the purposes of the de facto partners or either of them;

(c) property, the alienation or disposition of which is wholly or partly under the control of the de facto partners or either of them and which is lawfully capable of being used or applied by or on behalf of the de facto partners or either of them in or towards their or his or her own purposes; and

(d) any other valuable benefit;

"Local Court" means a Local Court established under section 6(1) of the Local Courts Act, 1982;

"property", in relation to de facto partners or either of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property;

"regulation" means a regulation made under this Act;

"Supreme Court" means the Supreme Court of New South Wales.

(2) A reference in this Act to a child of de facto partners (whether the de facto partners are referred to as the parties to an application for an order under Part III or otherwise) is a reference to-

(a) a child born as a result of sexual relations between the partners;

(b) a child of the woman of whom her de facto partner is presumed, pursuant to the Artificial Conception Act, 1984, to be the father; or

(c) a child adopted by the partners.

(3) A reference in this Act to periodic maintenance is a reference to maintenance paid or payable or to be paid, as the case may require, by means of a weekly, fortnightly, monthly, yearly or other periodic sum.

Construction of references to Local Courts, etc.

4. Where the appointed day occurs before the day appointed and notified under section 2(2) of the Local Courts Act, 1982-

(a) a reference in this Act to a Local Court shall, before the day so appointed and notified, be read and construed as a reference to a Court of Petty Sessions;

(b) a reference in this Act to the Local Courts (Civil Claims) Act, 1970, shall, before the day so appointed and notified, be read and construed as a reference to the Courts of Petty Sessions (Civil Claims) Act, 1970; and

(c) a reference in this Act to a Magistrate shall, before the day so appointed and notified, be read and construed as a reference to a stipendiary magistrate.

Application of references to de facto partners.

5. Except as provided by section 6, a reference in this Act to a de facto partner includes a reference to a person who has, whether before, on or after the appointed day, been a de facto partner.

Application of Act.

6. This Act (except Part V) does not apply to or in respect of-

(a) a de facto relationship which ceased before the appointed day; or

(b) a person in so far as he or she was a partner in a de facto relationship referred to in paragraph (a).

Other rights of de facto partners not affected by this Act.

7. Nothing in this Act derogates from or affects any right of a de facto partner to apply for any remedy or relief under any other Act or any other law.

Declaration of interests in property.

8. (1) Without limiting the generality of section 7, in proceedings between de facto partners with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a de facto partner has in respect of the property.

(2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including-

(a) orders as to possession; and

(b) in the case of a Local Court, orders of the kind which may be made under section 38(1)(b), (c), (i) and (j).

(3) An order under this section is binding on the de facto partners but not on any other person.

PART II.

JURISDICTION.

Courts having jurisdiction under this Act.

9. Subject to this Act, a person may apply to-

(a) the Supreme Court; or

(b) a Local Court,

for an order or relief under this Act.

Limit of jurisdiction of Local Courts.

10. Except as provided by section 12, a Local Court shall not have jurisdiction under this Act-

(a) in relation to property, to declare a title or right or adjust an interest; or

(b) to make an order for maintenance,

of a value or amount in excess of the amount prescribed for the time being by section 12 of the Local Courts (Civil Claims) Act, 1970.

Staying and transfer of proceedings. 11. (1) Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the firstmentioned court-

(a) may stay the proceedings pending before it for such time as it thinks fit; or

(b) may dismiss the proceedings.

(2) Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests

of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.

Transfer of proceedings from Local Courts in certain cases.

12. (1) Where proceedings are instituted in a Local Court with respect to an interest in property, being an interest of a value or amount in excess of the amount prescribed for the time being by section 12 of the Local Courts (Civil Claims) Act, 1970, the Local Court shall, unless the parties agree to the Court hearing and determining the proceedings, transfer the proceedings to the Supreme Court.

(2) Where proceedings referred to in subsection (1) are before it, the Local Court may transfer the proceedings of its own motion, notwithstanding that the parties would be willing for the Local Court to hear and determine the proceedings.

(3) Before transferring proceedings under subsection (1), the Local Court may make such orders as it considers necessary pending the disposal of the proceedings by the Supreme Court.

(4) Where proceedings are transferred to the Supreme Court under subsection (1), the Supreme Court shall, subject to the rules of court, proceed as if the proceedings had been originally instituted in that Court.

(5) Without prejudice to the duty of a Local Court to comply with this section, failure by the Local Court so to comply does not invalidate any order of the Court in the proceedings.

Courts to act in aid of each other.

13. All courts having jurisdiction under this Act shall severally act in aid of and be auxiliary to each other in all matters under this Act.

PART III.

PROCEEDINGS FOR FINANCIAL ADJUSTMENT.

DIVISION 1.--*Preliminary.*

Applications for orders under this Part.

14. (1) Subject to this Part, a de facto partner may apply to a court for an order under this Part for the adjustment of interests with respect to the property of the de facto partners or either of them or for the granting of maintenance, or both.

(2) An application referred to in subsection (1) may be made whether or not any other application for any remedy or relief is or may be made under this Act or any other Act or any other law.

Prerequisites for making of order--residence within State, etc.

15. (1) A court shall not make an order under this Part unless it is satisfied-

(a) that the parties to the application were or either of them was resident within New South Wales on the day on which the application was made; and

(b) that-

(i) both parties were resident within New South Wales for a substantial period of their de facto relationship; or

(ii) substantial contributions of the kind referred to in section 20(1)(a) or (b) have been made in New South Wales by the applicant.

(2) For the purposes of subsection (1)(b)(i), the parties to an application shall be taken to have been resident within New South Wales for a substantial period of their de facto relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship.

Relevant facts and circumstances.

16. Where a court is satisfied as to the matters specified in section 15(1)(a) and (b), it may make or refuse to make an order under this Part by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the appointed day or outside New South Wales.

Prerequisites for making of order--length of relationship, etc.

17. (1) Except as provided by subsection (2), a court shall not make an order under this Part unless it is

satisfied that the parties to the application have lived together in a de facto relationship for a period of not less than 2 years.

(2) A court may make an order under this Part where it is satisfied-

(a) that there is a child of the parties to the application; or

(b) that the applicant-

(i) has made substantial contributions of the kind referred to in section 20(1)(a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made; or

(ii) has the care and control of a child of the respondent,

and that the failure to make the order would result in serious injustice to the applicant.

Time limit for making applications.

18. (1) Except as provided by subsections (2) and (3), where de facto partners have ceased to live together as husband and wife on a bona fide domestic basis, an application to a court for an order under this Part shall be made before the expiration of the period of 2 years after the day on which they ceased, or last ceased, as the case may require, to so live together.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to a de facto partner to apply to the court for an order under this Part (other than an order under section 27(1) made where the court is satisfied as to the matters specified in section 27(1)(b)) where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted.

(3) Where, under subsection (2), a court grants a de facto partner leave to apply to the court for an order under this Part, the de facto partner may apply accordingly.

Duty of court to end financial relationships.

19. In proceedings for an order under this Part, a court shall, so far as is practicable, make such orders

as will finally determine the financial relationships between the de facto partners and avoid further proceedings between them.

DIVISION 2--*Adjustment of interests with respect to property.*

Application for adjustment.

20. (1) On an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them, a court may make such order adjusting the interests of the partners in the property as to it seems just and equitable having regard to-

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely:-

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.

(2) A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

Adjournment of application--likelihood of significant change in circumstances.

21. (1) Without limiting the power of a court to grant an adjournment in relation to any proceedings before it, where, on an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them, or otherwise, the court is of the opinion-

(a) that there is likely to be a significant change in the financial circumstances of the partners or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to the property of the partners or either of them if that significant change in financial circumstances occurs is more likely to do justice as between the partners than an order that the court could make immediately with respect to the property of the partners or either of them,

the court may, if so requested by either partner, adjourn the application until such time, before the expiration of a period specified by the court, as that partner applies for the application to be determined, but nothing in this section requires the court to adjourn any application in any particular circumstances.

