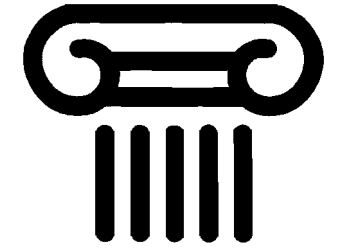

ALBERTA
LAW REFORM
INSTITUTE

FAMILY LAW PROJECT

OVERVIEW

Report for Discussion No. 18.1

October 1998

ALRI Family Law Project

Reports

Report No. 65—*Family Relationships: Obsolete Actions* (March 1993)

Report for Discussion No. 18.1—*Overview* (October 1998)

Report for Discussion No. 18.2—*Spousal Support* (October 1998)

Report for Discussion No. 18.3—*Child Support* (October 1998)

Report for Discussion No. 18.4—*Child Guardianship, Custody and Access* (October 1998)

Statutory Provisions Under Review

Child Welfare Act, R.S.A. 1984, c. C-8.1, Part 5

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

Maintenance Enforcement Act, S.A. 1985, c. M-0.5 (as to power of court to enforce its own order)

Maintenance Order Act, R.S.A. 1980, c. M-1 (as to spousal and child support)

Parentage and Maintenance Act, S.A. 1990, c. P-0.7

Provincial Court Act, R.S.A. 1980, c. P-20, Part 3

Surrogate Court Act, R.S.A. 1980, c. S-28, ss 10, 13

Abbreviations

ALRI	Alberta Law Reform Institute
CIR	Canadian Institute for Research
CRILF	Canadian Research Institute for Law and the Family
CWA	*Child Welfare Act*
Divorce Act	*Divorce Act, 1985*, R.S.C. 1985 (2nd Supp.), c. 3
DRA	*Domestic Relations Act*
FPTFLC	Federal/Provincial/Territorial Family Law Committee
MEA	*Maintenance Enforcement Act*
MOA	*Maintenance Order Act*
P&MA	*Parentage and Maintenance Act*
PCA	*Provincial Court Act*
RFD	Report for Discussion
SCA	*Surrogate Court Act*
SCC	Supreme Court of Canada

Related ALRI Publications

Reports

ALRI Report No. 74—*Protection Against Domestic Abuse* (February 1997)

ALRI Report No. 60—*Status of Children: Revised Report, 1991* (March 1991)

ALRI Report No. 53—*Towards Reform of the Law Relating to Cohabitation Outside Marriage* (June 1989)

ALRI Report No. 52—*Competence and Human Reproduction* (February 1989)

ALRI Report No. 45—*Status of Children, Revised Report, 1985* (November 1985)

ALRI Report No. 43—*Protection of Children's Interests in Custody Disputes* (October 1984)

ALRI Report No. 27—*Matrimonial Support* (March 1978)

ALRI Report No. 26—*Family Law Administration: Court Services* (April 1978)

ALRI Report No. 25—*Family Law Administration: The Unified Family Court* (April 1978)

ALRI Report No. 20—*Status of Children* (June 1976)

Reports for Discussion

ALRI Report for Discussion No. 15—*Domestic Abuse: Toward an Effective Legal Response* (June 1995)

ALRI Report for Discussion No. 6—*Sterilization Decisions: Minors and Mentally Incompetent Adults* (March 1988)

Research Papers

ALRI Research Paper No. 20—*Court-Connected Family Mediation Programs in Canada* (May 1994)

ALRI Research Paper No. 13—*Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (March 1981) (Vol. 1, *Summary Report*; vol. 2, *Technical Reports*)

LIST OF GENERAL PREMISES

GENERAL PREMISE 1
Compatibility with federal Divorce Act. Alberta legislation should be compatible with the federal *Divorce Act*.

GENERAL PREMISE 2
Inclusiveness. The substantive law and remedies embodied in Alberta legislation on family matters should be as inclusive as is constitutionally open to a province or territory.

GENERAL PREMISE 3
Effective remedies. Alberta legislation should ensure that effective remedies are available on separation.

GENERAL PREMISE 4
Equality among children. Rights and responsibilities relating to children should be based on the relationship between parent and child rather than the relationship between the child's parents.

GENERAL PREMISE 5
Individual fairness. The law should retain the flexibility necessary to achieve fairness in an individual case.

GENERAL PREMISE 6
Consistency with other Alberta legislation. Alberta legislation on spousal support and child support, guardianship, custody and access should be consistent with other Alberta law.

GENERAL PREMISE 7
Consistency with legislation in other Canadian provinces and territories. In developing legislation for Alberta, policy makers should consider whether it is desirable for Alberta legislation to be consistent with legislation in other Canadian provinces or territories.

GENERAL PREMISE 8
Uniform substantive law regime. Alberta legislation should create a uniform and coherent regime of substantive family law.