(2) Where a court proposes to adjourn an application as provided by subsection (1), the court may, before so adjourning the application, make such order or orders (if any) as it considers appropriate with respect to the property of the de facto partners or either of them.

(3) A court may, in forming an opinion for the purposes of subsection (1) as to whether there is likely to be a significant change in the financial circumstances of the de facto partners or either of them, have regard to any change in the financial circumstances of a partner that may occur by reason of the vesting in the partners or either of them or the use or application in or towards the purposes of the partners or either of them of a financial resource of the partners or either of them, but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of the partners or either of them.

Adjournment of application--proceedings in the Family Court of Australia.

22. (1) Without limiting the power of a court to grant an adjournment in relation to any proceedings before it, where, at any time before the court has made a final order under this Part to adjust interests with respect to the property of de facto partners or either of them, proceedings in relation to the property of the partners or either of them are commenced in the Family Court of Australia, the court may adjourn the hearing

of the application for the order.

(2) Where the hearing of an application for an order has been adjourned under subsection (1), the applicant for the order may, where the proceedings referred to in that subsection are delayed by neglect or by the unreasonable conduct of a party to those proceedings or by collusion between the parties to those proceedings, apply to the court for the hearing of the application to proceed.

Deferment of order.

23. Where a court is of the opinion that a de facto partner in respect of the property of whom an order is made pursuant to an application under section 20 is likely to become entitled, within a short period, to property which may be applied in satisfaction of the order, the court may defer the operation of the order until such date or the occurrence of such event as is specified in the order.

Effect of death of parties on application.

24. (1) Where, before an application under section 20 is determined, either party to the application dies, the application may be continued by or against, as the case may require, the legal personal representative of the deceased party.

(2) Where a court is of the opinion-

(a) that it would have adjusted interests in respect of property if the deceased party had not died; and

(b) that, notwithstanding the death of the deceased party, it is still appropriate to adjust those interests,

the court may make an order under this Part in respect of that property.

(3) An order referred to in subsection (2) may be enforced on behalf of, or against, as the case may require, the estate of the deceased party.

(4) The rules of a court may, for the purposes of subsection (1), provide for the substitution of the legal personal representative as a party to the application.

Effect of death of party on order.

25. Where, after an order is made against a party to

an application under section 20, the party dies, the order may be enforced against the estate of the deceased party.

DIVISION 3--*Maintenance*

No general right of de facto partner to maintenance.

26. Except as otherwise provided by this Division, a de facto partner is not liable to maintain the other de facto partner and a de facto partner is not entitled to claim maintenance from the other de facto partner.

Order for maintenance.

27. (1) On an application by a de facto partner for an order under this Part for maintenance, a court may make an order for maintenance (whether for periodic maintenance or otherwise) where the court is satisfied as to either or both of the following:-

(a) that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the de facto partners or a child of the respondent, being, in either case, a child who is, on the day on which the application is made-

(i) except in the case of a child referred to in subparagraph (ii)--under the age of 12 years; or

(ii) in the case of a physically handicapped child or mentally handicapped child--under the age of 16 years;

(b) that the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court-

(i) an order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a course or programme of training or education; and

(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

(2) In determining whether to make an order under

this Part for maintenance and in fixing any amount to be paid pursuant to such an order, a court shall have regard to-

(a) the income, property and financial resources of each de facto partner (including the rate of any pension, allowance or benefit paid to either partner or the eligibility of either partner for a pension, allowance or benefit) and the physical and mental capacity of each partner for appropriate gainful employment;

(b) the financial needs and obligations of each de facto partner;

(c) the responsibilities of either de facto partner to support any other person;

(d) the terms of any order made or proposed to be made under section 20 with respect to the property of the de facto partners; and

(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.

(3) In making an order for maintenance, a court shall ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant to a pension, allowance or benefit.

Interim maintenance.

28. Where, on an application by a de facto partner for an order under this Part for maintenance, it appears to a court that the applicant is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the respondent, pending the disposal of the application, of such periodic sum or other sums as the court considers reasonable.

Effect of subsequent relationship or marriage.

29. Where de facto partners have ceased to live together as husband and wife on a bona fide domestic basis, an application to a court for an order under this Part for maintenance may not be made by a de facto partner who, at the time at which the application is made, has entered into a subsequent de facto relationship with another person or who, at that time, has married or remarried.

Duration of orders for periodic maintenance.

30. (1) An order under this Part for periodic maintenance, being an order made where a court is satisfied solely as to the matters specified in section 27(1)(a), may apply for such period as may be determined by the court, not exceeding the period expiring when the child to whom section 27(1)(a) applies, or the younger or youngest such child, as the case may require-

(a) except in the case of a child referred to in paragraph (b)--attains the age of 12 years; or

(b) in the case of a physically handicapped child or mentally handicapped child--attains the age of 16 years.

(2) An order under this Part for periodic maintenance, being an order made where a court is satisfied solely as to the matters specified in section 27(1)(b), may apply for such period as may be determined by the court, not exceeding-

(a) 3 years after the day on which the order is made; or

(b) 4 years after the day on which the de facto partners ceased, or last ceased, as the case may require, to live together,

whichever is the shorter.

(3) An order under this Part for periodic maintenance, being an order made where a court is satisfied as to the matters specified in section 27(1)(a) and (b), may apply for such period as may be determined by the court, not exceeding the period permissible under subsection (1) or (2), whichever is the longer.

(4) Nothing in this section or an order under this Part for periodic maintenance prevents such an order from ceasing to have effect pursuant to section 32 or 33.

Effect of death of parties on application.

31. Where, before an application under section 27 is determined, either party to the application dies, the application shall abate.

Cessation of order--generally.

32. (1) An order under this Part for maintenance

shall cease to have effect-

(a) on the death of the de facto partner in whose favour the order was made;

(b) on the death of the de facto partner against whom the order was made; or

(c) on the marriage or remarriage of the de facto partner in whose favour the order was made.

(2) Where, in relation to a de facto partner in whose favour an order under this Part for maintenance is made, a marriage or remarriage referred to in subsection (1)(c) takes place, the partner shall, without delay, notify the de facto partner against whom the order was made of the date of the marriage or remarriage.

(3) Any money paid pursuant to an order under this Part for periodic maintenance, being money paid in respect of a period occurring after a marriage or remarriage referred to in subsection (1)(c) takes place, may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.

Cessation of order--child care responsibilities.

33. Where a court makes an order under this Part for periodic maintenance, being an order made where the court is satisfied solely as to the matters specified in section 27(1)(a), the order shall cease to have effect on the day on which the de facto partner in whose favour the order was made ceases to have the care and control of the child of the relationship, or the children of the relationship, as the case may require, in respect of whom the order was made.

Recovery of arrears.

34. Nothing in section 32 or 33 affects the recovery of arrears due pursuant to an order under this Part for maintenance at the time when the order ceased to have effect.

Variation, etc., of orders for periodic maintenance.

35. (1) On an application by a de facto partner in respect of whom an order has been made under this Part for periodic maintenance, a court may-

(a) subject to subsection (2), discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;

(c) revive wholly or in part the operation of an order suspended under paragraph (b); or

(d) subject to subsection (2), vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing an amount directed to be paid by an order unless it is satisfied that, since the order was made, or last varied-

(a) the circumstances of the de facto partner in whose favour the order was made have so changed;

(b) the circumstances of the de facto partner against whom the order was made have so changed; or

(c) the cost of living has changed to such an extent,

as to justify its so doing.

(3) In satisfying itself for the purposes of subsection (2)(b), a court shall have regard to any changes that, during the relevant period, have occurred-

(a) except as provided by paragraph (b), in the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or

(b) where a group of numbers or of amounts, other than those set out in the Index referred to in paragraph (a) (being a group of numbers or of amounts which relate to the price of goods and services, and which is issued by the Australian Statistician) is prescribed for the purposes of this paragraph--in the group of numbers or of amounts so prescribed.

(4) A court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made, or last varied having regard to a change in the cost of living.

(5) An order decreasing the amount of a periodic sum payable under an order may be expressed to be retrospective to such date as the court thinks fit.

(6) For the purposes of this section, a court shall have regard to the provisions of sections 26 and 27.

Other maintenance orders not to be varied.

36. Except as provided by section 41, an order made under this Part for maintenance, not being an order for periodic maintenance, may not be varied.

Extension of orders for periodic maintenance.

37. (1) Where a court has made an order under this Part for periodic maintenance for a period which is less than the maximum period permissible in accordance with section 30, the de facto partner in whose favour the order is made may, at any time before the expiration of that maximum period, apply to the court for an extension of the period for which the order applies.

(2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.

(3) An order extending the period for which an order under this Part for periodic maintenance applies may not be made so as to extend the period beyond the maximum period permissible under section 30 in relation to the secondmentioned order.

(4) For the purposes of this section, a court shall have regard to the provisions of sections 26 and 27.

DIVISION 4--*General*.

Orders, etc., of a court.

38. (1) Without derogating from any other power of a court under this or any other Act or any other law, a court, in exercising its powers under this Part, may do any one or more of the following:-

(a) order the transfer of property;

(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court thinks fit;

(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as

are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(d) order payment of a lump sum, whether in one amount or by instalments;

(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(g) appoint or remove trustees;

(h) make an order or grant an injunction-

(i) for the protection of or otherwise relating to the property or financial resources of the parties to an application or either of them; or

(ii) to aid enforcement of any other order made in respect of an application,

or both;

(i) impose terms and conditions;

(j) make an order by consent;

(k) make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it thinks it is necessary to make to do justice.

(2) A court may, in relation to an application under this Part-

(a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and

(b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.

Execution of instruments by order of a court.

39. (1) Where-

(a) an order under this Part has directed a

person to execute a deed or instrument; and

(b) the person has refused or neglected to comply with the direction or, for any other reason, a court thinks it necessary to exercise the powers conferred on it under this subsection,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) A court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

Ex parte orders.

40. (1) In the case of urgency, a court-

(a) may make an ex parte order pursuant to section 28; or

(b) may make an ex parte order or grant an ex parte injunction for either or both of the purposes specified in section 38(1)(h),

or both.

(2) An application under this section may be made orally or in writing or in such form as the court considers appropriate.

(3) Where an application under this section is not made in writing, the court shall not make an order or grant an injunction under subsection (1) unless by reason of extreme urgency of the case it considers that it is necessary to do so.

(4) The court may give such directions with respect to the filing of a written application, the service of the application and the further hearing of the application as it thinks fit.

(5) An order made or injunction granted under subsection (1) shall be expressed to operate or apply only until a specified time or the further order of the court.

(6) Where a court makes an order or grants an

injunction under subsection (1), it may give directions with respect to-

(a) the service of the order or injunction and such other documents as it thinks fit; and

(b) the hearing of an application for a further order.

Variation and setting aside of orders.

41. Where, on the application of a person in respect of whom an order referred to in section 20 or 27 has been made, a court is satisfied that-

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order,

the court may, in its discretion, vary the order or set the order aside and, if it thinks fit, make another order in accordance with this Part in substitution for the order so set aside.

Transactions to defeat claims.

42. (1) In this section, "disposition" includes a sale and a gift.

(2) On an application for an order under this Part, a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application (being an order adjusting interests with respect to the property of the parties or either of them, an order for maintenance or an order for costs) or which, irrespective of intention, is likely to defeat any such order.

(3) The court may, without limiting section 38,

order that any property dealt with by any such instrument or disposition may be taken in execution or used or applied in, or charged with, the payment of such sums payable pursuant to an order adjusting interests with respect to the property of the parties or either of them or for maintenance or costs as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

Interests of other parties.

43. In the exercise of its powers under this Part, a court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

PART IV.

COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS.

Interpretation.

44. (1) In this Part-

"cohabitation agreement" means an agreement between a man and a woman, whether or not there are other parties to the agreement-

(a) which is made (whether before, on or after the appointed day)-

(i) in contemplation of their entering into a de facto relationship; or

(ii) during the existence of a de facto relationship between them; and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement;

"financial matters", in relation to de facto partners,

means matters with respect to any one or more of the following:-

(a) the maintenance of either or both of the partners;

(b) the property of those partners or either of them;

(c) the financial resources of those partners or either of them;

"separation agreement" means an agreement between a man and a woman, whether or not there are other parties to the agreement-

(a) which is made (whether before, on or after the appointed day)-

(i) except as provided by subsection (2), in contemplation of the termination of a de facto relationship that exists between them; or

(ii) after the termination of a de facto relationship that existed between them; and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

(2) Where, in relation to a separation agreement made in contemplation of the termination of a de facto relationship, the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement shall be deemed to be a cohabitation agreement.

Entering into of agreements.

45. (1) Notwithstanding any rule of public policy to the contrary, a man and a woman who are not married to each other may enter into a cohabitation agreement or separation agreement.

(2) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to the right to custody of, maintenance of or access to or otherwise in relation to the children of the parties to the agreement.

Agreements subject to law of contract.

46. Except as otherwise provided by this Part, a cohabitation agreement or separation agreement shall be subject to and enforceable in accordance with the law of contract, including, without limiting the generality of this section, the Contracts Review Act, 1980.

Effect of agreements in certain proceedings.

47. (1) Where, on an application by a de facto partner for an order under Part III, a court is satisfied-

(a) that there is a cohabitation agreement or separation agreement between the de facto partners;

(b) that the agreement is in writing;

(c) that the agreement is signed by the partner against whom it is sought to be enforced;

(d) that each partner was, before the time at which the agreement was signed by him or her, as the case may be, furnished with a certificate in or to the effect of the prescribed form by a solicitor which states that, before that time, the solicitor advised that partner, independently of the other partner, as to the following matters:-

(i) the effect of the agreement on the rights of the partners to apply for an order under Part III;

(ii) whether or not, at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement;

(iii) whether or not, at that time, it was prudent for that partner to enter into the agreement;

(iv) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; and

(e) that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement,

the court shall not, except as provided by sections 49 and 50, make an order under Part III in so far as the

order would be inconsistent with the terms of the agreement.

(2) Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1)(b), (c), (d) or (e), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part III, may have regard to the terms of the cohabitation agreement or separation agreement.

(3) A court may make an order referred to in subsection (2) notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make the order.

Effect of certain exclusion provisions in agreements.

48. Where a cohabitation agreement or separation agreement does not satisfy any one or more of the matters referred to in section 47(1)(b), (c), (d) or (e), the provisions of the agreement may, in proceedings other than an application for an order under Part III, be enforced notwithstanding that the cohabitation agreement purports to exclude the jurisdiction of a court under Part III to make such an order.

Variation of terms of cohabitation agreements.

49. (1) On an application by a de facto partner for an order under Part III, a court may vary or set aside the provisions, or any one or more of the provisions, of a cohabitation agreement (but not a separation agreement) made between the de facto partners, being a cohabitation agreement which satisfied the matters referred to in section 47(1)(b), (c), (d) and (e), where, in the opinion of the court, the circumstances of the partners have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were, whether on the application for the order under Part III or on any other application for any remedy or relief under any other Act or any other law, to be enforced.