GENERAL PREMISE 9
Choice of court. Given the existing court structure, Alberta legislation should allow parties to choose the forum in which the remedy is sought, Provincial Court, Family Division, or Court of Queen's Bench.

GENERAL PREMISE 10

Public v. *private law*. The recommendations for the reform of family law must show an understanding of the interrelationship between private and public law rights and responsibilities.

CHAPTER 1 THE PROJECT

A. Purpose

As will be seen from this *Overview*,

• much of Alberta family law is out-dated,

• the family law provisions are scattered piecemeal through the statute books,

• the statutory provisions are filled with inconsistencies, and

• family law is subject to the authority of diverse bodies, both governmental and judicial.

The purpose of the Alberta Law Reform Institute (ALRI) family law project is to respond to these shortcomings by recommending legislation to modernize, rationalize and consolidate Alberta family law. Providing a clear, sound, contemporary legislative framework should assist decision making by courts, litigants and other persons dealing with family law matters.

Our recommendations, if implemented, will bring family law in Alberta more closely into line with the federal *Divorce Act* and legislation in other provinces.

B. Use and Organization of this Overview

As stated in the Preface, this *Overview* shapes the framework for consideration of the issues raised in ALRI RFD No. 18.2 on *Spousal Support*, ALRI RFD No. 18.3 on *Child Support* and ALRI RFD No. 18.4 on *Child Guardianship, Custody and Access*. It provides background information that is common to all three reports for discussion (RFDs) and is designed to be read in conjunction with them, taken either individually or as a set. We will introduce these RFDs under heading C. Scope of Project.

This *Overview* consists of five chapters. In Chapter 1 (this chapter), we delineate the purpose and scope of the project, mention related ALRI work

which grew as offshoots from this project and identify areas of family law that are excluded from the project. These areas have been excluded for various reasons. It may be that we are satisfied that the existing law is functioning well, or that reform requires the commitment and involvement of other institutions, or that we do not have resources available to examine a particular area of law at this time but think that a law reform project should be initiated in the future.

C. Scope of Project

In the early 1990's, aware that the reform of Alberta family law lagged behind the reforms taking place across Canada, the ALRI undertook a project to recommend reform of the *Domestic Relations Act*[1] *(DRA)* — Alberta's principal family law statute. We completed our initial work with the publication, in March 1993, of our Report No. 65 on *Family Relationships: Obsolete Actions*. As the title indicates, that report covered obsolete actions having to do with family relationships.

After publishing Report No. 65, in addition to the *DRA*, we expanded the project to encompass law in other statutes. The discussion in the current series of RFDs and our recommendations for reform include provisions in the *Maintenance Order Act*[2] *(MOA)*, *Parentage and Maintenance Act*[3] *(P&MA)*, *Provincial Court Act (PCA)*, Part 3,[4] *Child Welfare Act (CWA)*, Part 5,[5] *Surrogate Court Act (SCA)*, sections 10 and 13,[6] and *Maintenance Enforcement Act* (MEA). For ease of reference, the statutory provisions under review are listed in the front of this report.

We also realized that formulating recommendations on any one of the included topics requires an understanding, in depth, of the issues at stake in the others. We therefore decided to publish documents containing

---

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

[2] R.S.A. 1980, c. M-1.

[3] S.A. 1990, c. P-0.7.

[4] R.S.A. 1980, c. P-20.

[5] S.A. 1984, c. C-8.1.

[6] R.S.A. 1980, c. S-28.

recommendations on family law reform in other areas in a set rather than sequentially, as we normally do. That set consists of this *Overview* and three accompanying RFDs:

- RFD No. 18.1—*Overview.* This document shapes the framework for consideration of the issues raised in the three RFDs and provides background information that is common to all of them. It is designed so that it can be read in conjunction with any one of these RFD's individually or the set as a whole.

- RFD No. 18.2—*Spousal Support.* In this report, we examine the financial rights and obligations of spouses to support each other. The report includes an examination of the support rights and obligations of men and women who, although not married to each other, are living together in a marriage-like relationship.

- RFD No. 18.3—*Child Support.* In this report, we examine the financial obligations of parents to support their children, including children who have reached adult age. The report includes an examination of the support obligations owed by persons who stand in the place of parents (*in loco parentis*), for example, step-parents. Reporting on child support separately from spousal support underscores that different rationales underlie the support obligation for spouses and children.

- RFD No. 18.4—*Child Guardianship, Custody and Access.* In this report, we cover the responsibilities of parents, or parent substitutes, to provide care, guidance, control and protection in bringing up children. Those responsibilities are contained within the operative concepts of guardianship, custody and access.

Each of these RFDs focuses on the basic principles and policy that the law should carry out, that is, the reform of the substantive law. We also include recommendations with respect to the court powers that are necessary to give effect to the substantive law.