(2) A court may, pursuant to subsection (1), vary or set aside the provisions, or any one or more of the provisions, of a cohabitation agreement notwithstanding any provision of the agreement to the contrary.

Effect of revocation, etc., of agreements.

50. Without limiting or derogating from the provisions of section 46, on an application by a de facto partner for an order under Part III, a court is not required to give effect to the terms of any cohabitation agreement or separation agreement entered into by that partner where the court is of the opinion-

(a) that the de facto partners have, by their words or conduct, revoked or consented to the revocation of the agreement; or

(b) that the agreement has otherwise ceased to have effect.

Effect of death of de facto partner--periodic maintenance.

51. (1) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner shall, on the deathof the firstmentioned de facto partner, except in so far as the cohabitation agreement or separation agreement otherwise provides, be unenforceable against his or her estate.

(2) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner shall, on the death of the secondmentioned partner, be unenforceable by his or her estate.

(3) Nothing in subsection (1) or (2) affects the recovery of arrears of periodic maintenance due and payable under a cohabitation agreement or separation agreement at the date of death of the partner.

Effect of death of de facto partner--transfer of property and lump sum payments.

52. Except in so far as a cohabitation agreement or separation agreement otherwise provides, the provisions of such an agreement entered into by de facto partners relating to property and lump sum payments may, on the death of one of the partners, be enforced on behalf of, or against, as the case may be, the estate of the deceased partner.

PART V.

DOMESTIC VIOLENCE AND HARASSMENT.

Granting of injunctions.

53. A court may, on an application made to it by a de facto partner or in any proceedings between de facto partners, whether under Part III or otherwise, grant an injunction-

(a) for the personal protection of a de facto partner or of a child ordinarily residing within the same household as the de facto partners or who at any time ordinarily so resided;

(b) restraining a de facto partner-

(i) from entering the premises in which the other de facto partner resides; or

(ii) from entering a specified area, being an area in which the premises in which the other de facto partner resides are situated;

(c) restraining a de facto partner-

(i) from entering the place of work of the other de facto partner; or

(ii) from entering the place of work of a child referred to in paragraph (a); or

(d) relating to the use or occupancy of the premises in which the de facto partners reside.

Failure to comply with injunction.

54. (1) A person against whom an injunction under section 53 has been granted and who-

(a) has been served personally, in the prescribed manner, with a copy of the order under section 53 by which the injunction was granted; and

(b) after having been so served, knowingly fails to comply with a restriction or prohibition specified in the order,

shall be guilty of an offence and liable on conviction before a Magistrate to imprisonment for 6 months.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.

Other powers of courts not affected.

55. Nothing in this Part derogates from or affects any power of a court under any other Act or law with respect to any act, matter or thing to which this Part applies.

PART VI.

MISCELLANEOUS.

Declaration as to existence of de facto relationship.

56. (1) A person who alleges that a de facto relationship exists or has existed between the person and another person or between 2 named persons may apply to the Supreme Court for a declaration as to the existence of a de facto relationship between the persons.

(2) If, on an application under subsection (1), it is proved to the satisfaction of the Court that a de facto relationship exists or has existed, the Court may make a declaration (which shall have effect as a judgment of the Court) that persons named in the declaration have or have had a de facto relationship.

(3) Where the Court makes a declaration under subsection (2), it shall state in its declaration that-

(a) the de facto relationship existed as at a date specified in the declaration; or

(b) the de facto relationship existed between dates specified in the declaration,

or both.

(4) Where any person whose interests would, in the opinion of the Court, be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application under subsection (1), the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(5) A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

(6) While a declaration made under subsection (2) remains in force, the persons named in the declaration

shall, for all purposes, be presumed conclusively to have had a de facto relationship as at the date specified in the declaration or between the dates so specified, or both, as the case may require.

(7) Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration, it appears to the Court that new facts or circumstances have arisen that have not previously been disclosed to the Court and could not by the exercise of reasonable diligence have previously been disclosed to the Court, the Court may make an order annulling the declaration, and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.

(8) Where any person whose interests would, in the opinion of the Court, be affected by the making of an order under subsection (7) is not present or represented and has not been given an opportunity to be present or represented, at the hearing of an application made under that subsection, the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(9) Where the Court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as that person would have been in if the declaration had not been made.

Enforcement of certain Supreme Court orders by Local Courts.

57. The regulations may make provision for or with respect to the enforcement by a Local Court of an order under this Act of the Supreme Court for payment of money.

Enforcement of certain orders for payment of money.

58. The provisions of Division 6 of Part IV of the Local Courts (Civil Claims) Act, 1970, and of Part V of that Act apply to and in respect of-

(a) an order under this Act of a Local Court for

the payment of money; and

(b) an order under this Act of the Supreme Court for the payment of money, being an order which, pursuant to the regulations, may be enforced by a Local Court,

in the same way as they apply to and in respect of a judgment of a Local Court under that Act.

Enforcement of other orders, etc.

59. (1) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act (not being an order for the payment of money), the court may-

(a) order the person to pay a fine not exceeding $2,000;

(b) require the person to enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such a recognizance or until the expiration of 3 months, whichever first occurs;

(c) order the person to deliver up to the court such documents as the court thinks fit; and

(d) make such other orders as the court considers necessary to enforce compliance with the order or injunction.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.

(3) Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.

Rules of court.

60. (1) For the purpose of regulating any proceedings under this Act in or before the Supreme Court, rules of court may be made under the Supreme Court Act, 1970, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying

out or giving effect to this Act.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

Regulations.

61. (1) the Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A provision of a regulation may-

(a) apply generally or be limited in its application by references to specified exceptions or factors;

(b) apply differently according to different factors of a specified kind; or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.

APPENDIX 2

Matrimonial Property Act RSA 1980 c. M-9 Part II

MATRIMONIAL HOME POSSESSION

19(1) The Court, on application by a spouse, may by order do any one or more of the following:

(a) direct that a spouse be given exclusive possession of the matrimonial home;

(b) direct that a spouse be evicted from the matrimonial home;

(c) restrain a spouse from entering or attending at or near the matrimonial home.

(2) In addition to making an order under subsection (1) the Court may, by order, give a spouse possession of as much of the property surrounding the matrimonial home as is necessary, in the opinion of the Court, for the use and enjoyment of the matrimonial home.

(3) An order under this section may be made subject to any conditions and for any time that the Court considers necessary.

(4) An order under this section may be varied by the Court on application by a spouse.

(5) An order under this section does not create a subdivision within the meaning of the *Planning Act*.

20 In exercising its powers under this Part, the Court shall have regard to

(a) The availability of other accommodation within the means of both the spouses,

(b) the needs of any children residing in the matrimonial home,

(c) the financial position of each of the spouses, and

(d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.

21 An order made under this Part takes effect notwithstanding an order under Part I or a subsequent order for the partition and sale of the matrimonial home.

22(1) If an order is made under section 19 with respect to a matrimonial home and the matrimonial home or part of it is real property that

(a) is owned by one or both of the spouses,

(b) is leased by one or both of the spouses for a term of more than 3 years, or

(c) is the subject of a life estate in favour of one or both of the spouses,

the order may be registered with the Registrar of Land Titles for the land registration district in which the property is situated.

(2) An order registered under this section binds the estate or interest of every description that the spouse or spouses have in the property to the extent stipulated in the order.

(3) A spouse against whose estate or interest an order is registered under this section may only dispose of or encumber his estate or interest with the consent in writing of the spouse in possession or under an order of the Court.

23 If the Court makes an order under section 19 and the matrimonial home is a mobile home owned or leased by one or both spouses, the order may be registered at the Vehicle Registry under the *Chattel Securities Registries Act*.

24 If a matrimonial home is leased by one or both spouses under an oral or written lease and the Court makes an order giving possession of the matrimonial home to one

spouse, that spouse shall be deemed to be the tenant for the purposes of the lease.

25(1) The Court, on application by a spouse, may by order direct that a spouse be given the exclusive use and enjoyment of any or all of the household goods.

(2) An order under subsection (1) may be made subject to any conditions and for any time that the Court considers necessary.

(3) An order made under this section may be varied by the Court on application by a spouse.

26 If the Court makes an order with respect to household goods under section 25, the order may be registered at

(a) the Vehicle Registry under the *Chattel Security Registries Act* as to an itinerant machine as defined in the *Bills of Sale Act*, and

(b) the Central Registry under the *Chattel Security Registries Act* as to all other household goods.

27(1) If an order is registered under section 23 or 26, the order

(a) is notice of the interests of the spouses in the property described in the order, and

(b) takes effect, as against subsequent creditors, purchasers and mortgagees only from the date of registration.

(2) A spouse against whose interest in property an order is registered under section 23 or 26 may only dispose of or encumber that interest with the consent in writing of the spouse in possession or under an order of the Court.

28(1) The rights under this Part are in addition to and not in substitution for or derogation of the rights of a spouse under the *Dower Act*.

(2) If a spouse is in possession of a matrimonial home and a life estate in the

matrimonial home vests in that spouse pursuant to the *Dower Act*, the registration of an order under this Part may be cancelled by the Registrar of Land Titles on application by that spouse.

29(1) The person against whose property an order is registered under section 22 may apply to the Court for an order cancelling the registration.

(2) The person against whose property an order is registered under section 23 or 26 may apply to the Court for an order cancelling the registration.

(3) The Court may make an order under this section on any conditions the Court considers necessary.

30(1) An application under this Part

(a) may be made by originating notice,

(b) may be joined with, or heard at the same time as, a matrimonial cause between the spouses, or

(c) may be made as an application in an action or proceeding between the spouses under the *Domestic Relations Act* or Part I of this Act.

(2) An order may be made under this Part on an ex parte application if the Court is satisfied that there is a danger of injury to the applicant spouse or a child residing in the matrimonial home as a result of the conduct of the respondent spouse.

(3) If an application is made ex parte, the Court may dispense with service of notice of the application or direct that the originating notice be served at a time and in a manner that it sees fit.

APPENDIX 3

Marital Property Act SNB 1980 c. M 1.1 PART III

DOMESTIC CONTRACTS

Sec. 33. [Definitions].--In this Part,

"domestic contract" means a marriage contract, separation agreement or an agreement entered into under section 35;

"marriage contract" means an agreement entered into under section 34;

"separation agreement" means an agreement entered into under section 36.

Sec. 34. [Marriage contract].--A man and a woman may enter into an agreement, before their marriage or during their marriage while cohabitating, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death, including,

(a) ownerhsip in or division of property;

(b) support obligations;

(c) any other matter in the settlement of their affairs;

(d) but not the right to custody of or access to their children.

Sec. 35. [Cohabitation agreement].--A man and a woman who are cohabiting and who are not married ot one another may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or upon ceasing to cohabit or death, including,

(a) ownership in or division of property;

(b) support obligations;

(c) any other matter in the settlement of their affairs.

(d) but not the right to custody of or access to their children.

(2) *Effect of subsequent marriage*].--Where the parties to an agreement entered into under subsection (1) subsequently marry, the agreement shall be deemed to be a marriage contract.

Sec. 36. [Separation Agreement].--A man and a woman who cohabited and who are living separate and apart or who are cohabiting and who agree to live separate and apart may enter into a separation agreement in which they agree on their respective rights and obligations, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to custody of and access to their children; and

(d) any other matter in the settlement of their affairs.

Sec. 37. [Form of domestic contract].--(1) A domestic contract and any agreement to amend or rescind a domestic contract shall be in writing, shall be signed by the parties to be bound and shall be witnessed.

(2) [*Capacity of minor*].--A minor who has capacity to contract marriage has capacity to enter into a marriage contract or a separation agreement that is approved by the Court, whether the approval is given before or after the contract is entered into.

(3) [*Agreement on behalf of mentally incompetent person*].--The committee of a person who is mentally incompetent or, if the committee is the spouse of such person or if there is no comittee, the Administrator of Estates appointed under section 35 of the *Mental Health Act*, may, subject to the approval of the Court, enter into a domestic contract or give any waiver or consent under this Act on behalf of the mentally incompetent person.

Sec. 38. [Agreement respecting custody or support of a child].--(1) In the declaration of any matter respecting the support, or custody of or access to a child, the Court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the Court, to do so is in the best interests of the child.

(2) [*Dum casta clause*].--A provision in a separation agreement or a provision in a marriage contract to take effect on separation whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with

another.

(3) [*Effect of provision made before coming into force of section*].--A provision in a separation agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.

Sec. 39. [Application of Act to pre-existing contracts].--(1)A separation agreement or a marriage contract validly made before the coming into force of this Part shall be deemed to be a domestic contract for the purposes of this Act.

(2) [*Domestic contract made in contemplation of Act coming into force*].--Where a domestic contract is entered into in accordance with this Part before the coming into force of this Part, and

> (a) the contract or any part would be valid if entered into after the coming into force of this Part; and
>
> (b) the contract or part is entered into in contemplation of the coming into force of this Part,

the contract or part is not invalid for the reason only that it was entered into before the coming into force of this Part.

Sec. 40. Terms of domestic contract prevail].--Subject to subsection 38(1) and section 41, where there is a conflict between a provision of this Act and a domestic contract the domestic contract prevails.

Sec. 41. [Discretionary powers of court].--The Court may disregard any provision of a domestic contract

> (a) if the domestic contract was made before the coming into force of this Part and was not made in contemplation of the coming into force of this Part; or
>
> (b) if the spouse who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse;

where the Court is of the opinion that to apply the provision would be inequitable in all the circumstance of the case.

APPENDIX 4

INTESTATE SUCCESSION ACT
CHAPTER I-9

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

1 In this Act,

(a) "estate" includes both real and personal property;

(b) "issue" includes all lawful lineal descendants of the ancestor;

(c) "net value" means the value of the estate wherever situated, both within and outside Alberta, after payment of the charges thereon and the debts, funeral expenses, expenses of administration, estate tax and succession duty.

2 If an intestate dies leaving a surviving spouse but no issue, his estate goes to the spouse.

3(1) When an intestate dies on or after January 1, 1976 leaving a surviving spouse and issue,

(a) if the net value of the estate does not exceed $40,000, the estate goes to the spouse, and

(b) if the net value of the estate exceeds $40,000, the spouse is entitled to $40,000 and has a charge on the estate for that amount with interest from the date of death.

(2) If an intestate dies prior to January 1, 1976 leaving a surviving spouse and issue,

(a) if the net value of the estate does not exceed $20,000, the estate goes to the spouse, and

(b) if the net value of the estate exceeds $20,000, the spouse is entitled to $20,000 and has a charge on the estate for that amount with interest from the date of death.

(3) After payment to the surviving spouse pursuant to subsection (1) or (2),

(a) if the intestate dies leaving a surviving spouse and one child, 1/2 of the residue of the estate goes to the surviving

spouse;

(b) if the intestate died leaving a surviving spouse and more than one child, 1/3 of the residue of the estate goes to the surviving spouse.

(4) If a child of the intestate has died during the lifetime of the intestate leaving issue one or more of whom are alive at the date of the intestate's death, the surviving spouse shall take the same share of the estate of the intestate as if the child had been living at that date.

4 If an intestate dies leaving issue, the estate shall be distributed, subject to the rights of the surviving spouse, per stirpes among the issue.