Following consultation and the finalization of our recommendations, we intend to propose the consolidation of Alberta family legislation into a single statute.

D. Related ALRI Work

Work in two further areas has emerged from our work on this project. We published Research Paper No. 20 on *Court-connected Family Mediation Programs in Canada* in May 1994. The research for this publication was conducted with the cooperation of the Premier's Council in Support of Alberta Families. We published Report No. 74 on *Protection Against Domestic Abuse* in February 1997.[7] We initiated this project for the purpose of recommending reform of the civil remedies available to persons at risk of domestic abuse. Other ALRI publications on family law and related matters are listed on page v.

E. Topics Excluded

This project does not provide a comprehensive review of all aspects of the law relating to family relationships. Therefore, it is important to identify the areas that are excluded from this study. As stated above, various explanations account for these exclusions. In some cases, we are satisfied that the existing law is functioning well. In other cases, it is our opinion that reform requires the commitment and involvement of other institutions. In still other cases, we simply do not have resources available to examine a particular area of law at this time but think that a law reform project should be initiated in the future.

The exclusions include: public law matters; a number of specific substantive family law areas which stretch the scope of this project; and, with one exception, the enforcement of family law orders; and court structure, jurisdiction and process.

1. Restriction to private law

The project is restricted to the operation of rights, obligations and responsibilities that exist in the private law sphere.

This project does not include consideration of the government role in providing income assistance or security as a matter of public law, or in

---

[7] The Alberta Legislature passed the *Protection Against Family Violence Act* on April 30, 1998. The Act will come into force on a date yet to be fixed by Proclamation.

enforcing private support orders.[8] The provision and recoupment of support by the government is dealt with in the *Social Development Act*,[9] the *Income Support Recovery Act*,[10] and the *Maintenance Enforcement Act* (*MEA*).[11]

This project does not include the public law issue of child protection. This is provided for in the *CWA*.[12] The *CWA* regulates the power of the state to intervene for the purpose of providing protective services to children under 18 years of age whose "survival, security or development" is endangered.[13] However, RFD No. 18.4 includes consideration of Part 5 of the *CWA* on private guardianship.

We are sensitive to the intricacies of the relationship between private law and public law rights, obligations and responsibilities, as is demonstrated by our discussion, in chapter 3, of the interaction between public and private law and our adoption, in chapter 5, of General Premise 10.

2. Specific family law areas

a. Review Not Indicated

i. Establishing parentage

In general, our recommendations do not include consideration of the *DRA*, Part 8, on Establishing Parentage. This Part was legislated pursuant to our earlier recommendations in our Report Nos. 20, 45 and 60 on the *Status of Children* and we think its provisions generally should be continued. In RFD No. 18.3, however, we have recommended modification of the definition of "parent" in section 63, and we have adopted the modified definition in RFD No. 18.4.

The *P&MA* also contains provisions having to do with establishing parentage for the purposes of child support. Most of these provisions merely duplicate those found in the *DRA*. Where they do not, we recommend that

---

[8] See *infra* at 9.

[9] R.S.A. 1980, c. S-16.

[10] R.S.A. 1980, c. I-1.7.

[11] S.A. 1985, c. M-0.5.

[12] *Supra*, note 5.

[13] See RFD No. 18.4 at 12.

similar provisions be included in legislation that is enacted to reform child support law in Alberta.

ii. Formation of relationships

Certain Alberta statutes regulate the formation of relationships or relationship status. Examples include: the *Marriage Act*,[14] which specifies the formalities that attend a valid marriage; the *Legitimacy Act*,[15] which provides for the legitimation of certain children born outside marriage; and the *CWA*, Part 6, which regulates adoption. This project is focussed on what happens when the relationship between spouses or parents breaks down. For this reason, we have not included a review of this legislation.

There are other reasons, as well:

We have not heard complaints about the operation of the *Marriage Act*, so therefore see no need to include it in our current project.

We recommended the abolition of the concept of illegitimacy in our Report Nos. 20, 45 and 60 on the *Status of Children*.[16] Most, but not all of the recommendations we made in these reports have been enacted. Their full implementation would mean the repeal of the *Legitimacy Act*. We continue to endorse that repeal.

For the purposes of this project, we accept the effect of an adoption. An adopted parent steps into the shoes of the parent of a child conceived and born within marriage: where an adoption order has been granted, the adoptive parent becomes the parent and guardian of the child for all purposes "as if the child had been born to that parent in lawful wedlock."[17] Except where a person adopts the child of their spouse, an adoption order terminates

---

[14] R.S.A. 1980, c. M-6.

[15] R.S.A. 1980, c. L-11.

[16] ALRI Report No. 20, *Status of Children* (June 1976); ALRI Report No. 45, *Status of Children: Revised Report, 1985* (November 1985); and ALRI Report No. 60, *Status of Children: Revised Report 1991* (March 1991).

[17] *Supra*, note 5, s. 65 (Part 6).

the child's relationship with a former parent.[18] Although in a sense adoption straddles the boundary between public and private law, it is usually dealt with in the public law realm. For this reason, we see no need to review the law that creates the adoptive relationship as part of this project.

iii. Guardianship of adult children

This project is confined to issues of guardianship, custody or access that relate to persons under 18 years of age. It does not include issues relating to the guardianship of adults who are not able to care for themselves. In Alberta, these issues are governed by the *Dependent Adults Act*.[19] In forming our recommendations with respect to children under 18 years, we will be looking at consistency with the law that governs dependent adults.

As stated previously,[20] the obligation of parents, in specific circumstances, to support children who are young adults is included within the scope of this report.

b. Future Law Reform

i. Parentage of child conceived with assistance of new reproductive technology

The law is unclear about the position of third parties who contribute genetic material — sperm or ovum — for use in assisted reproduction, or of women who provide their womb to gestate a fetus conceived with genetic material obtained from others. The issues arising from procreation through the use of new reproductive technologies require separate study. We do not propose to examine them in this project.[21]

ii. Protection of child's property

This project is restricted to issues that relate to the care, guidance, control and protection of the child's person. In general, we do not look at the management and protection of the child's property (which is sometimes also referred to as guardianship). In Alberta, this subject is regulated, in part, by

---

[18] *Ibid.* ss. 85(2) and (3).

[19] R.S.A. 1980, c. D-32.

[20] *Supra* at 3.

[21] The 1991 revisions to the *Uniform Child Status Act* adopted by the Uniform Law Conference of Canada are instructive in this regard.

the *Minor's Property Act*[22] and the *Public Trustee Act*.[23] The law governing children's property is confusing and needs review. We think that topic should be undertaken as a future law reform project. We will refer to the protection of a child's property only to the extent necessary to draw the distinction between the child's person and property and define the limits of guardianship of the person.

This restriction does not affect our review, in ALRI RFD No. 18.3 on *Child Support*, of the court power to make orders for the benefit of a child with respect to property owned by a parent.

iii. Other familial support obligations

This project embraces the support rights arising from the spousal relationship or the relationship of parent to child. The obligation of family members other than spouses and parents to support each other lends is another area that lends itself to future review.

In the existing law, the *MOA* contains these obligations.[24] Under the *MOA*:

- children (of any age) have an obligation, where they are able, to support a parent who is disabled or destitute[25]

---

[22] R.S.A. 1980, c. M-16.

[23] R.S.A. 1980, c. P-36.

[24] *Supra*, note 2.

[25] *Ibid.* s. 2(1). The *MOA* originated with the English *Poor Laws* which commenced in 1576 and had the purpose of relieving the burden which fell on the parish. It is rarely the basis for application although recent cases indicate a possible revival of its use. The current political and economic climate increases the likelihood of court proceedings to enforce this obligation. The public law dimension of this legislation is evident from the fact that it permits proceedings to be commenced by the person to whom the obligation is owed or by certain persons holding public office: s. 4(1).

Harsh criticisms have been levelled at the economic and social ramifications of such legislation as it applies to extended family relationships: Freda Steele, "Financial Obligations Toward the Elderly: Filial Responsibility Laws," in Margaret E. Hughes and E. Diane Pask (eds.) *National Themes in Family Law*, (Carswell, 1988) 99 at 112.

• grandparents have an obligation to support their grandchildren under age 16,[26] and to support an older grandchild who is disabled or destitute.[27] The obligation arises only where the father and mother are both unable and the grandparent is able to provide support.[28] The grandmother is liable only if the grandfather is unable to provide support.[29]

• grandchildren (of any age) have an obligation to support a grandparent who is disabled or destitute. The obligation arises only where the grandparent's child — who is also the grandchild's parent — is unable to provide support.[30]

3. Enforcement of orders

With one exception, in these RFDs, we do not make recommendations for the enforcement of orders no matter whether enforcement is sought within the province, extra-provincially or internationally.

RFD No. 18.2 on *Spousal Support* and RFD No. 18.3 on *Child Support* do not contain recommendations regarding the enforcement of support rights and obligations. "Automatic" procedures for the enforcement of spousal and child support orders already exist in the *MEA*.[31] The improved collection procedures established by this statute are consistent with, but in several particulars more stringent than, the recommendations we made in ALRI Report No. 27 on *Matrimonial Support* which was published in March 1978. The enforcement of support orders in other jurisdictions is governed by the *Reciprocal Enforcement of Maintenance Orders Act, 1980*.[32]

Enforcement provisions contained in the *DRA*, Part 4, predate the enactment of the *MEA*. Although the *MEA* provided for their repeal on proclamation, that proclamation has not taken place. We think that is

---

[26] *Ibid.* s. 2(2). As defined in s. 1, "father" includes grandfather and "mother" includes grandmother.