5 If an intestate dies leaving no surviving spouse or issue, his estate goes to his father and mother in equal shares if both are living, but if either of them is dead the estate goes to the other of them if still living.

6 If an intestate dies leaving no surviving spouse, issue, father or mother, his estates goes to his brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister take the share their parent would have taken if living.

7 If an intestate dies leaving no surviving spouse, issue, father, mother, brother or sister, his estate goes to his nephews and nieces in equal shares and in no case shall representation be admitted.

8 If an intestate dies leaving no surviving spouse, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted.

9(1) For the purposes of this Act, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative.

(2) Kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

10 Descendants and relatives of the intestate, conceived before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him.

11(1)If a child of a person who has died wholly intestate has been advanced by that person by portion,

the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law.

(2) If the advancement is equal to or greater than the share of the estate that the child would be entitled to receive under the previous sections of this Act, the child and his descendants shall be excluded from any share in the estate.

(3) If the portion by which the child was advanced is less than that share, the child and his descendants are entited to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and the advancement as nearly equal as possible.

(4) The value of any portion so advanced shall be deemed to be the value as expressed by the intestate, or acknowledged by the child, in writing; otherwise the value shall be deemed to be the value of the portion when advanced.

(5) Unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing, the onus of proving that a child has, with a view to a portion, been maintained or educated, or been given money, is on the person so asserting.

12 So much of the estate of a person dying partially intestate as is not disposed of by his will shall be distributed as if he had died intestate and had left no other estate.

13 For the purposes of this Act, an illegitimate child shall be treated as if he were the legitimate child of his mother.

14(1)Where a male person who is survived by illegitmate children dies intestate with respect to the whole or any part of his estate, and leaves no widow or lawful issue, if the Court of Queen's Bench, on an application made by the executor, administrator or trustee or by a person claiming to be an illegitimate child, declares after due inquiry that

(a) the intestate has acknowledged the paternity of the illegitimate children, or

(b) the person has been declared to be the father by order made under any of the provisions of the *Children of Unmarried Parents Act*, *a Child Welfare Act* or the *Maintenance and Recovery Act*, the illegitimate children and their issue shall inherit from the person so dying the estate in respect of which there is an intestacy as if they were his legitimate children.

(2) For the purposes of this section, an intestate male person shall be deemed to have left no widow if she has left him and was at the time of his death living in adultery.

15 A surviving spouse who had left the intestate and was living in adultery at the time of the intestate's death shall take no part in the intestate's estate.

APPENDIX 5

FATAL ACCIDENTS ACT

CHAPTER F-5

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

1 In this Act,

(a) "Child includes a son, daughter, grandson, granddaughter, stepson, stepdaughter and illegitimate child;

(b) "parent" includes a father, mother, grandfather, grandmother, stepfather and stepmother.

2 When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

3(1) An action under this Act

(a) shall be for the benefit of the wife, husband, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator. nl 2> (3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedures as if it were brought

by and in the name of the executor or administrator.

4. Not more than one action lies for and in respect of the same subject matter of complaint.

5(1) If a person dies who would have been liable to an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained or, if pending, may be continued against the executor or administrator of the deceased person.

(2) If neither probate of the will of the deceased person mentioned in subsection (1) nor letters of administration of his estate have been granted in Alberta, a judge of the Court of Queen's Bench may, on the application of any party intending to bring or to continue an action under this section and on the terms and on the notice that the judge may direct, appoint an administrator ad litem of the estate of the deceased person, whereupon

(a) the administrator ad litem is an administrator against whom an action may be brought or continued under subsection (1) and by whom it may be defended,

(b) the administrator ad litem may take any steps that a defendant may take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person, and

(c) a judgment in favour or against the administrator ad litem in that action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity.

6 IN assessing damages in an action brought under this Act, there shall not be taken into account a sum paid or payable on the death of the deceased under a contract of insurance.

7 Where an action has been brought under this Act there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought.

8(1) In this section,

(a) "child" means a son or daughter, whether legitimate or illegitimate;

(b) "parent" means a mother or father.

(2) If an action is brought under this Act, the court shall, without reference to any other damages that may be awarded and without evidence of damage, give damages for bereavement of

(a) $3000 to the spouse of the deceased person,

(b) $3000 to the parent or parents of the deceased child, to be divided equally if the action is brought for the benefit of both, and

(c) $3000 to the monor child or children of the deceased parent, to be divided equally among the minor children for whose benefit the action is brought.

(3) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of his estate.

(4) Subsection (2) applies only where the deceased person, deceased child, or deceased parent, as the case may be, died on or after January 1, 1979.

APPENDIX 6

CRIMINAL INJURIES COMPENSATION ACT

CHAPTER C-33

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

1(1) In this Act,

(a) "Board" means The Crimes Compensation Board established under this Act;

(b) "child" includes an illegitimate child and a child with respect to whom a victim stands in loco parentis;

(c) "dependant" means a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent on the income of the victim at the time of his death and includes a child of the victim born after his death;

(d) "injury" means actual bodily harm and includes pregnancy and mental or nervous shock;

(e) "victim" means a person to whom or in respect of whom compensation is or may be payable under this Act.

(2) For the purposes of this Act, "spouse" includes a common law spouse who cohabited with the victim for

(a) at least the 5 years immediately preceding the victim's application for compensation, or

(b) at least the 2 years immediately preceding the victim's application for compensation, if there is a child of the common law relationship.

2(1) When a person is injured or killed and the injury or death

(a) is the direct result of an act or omission of another person that occurred in Alberta and is within the description of any of the criminal offences set out in Schedule 1,

(b) directly resulted to the person while he was

(i) arresting or attempting to arrest any offender or suspected offender,

(ii) assisting a peace officer in making or attempting to make an arrest in Alberta,

(iii) preventing or attempting to prevent the commission of any criminal offence or suspected criminal offence, or

(iv) assisting a peace officer in preventing or attempting to prevent the commission of a criminal offence or suspected criminal offence in Alberta,

or,

(c) is the direct result of an act of a peace officer performed in Alberta while that officer is endeavouring to prevent a criminal offence or suspected criminal offence or to apprehend an offender or suspected offender,

the Board may, on receipt of an application in writing, make an order in accordance with this Act for the payment of compensation.

(2) The Board may, under subsection (1), order the payment of compensation

(a) to or for the benefit of the injured person,

(b) to any person, in respect of

(i) expenses incurred by that person as the result of the death of the victim, or

(ii) pecuniary loss suffered by or expenses incurred by that person as the result of an injury to the victim if the maintenance of the victim is the responsibility of that person,

or,

(c) to any one or more of the dependants of a victim.

(3) The Board shall not make an order for compensation

(a) if the application for compensation is made after the expiration of one year from the date of the injury or death, as the case may be, or

(b) if the injury or death, as the case may be, and the act or omission or the event resulting in hte injury or death are not reported within a reasonable time after the happening thereof to the proper law enforcement authority,

unless the applicant for the compensation provides to

the Board an explanation considered reasonable by the Board of the failure to make the application within the year or to report the matter to the proper law enforcement authority within a reasonable time, as the case may be.

(4) Subsection (1) does not apply to a person who is convicted of a criminal offence that arises out of the events in respect of which he received his injury.

2.1(1) When a person's property, whether real or personal, is destroyed or damaged while a peace officer is endeavouring to

(a) prevent a criminal offence or a suspected criminal offence, or

(b) apprehend an offender or suspected offender who has committed or is suspected of having committed a criminal offence or a suspected criminal offence,

that is within the description of any of the criminal offences set out in Schedule 1, the Board may, on receipt of an application in writing, make an order in accordance with this Act for the payment of compensation.