[27] *Ibid.* s. 2.

[28] *Ibid.* s. 3(2)(b).

[29] *Ibid.* s. 3(2)(c).

[30] *Ibid.* s. 3(3).

[31] *Supra*, note 11.

[32] R.S.A. 1980, c. R-7.1.

because these provisions have proved themselves useful. We think that as long as it exists as a forum having jurisdiction over spousal and child support, the Provincial Court of Alberta should continue to have these powers of enforcement. To achieve this result, we recommend, in Chapter 10 of RFD No. 18.2 on *Spousal Support* and RFD No. 18.3 on *Child Support*, that the *MEA* should be amended to empower any court with jurisdiction over spousal or child support to enforce its own orders to the fullest extent constitutionally allowable without curtailing the jurisdiction of the Provincial Court to vary its own order.

RFD No. 18.4 on *Child Guardianship, Custody and Access* does not contain specific recommendations relating to the enforcement of child guardianship, custody or access orders. Because these orders can be revisited, many of the powers associated with the jurisdiction to make an order — or to vary, suspend or rescind a previous order — give the court discretionary powers that go a long way toward ensuring compliance within Alberta. Cross-jurisdictional procedures for the enforcement of child custody orders already exist in the *Extra-Provincial Enforcement of Custody Orders Act*[33] and the *International Child Abduction Act*.[34] As might be imagined from its title, the *Extra-Provincial Enforcement of Custody Orders Act*[35] defines the criteria on which Alberta courts will enforce or vary custody orders that have been granted by courts or tribunals outside Alberta.

Similarly, RFD No. 18.4 does not contain recommendations about the remedies for child abduction under civil or criminal law. The *International Child Abduction Act*[36] renders the *Hague Convention on the Civil Aspects of International Child Abduction* applicable in Alberta. Criminal law is, of course, a federal matter.

4. Court structure, jurisdiction and process

Generally, we have excluded from consideration in this project constitutional and other issues relating to court structure, the assignment of court

---

[33] R.S.A. 1980, c. E-17.

[34] S.A. 1986, c. I-6.5.

[35] *Supra*, note 33.

[36] *Supra*, note 34.

jurisdiction and court procedures. In 1978, in ALRI Report Nos. 25 and 26, we made recommendations for a Unified Family Court supported by a range of services. These reports have not been acted on. The recommendations may now be dated. Even if they are still current, it is clear that court reform would require a significant political will. Whereas we could respond to such a will, we cannot generate it. Therefore, for the purposes of this project, we accept the continuation of the existing court system, consisting at the trial level of the Court of Queen's Bench of Alberta, the Provincial Court of Alberta (Family Division) and the Surrogate Court of Alberta.

We have also excluded consideration of the reform of the processes employed to resolve family law issues. We note that, as a dispute resolution process, litigation is adversarial and not always helpful in an area like family law where the resolution of the legal issues is complicated by the parties' unresolved emotional issues. Dispute resolution processes which may be helpful include negotiation, counselling, conciliation, mediation and arbitration.[37] Process issues are complex in their own right.

As the royal commission that reviewed the civil justice system in Ontario concluded, what may be needed as a precursor to reform is "a 'Family Justice Review' which endeavours to do for family what the Civil Justice Review has been able to do for the balance of the civil justice system — a "royal commission" on family law, if you will."[38]

---

[37] ALRI Research Paper No. 20 on *Court-connected Family Mediation Programs in Canada* (May 1994), which contains our initial work in this area, gives information about court-connected mediation and related services in operation in jurisdictions across Canada.

[38] Province of Ontario, *Civil Justice Review : Supplemental and Final Report* (November 1996) at 140.

CHAPTER 2 HISTORICAL DEVELOPMENT OF ALBERTA STATUTE LAW

In this chapter, we provide a brief history of the evolution of Alberta family law since it was first received from England. We then note significant developments in family law federally and in other provinces. Changes in the law respond to new developments, changing times and changing attitudes. We discuss the interplay among these elements in chapter 3, under heading A.