(2) The Board may, under subsection (1), order the payment of compensation

(a) to or for the benefit of the person whose property was destroyed or damaged, or

(b) to any one or more of the dependants of a victim.

(3) The Board shall not make an order for compensation

(a) if the application for compensation is made after the expiration of 1 year from the date of the destruction of or damage to the property, or

(b) if the destruction of or damage to the property and the act causing the destruction or damage are not reported within a reasonable time after the happening thereof to the proper law enforcement authority,

unless the applicant for the compensation provides to the Board an explanation considered reasonable by the Board of the failure to make the application within the year or to report the matter to the proper law enforcement authority within a reasonable time, as the case may be.

(4) Subsection (1) does not apply to a person who is

convicted of a criminal offence that arises out of the events in respect of which the property was destroyed or damaged.

(5) The amount of compensation awarded to any one victim under subsection (1) shall not exceed $10,000.

3(1) The Board shall, on receipt of an application for the payment of compensation, fix a time and place for the hearing of the application and shall give written notice of the time and place to the applicant and to any other party that the Board considers to be interested in the proceedings.

(2) When a person entitled to apply for the payment of compensation

(a) is a minor, the application may be made on his behalf by his parent or guardian or by some person that the Board may direct, or

(b) is a person of unsound mind, the application shall be made on his behalf by his committee or, if the person has no committee, by some person that the Board may direct.

(3) When a notice in respect of the hearing of an application for the payment of compensation is required to be served

(a) on a person of unsound mind for whom no committee or guardian has been appointed, the notice may be served on the Public Trustee and from the time of the service the Public Trustee shall attend actively to the interests of that person before the Board, or

(b) on a minor who is residing at the home of his parents or guardian, the notice may be served on either of the parents or on the guardian, as the case may require, and from the time of the service the parent or guardian shall attend actively to the interests of the minor before the Board.

4(1) Subject to subsection (2), the hearing by the Board of an application for the payment of compensation shall, except where the Board considers that the hearing or part of it should be held in private, be open to the public.

(2) A hearing by the Board of an application for the payment of compensation shall be held in private when

(a) the person

(i) whose act or omission caused the injury

or death referred to in section 2,

(ii) who committed or is suspected of having committed the criminal offence or suspected criminal offence referred to in section 2.1(1)(a), or

(iii) who is an offender or suspected offender referred to in section 2.1(1)(b),

has not been charged with a criminal offence or, if charged, was not convicted of a criminal offence, (b) it would not be in the interests of the victim, or of the dependants of the victim, of an alleged sexual offence to hold the hearings in public, or

(c) it would not be in the interests of public morality to hold the hearings in public.

5 A person appearing before the Board in respect of an application for the payment of compensation may appear and be represented by counsel.

6(1) The Board may receive in evidence any statement, document, information or matter that, in its opinion, may assist it to deal effectually with the matter before it, whether or not the statement, document, information or matter would be admissible as evidence in a court of law.

(2) If a person is convicted of a criminal offence in respect of an act or omission on which a claim under this Act is based, proof of the conviction shall, after the time for an appeal has expired or, if an appeal was taken, it was dismissed and no further appeal is available, be taken as conclusive proof that the offence has been committed.

7 Notwithstanding that a person for any reason is legally incapable of forming a criminal intent, the Board may, for the purposes of this Act, deem him to have intended an act or omission that caused injury or death for which compensation is payable under this Act.

8(1) The Board, in making an order for the payment of compensation, shall consider and take into account all circumstances it considers relevant to the making of the order and, without limiting the generality of the foregoing, the Board shall consider and take into account any behavior that directly or indirectly contributed to the injury or death of the victim or to the destruction of or damage to the victim's property.

(2) The Board may decline to make an order for compensation or may reduce the amount of compensation it would otherwise order if the victim

(a) fails to provide any information or documentation that the Board may require that relates to the claim for compensation,

(b) does not co-operate with a law enforcement agency in relation to the investigation of the alleged crime or the identification and prosecution of the alleged offender,

(c) refuses to submit to a medical examination by a duly qualified medical practitioner appointed by the Board, or

(d) refuses to testify under oath at a hearing by the Board.

9(1) Compensation may be awarded by the Board under section 2 in respect of any one or more of the following matters

(a) expenses actually and reasonably incurred as a result of the victim's injury or death and any other expenses that, in the opinion of the Board, it was necessary to incur;

(b) pecuniary loss to the victim resulting from the total or partial incapacity of the victim to work;

(c) pecuniary loss to dependants as a result of the victim's death;

(d) maintenance of a child born as a result of rape;

(e) other pecuniary loss resulting from the victim's injury.

(2) When the injury to a person occurred in the circumstances mentioned in section 2(1)(b), the Board may, in addition to the matters set out in subsection (1), award compensation to the injured person, in an amount not exceeding $10,000, as damages for physical disability or disfigurement and pain and suffering.

(3) The Board shall not make an order for the payment of compensation under section 2

(a) for loss of or damage to property, except clothing, eye-glasses or other like property on the person of the victim,

(b) in respect of offences arising out of the

operation of a motor vehicle, except as provided in subsection (4), or

(c) when the amount of compensation would be less than $100.

(3.1) Subsection (3)(a) does not preclude a victim from being awarded compensation under section 2.1.

(4) If a person is killed and the death is a direct result of an act or omission of another person that occurred in Alberta and is within the description of any of the criminal offences set out in Schedule 2, a person who was a spouse of the deceased person within the meaning of section 1(2) may, subject to all the other requirements of this Act, be paid compensation.

10(1) When, with respect to an applicant under section 2,

(a) the applicant is in actual financial need, and

(b) it appears to the Board that it will probably award compensation to the applicant,

the Board may, in its discretion, order interim payments to the applicant in respect of maintenance and medical expenses and, if compensation is not awarded, the amount so paid is not recoverable from the applicant.

(2) In an order for the payment of compensation, the Board may provide for all or part of the cost of measures to rehabilitate or retrain the victim.

11 In determining the amount to be awarded to an applicant under section 2, the Board shall deduct any payment or benefit

(a) made or provided by the person whose act or omission resulted in the injury or death, and

(b) received or to be received by the applicant in respect of his injury or by his dependants in respect of the death of the victim under

(i) the *Workers' Compensation Act* or any equivalent Act of Canada or of a province, or

(ii) any policy or contract of insurance or other arrangement that provides for payment to the victim or his dependants on an injury to or death of the victim, other than payments made pursuant to the Canada Pension Plan.

11.1 In determining the amount of compensation to be paid under section 2.1, the Board shall deduct any payment or benefit

(a) made or provided by

(i) the person who committed or is suspected of having committed the criminal offence or suspected criminal offence referred to in section 2.1(1)(a), or

(ii) the offender or suspected offender referred to in section 2.1(1)(b),

or

(b) received or to be received by the applicant in respect of the destruction of or damage to his property under any policy or contract of insurance or other arrangement that provides for payment to the victim or his dependants on the destruction of or damage to the victim's property.

11.2(1) The Board may, with respect to a hearing, inquiry or other proceeding under this Act, make any order as to costs that it considers appropriate.

(2) Any compensation or other amount awarded as costs paid or payable under this Act is not subject to garnishment, attachment, seizure or any legal process and is not assignable.

12(1) Subject to this Act and the regulations, when the Board makes an order for the payment of compensation it may award any amount it thinks fit and compensation so awarded may be a lump sum or periodical payments during any period the Board thinks fit, or both.

(2) An order for the payment of compensation may be made subject to any terms and conditions the Board thinks fit

(a) with respect to the payment, disposition, allotment or apportionment of the compensation to or for the benefit of the victim or the dependants, or for any other person, or any of them, or

(b) as to the holding of the compensation or any part of it in trust for the victim or the dependants, or any of them, whether as a fund for a class or otherwise.