A. Northwest Territories

In 1886, the Parliament of Canada declared the laws of England as of July 15, 1870 to have been received in the Northwest Territories (then including what later became the Yukon Territory and the provinces of Alberta and Saskatchewan), except insofar as they are excluded by competent legislation.[39] The laws of England at that time included a series of public law statutes known as the *Poor Laws,* which were enacted to prevent the burden of indigent people from falling on the state. With respect to the private law relating to married persons, the applicable law was England's *Matrimonial Causes Act, 1857*[40] as it stood on July 15, 1870.[41]

B. Alberta

The *Alberta Act*,[42] which established Alberta as a province in 1905, provided that the laws which were previously in force in that part of the territories included in the new province should continue in force unless repealed or altered by competent legislation. Those laws included England's *Poor Laws*

---

[39] *Dominion Act, 1886* (Can.) 49 Vict., c. 2, s. 3, re-enacted as R.S.C. 1886, c. 50, s. 11, and now R.S.C. 1970, c. N-22, s. 18(1); see also *Power on Divorce*, 2nd ed. (Burroughs, 1964) at 16.

[40] *Divorce and Matrimonial Causes Act, 1857* (U.K.), 20 & 21 Vict., c. 85. Pursuant to legislation enacted in England in 1907, this Act was subsequently renamed the *Matrimonial Causes Act*: see *Power on Divorce*, *ibid.* at 1, note (a).

[41] *Board* v. *Board*, [1919] 2 W.W.R. 940 (P.C.), citing the reasons in *Walker* v. *Walker*, [1919] 2 W.W.R. 935 (Man.).

[42] *Alberta Act, 1905*, R.S.C. 1970, Appendix II, No. 19, s.16.

and the *Matrimonial Causes Act, 1857*.[43] The Alberta *MOA*, first enacted in 1921, carried forward the public law interest in conserving public funds by rendering family members liable to support each other.[44] Where the person liable failed to provide support, the Act enabled certain public officials to apply to obtain summarily a maintenance order. The *MOA* remains on Alberta's statute books today, with very little change. The *Matrimonial Causes Act, 1857* continued in the Northwest Territories and later Alberta virtually unmodified for 57 years from 1870 until the Alberta *DRA* received Royal Assent on April 2, 1927. Apart from a few amendments we will describe, Alberta's *DRA* has remained substantially unaltered since 1927.

1. Spousal support

The *MOA* enacted in 1921 rendered husbands and wives liable to maintain each other, where they were able to do so. It continues to render them liable today.

The *DRA*, first enacted in 1927,[45] governed the private law support obligation between spouses. In contrast to the *MOA*, on marriage breakdown, England's *Matrimonial Causes Act, 1857* and, in turn, Alberta's *DRA* imposed the spousal support obligation on husbands with wives being dependent. The *DRA* added little to the statutory provisions in England's *Matrimonial Causes Act, 1857*. The English approach to grounds for relief by way of support (and hence the Alberta approach) was fault- or matrimonial offence-related. Under the fault doctrine, the entitlement to support is dependent on the blameworthy conduct of the spouse from whom support is sought and the blameless conduct of the spouse seeking support. The commission of a matrimonial offence by the spouse from whom support is sought operates as a condition precedent to an application for support.[46] Where a matrimonial offence is proven, absolute or discretionary bars to

---

[43] *Supra*, note 40.

[44] Other examples of legislation having the purpose of authorizing the state to recover from the father costs incurred by the state in supporting his wife and children included: *An Ordinance respecting the Support of Illegitimate Children Act* (Northwest Territories, c. 9 (1903); the *Children's Protection Act(s)* of Alberta (S.A. 1909 and S.A. 1920) and the *Maintenance and Recovery Act* (R.S.A. 1970). Today, the *Maintenance Enforcement Act* and the *Parentage and Maintenance Act* continue to lend the weight of the state to the enforcement of the spousal and child support obligation.

[45] S.A. 1927, c. 5.

[46] *DRA*, *supra*, note 1, ss. 2, 4 and 6.

relief may operate to disentitle the spouse seeking support.[47] In short, an applicant seeking spousal support must prove that their spouse has committed a matrimonial offence such as adultery, cruelty or desertion. Moveover, the applicant's own misconduct may constitute a bar to an order for support.[48]

The English statutory procedure called upon the plenary, or comprehensive, jurisdiction of the superior courts. A similar plenary jurisdiction exists in the Court of Queen's Bench today under the *DRA*, Part 3 (alimony and maintenance).[49]

The Alberta *DRA* added a summary procedure for obtaining support. This summary jurisdiction is vested in a provincial judge under the *DRA*, Part 4 (protection orders).[50] Its origin is this: England's *Matrimonial Causes Act, 1857* was inadequate to meet the needs of deserted wives in the lower income groups. Accordingly, early in this century, a summary procedure was statutorily devised in England whereby deserted wives could apply to the local magistrates' courts for spousal and child support without recourse to the costly and more formal proceedings available in courts of superior jurisdiction. The *DRA* enacted in 1927 introduced a similar procedure in Alberta. Under this procedure, a deserted wife could obtain an order for support without having to show grounds that would entitle her to some other form of matrimonial relief, such as judicial separation or divorce. The applicant had to prove, however, that she had been deserted by her husband or was living apart from him because of his cruelty or failure without sufficient cause to provide basic support ("food and other necessaries").[51] Adultery was a statutory bar to a deserted wife's claim for support.