(3) Any compensation payable for expenses under

section 9 may, in the discretion of the Board, be paid directly to the person entitled to it.

13(1) When the Board makes a decision on an application it shall furnish to each person affected by it a written statement setting out

(a) the findings of fact on which it based its decision, and

(b) the reasons for the decision.

(2) When the Board makes an order for the payment of compensation, a copy of the order shall be sent by the Board to the Attorney General.

14(1) An applicant for or a person awarded compensation shall forthwith notify the Board of any action he has brought against

(a) the person whose act or omission caused the injury or death referred to in section 2,

(b) the person who committed or is suspected of having committed the criminal offence or suspected criminal offence referred to in section 2.1(1)(a), or

(c) the person who is an offender or suspected offender referred to in section 2.1(1)(b).

(2) The Board may request an applicant for or a person awarded compensation to bring an action against

(a) the person whose act or omission caused the injury or death referred to in section 2,

(b) the person who committed or is suspected of having committed the criminal offence or suspected criminal offence referred to in section 2.1(1)(a), or

(c) the person who is an offender or suspected offender referred to in section 2.1(1)(b),

and if he fails to do so within the time specified by the Board, the action may be commenced and maintained in his name and on his behalf by the Attorney General.

(3) The consent of the Board shall be obtained to a settlement of an action referred to in subsection (1) or (2) that is commenced and a settlement without that consent is void.

(4) If an applicant for or person awarded compensation fails to bring or prosecute an action or fails to

co-operate with the Attorney General in an action brought on his behalf, the Board

(a) may decline to award compensation, or

(b) may, if compensation was previously awarded, reduce or revoke the award.

15(1) If compensation is awarded by the Board and the person who received or is receiving the compensation receives money as a result of an action commenced in respect of the injury or death or the destruction of or damage to property or by settlement of that action or otherwise, that money shall be applied

(a) first, in payment of the legal costs and fees incurred in obtaining the money, and

(b) secondly, in reimbursing the Crown for compensation paid,

and the balance, if any, goes to the person or dependants by or for whom the money was recovered.

(2) The Board may reduce or discontinue any monthly compensation payments to a person injured or a dependant of a person killed if he has received any money from the offender who caused the injury or death.

(3) Any compensation required to be refunded under subsection (1) may be recovered by the Attorney General as a debt due the Crown.

16 If a person is convicted of an offence under section 19 and the Board has made an award of compensation on the basis of the evidence of the convicted person, the Attorney General may recover from the person to whom the compensation was paid all or a portion of the compensation as a debt due the Crown.

17(1) The Board may at any time of its own motion or on the application of the Attorney General, the victim, the dependant or the offender, vary an order for payment of compensation in any manner the Board thinks fit, whether as to the terms of the order or by increasing or decreasing the amount ordered to be paid or otherwise.

(2) In dealing with an application under subsection (1), the Board shall consider

(a) any new evidence that has become available,

(b) any change of circumstances that has occurred since the making of the order or any variation of

it, or that is likely to occur, and

(c) any other matter the Board considers relevant.

18(1) On a question of jurisdiction or a question of law, an appeal lies from an order or decision of the Board to the Court of Appeal.

(2) Except as provided in subsection (1), there is no appeal from an order or decision of the Board and its proceedings, orders and decisions are not reviewable by any court of law or by certiorari, mandamus, prohibition, injunction or other proceeding.

19 A person who, in any hearing, inquiry or other proceeding under this Act, knowingly

(a) makes a false statement to the Board or a member of it, or

(b) misleads or attempts to mislead the Board,

is guilty of an offence and liable to a fine of not more than $500 and in default of payment to imprisonment for a term not exceeding 60 days.

20(1) There is hereby established a board with the name The Crimes Compensation Board.

(2) The Board shall be composed of 3 members appointed by the Lieutenant Governor in Council, one of whom shall be named as chairman and another who shall be named as vice-chairman.

(3) One of the members of the Board shall be a barrister and solicitor.

(4) A member of the Board who is not an employee of the Government may be paid such remuneration for his services and any allowances for travelling and other expenses that the Lieutenant Governor in Council determines.

21(1) The chairman is the chief executive officer of the Board and shall preside at all meetings, inquiries and hearings of the Board.

(2) During the illness or absence of the chairman for any other reason, or if the office of chairman is vacant, the vice-chairman shall act in his place.

22(1) Except as otherwise provided in this Act or the

regulations, the Board may determine its own procedure.

(2) Two members of the Board constitute a quorum for the transaction of business.

(3) In the event of a vacancy on the Board, the remaining members may exercise the powers and carry out the duties of the Board.

23 The Board and each member of it have, for the purposes of this Act, all the powers of commissioners appointed under the *Public Inquiries Act*.

24(1) The Lieutenant Governor in Council may make regulations

(a) prescribing the procedure to be followed in respect of applications to the Board and in respect of proceedings under this Act, including the procedure for the service of notices and documents;

(b) prescribing fees to be paid in respect of applications or proceedings under this Act;

(c) fixing the maximum amount of compensation that may be awarded in respect of any of the matters set out in section 9(1);

(d) designating certain payments or amounts, or certain classes of payments or amounts, received or to be received by a victim or his dependants that must or must not be considered by the Board in determining compensation;

(e) generally, for carrying out this Act.

(2) The Lieutenant Governor in Council may amend Schedule 1 or 2

(a) by adding to it a description of any criminal offence, and

(b) by deleting from it the description of any criminal offence set out in it.

25(1) This Act applies in respect of claims for compensation under section 2 arising from injury or death occurring on or after October 1, 1969.

(2) Notwithstanding subsection (1), if a person was injured in one of the circumstances mentioned in section 2(1) before October 1, 1969 and if the injured person

(a) is still wholly or partly incapacitated, and

(b) is still in actual financial need,

the Board, in its discretion, may make an order for the payment of compensation to the injured person.

(3) Any payment made pursuant to subsection (2) is made ex gratia and section 18(1) does not apply to an order or decision of the Board acting under subsection (2).

26 This Act applies in respect of claims for compensation under section 2.1 arising from destruction of or damage to property occurring after the coming into force of section 2.1.

SCHEDULE 1

Section of Criminal Code (Canada)	Description of Offence
66	taking part in a riot
76.1	hijacking of aircraft
76.2	endangering safety of aircraft in flight
76.3	taking on board a civilian aircraft offensive weapons or explosive substances
78	failure to take reasonable care in respect of explosives where death or bodily harm results
79	intentionally causing death or bodily harm by explosive substance
84	careless use of firearm
144	rape
145	attempted rape
146	sexual intercourse with female under 14 or under 16 years of age
149	indecent assault on female
156	indecent assault on male
176	common nuisance causing harm

197	failure to provide necessaries
200	abandoning child
201(a)	causing bodily harm to apprentice or servant
203	causing death by criminal negligence
204	causing bodily harm by criminal negligence
218	murder
219	manslaughter
222	attempted murder
228	causing bodily harm with intent
229	administering poison
230	overcoming resistance to commission of offence
231	setting traps likely to cause death or bodily harm
232	interfering with transportation facilities
240(1)	dangerous operation of vessel or towed object
240(4)	impaired operation of vessel
241	impeding attempt to save life
245(1)	common assault
245(2)	assault causing bodily harm
246(1)	assault with intent to commit indictable offence
246(2)	assault interfering with lawful process
247(1)	kidnapping
247(2)	illegal confinement
303	robbery
381	intimidation by violence
387(2)	mischief causing actual danger to life
389	arson
392	causing fire resulting in loss of life
393	false fire alarm

SCHEDULE 2

Section of Criminal Code (Canada)	Description of Offence
233	criminal negligence in operation of motor vehicle; dangerous driving
234	impaired driving