---

[47] *Ibid.* ss. 8 and 9.

[48] See Christine Davies, *Family Law in Canada* (Toronto: Carswell, 1984) at 170-73 (c. 9, Alimony as an Independent Remedy) and 245-48 (c. 12, Deserted Wives' and Children's Maintenance Legislation). And see *DRA*, *supra*, note 1, s. 22, which requires the court to have regard to "the conduct of both parties" when support is sought in nullity proceedings.

[49] *DRA*, *supra*, note 1, s. 1.

[50] *Ibid.* s. 27(2).

[51] *Ibid.* s. 27(1).

The 1927 *DRA* added two other provisions to England's *Matrimonial Causes Act, 1857*. It extended the English statutory support provisions to nullity cases. It also made express provision for an independent action for alimony which had previously received some judicial recognition.

Alberta enacted two more significant amendments in 1973.[52] First, the adultery of a deserted wife was removed as a statutory bar to a claim for spousal support. Second, the *DRA* was amended to provide for gender equality: in 1973, husbands were accorded the same rights as wives and became entitled to pursue support claims under either Part 3 or Part 4 of the *DRA*. However, the fault-related approach to support remained unaffected; it continues to the present day.

By a 1985 amendment, the enforcement provisions in Part 4 (sections 28 to 38) were to be repealed in favour of the newly enacted *MEA*, but this repeal has not been proclaimed.[53]

2. Child support

The *MOA* enacted in 1921 rendered mothers and fathers liable to maintain their children up to the age of 16 years and over that age if the child was unable to work and the parents were able to provide support. The obligation of the mother arose only where the father was unable and she was able to provide support. Historically, 19th century amendments to England's *Poor Laws* (a series of statutes which commenced in 1576) made the mothers of children born outside marriage responsible for their support and the *MOA* did the same. Subsequently, other legislation was enacted to assist the mother to obtain child support from the father of a child born outside marriage,[54] and the *MOA* was amended to exclude "illegitimate" children.

In the private law sphere, child support could be obtained, in conjunction with spousal support, under certain provisions of the *DRA*, Parts 2 and 3. Three sections authorize the court to settle property for the benefit of

---

[52] *Attorney General Statutes Amendment Act, 1973 (No. 2)*, S.A. 1973, c. 61, s. 5.

[53] S.A. 1985, c.M-0.5, based in part on recommendations made in ALRI Report No. 27, *Matrimonial Support* (March 1978).

[54] Included in this line of succession are the *Maintenance and Recovery Act*, R.S.A. 1980, c. M-2, and the *P&MA*, S.A. 1990, c. P-0.7.

children on marriage breakdown, nullity or divorce. Another section authorizes the court to order periodic support payments to be made from a neglectful spouse's "profit of trade or earnings." Initially, because the spousal support was owed only by the husband to the wife, under these provisions, the child support obligation was owed only by the father to the child.

Child support, for a child of the marriage, could also be obtained under the same summary procedure as spousal support in the *DRA* enacted in 1927. Again, initially, the obligation was owed only by the father to the child. Child support was available whether or not the applicant spouse had a valid personal claim to support.

The gender equality amendments made in 1973 (referred to in the discussion of spousal support) rendered mothers liable for child support on the same basis as fathers.

In 1995, the definition of child in the *DRA*, Part 4, was amended to bring it into conformity with the age then specified in the *Divorce Act* and some other child support provisions in Alberta legislation (e.g. the *MOA* and the *CWA*). The basic liability to pay support was stipulated to be owed to a child under the age of 16 years, with certain exceptions being made for a child 16 years of age or over.[55] Ironically, the 1997 amendments to the *Divorce Act* extended the basic support liability until the child reaches age of majority (the age specified in the *DRA*, Part 4, before 1995).

In 1997, the *DRA*, Part 4, was amended to provide for the designation or establishment of child support guidelines to be used in determining the amount of support awards.[56] These amendments respond to *Divorce Act* amendments made earlier that year.[57] The Alberta legislation has not yet been proclaimed in force.

Applications for the support of children born outside marriage who have not been accepted into a family as "children of the marriage" and therefore

---

[55] S.A. 1995, c. 23, s. 10, amending *DRA*, *supra*, note 1, s. 25.1(a).

[56] S.A. 1997, c. 13, s. 1, amending several sections in the *DRA*, Part 4.

[57] See *infra* at 21.

cannot bring themselves within any of the provisions of the *DRA* must be brought under the *P&MA*. The child support obligation under this Act continues until the child reaches the age of 18 years.[58]

3. Child guardianship, custody and access

The English common law as of July 15, 1870, which was received by Alberta, recognized at least three sources of justification for guardianship: guardianship by nature, guardianship for nurture, and guardianship in socage.[59] Basically, under the English common law, the father of a child born within marriage had the exclusive right to the child's custody and a judge deciding a custody case might draw on any or all of these sources to justify awarding custody to the father. The mother of a child born outside marriage gained the right to custody as an extension of her obligation to maintain the child under the *Poor Laws*.[60]

The *DRA*, enacted in 1927, abolished the common law sources of guardianship, and made the mother and father joint guardians of their child born within marriage.[61] That Act gave sole guardianship of a child born outside marriage to the mother.[62] However, the notion of "fault" continued to influence thinking. To this day, spousal misconduct leading to a judgment for judicial separation could also provide grounds for a declaration that the parent is "a person unfit to have the custody of the children of the marriage."[63] Subject to an amendment in 1991, extending guardianship to the

---

[58] *P&MA*, *supra*, note 3, ss. 15 and 16.

[59] "Guardianship by nature" held that a child under age 21 was under the guardianship or custody of the father, and on his death, of the mother. "Guardianship for nurture" held that a father was responsible to exercise guardianship and custody of the person of a child until age fourteen. "Guardianship in socage" held that, the individual, who had custody of lands coming to a child under age fourteen, also had custody of the person of the child. (This individual was invariably the next of kin to whom the inheritance cannot possibly descend.)

[60] ALRI Report No. 20, *supra*, note 16 at 3-5.

[61] *DRA*, *supra*, note 45, s. 60.

[62] *Ibid.* s. 61.

[63] *DRA*, s. 54(1). No cases applying the section were found. Interestingly, the *Infants Act*, enacted in 1913, went even further. It stipulated that "no order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation or for alimony." The *Infant Act* bar to custody and access disappeared in 1920: *An Act to amend An Act respecting Infants, and to Provide*

(continued...)

father of a child born outside marriage in some situations,[64] the *DRA* provisions governing guardianship, custody and access remain in force, essentially unchanged, today.

By the 1920s, a broad range of physical, emotional and social needs of younger children were thought to be better met by mothers than by fathers, and custody was routinely awarded to mothers under the "tender years doctrine." The tender years presumption, which was especially strong for girls,[65] held sway until the 1970s. By the 1980s, courts had begun to view it as gender biased:[66]

> ... the Tender Years Doctrine arose in an era where the role and function of mothers and fathers were clearly defined in society. A revolution in such roles in recent years requires that the quality of parent-child contact become of major significance in determining custody.

Under current law, guardianship, custody and access decisions are made in accordance with the "best interests of the child" standard. The process of adoption of this standard was gradual.[67]

Historically, in England, superior court judges could take jurisdiction *parens patriae*. This jurisdiction enabled them to make decisions in the best interests of a child where no legislation covered the matter. The *parens patriae* jurisdiction derived from the power and duty of the king, as protector of his subjects, to come to the aid of persons who were unable to care for themselves. In Alberta today, the judges of the Court of Queen's Bench and Court of Appeal in Alberta have power to exercise *parens patriae* jurisdiction.

---

[63] (...continued)
for Equal Parental Rights, S.A. 1920, c. 10.

[64] See *infra* at 20.

[65] Nicholas Bala and Susan Miklas, *Rethinking Decisions About Children: Is the "Best Interests of the Child" Approach Really in the Best Interest of Children?* (Toronto: The Policy Research Centre on Children, Youth and Families, February 1993) at 8.

[66] *H. (M.E.)* v. *H. (M.R.)* (1981), 45 N.S.R. (2d) 629. By the end of the 1980s, Canadian Courts had declared the doctrine no longer applicable: *Williams* v. *Williams* (1989), 24 R.F.L. (3rd) 86 (B.C.C.A.); or inapplicable when the father was capable of responding to the children's needs: *Bendle* v. *Bendle* (1985), 48 R.F.L. (2d) 120 (Ont. Fam.Ct.).

[67] Bala and Miklas, *supra*, note 65, at 10-14.

A major amendment to the *DRA* in 1991 added Part 8, *Establishing Parentage*.[68] The 1991 amendment also clarified when the father of a minor child is also a guardian.[69] In addition to a husband, statutory guardianship was extended to a man who "cohabited with the mother for at least one year immediately before the birth of the child." The amendment also authorized the Court of Queen's Bench to appoint as guardian a person declared to be a parent under Part 8.[70] The 1991 amendment was based on recommendations we made in ALRI Report Nos. 20, 45 and 60 on *Status of Children*.

Jurisdiction under the *DRA* lies with the Court of Queen's Bench or the Surrogate Court. The *PCA* empowers the Provincial Court to make custody and access awards.[71]

C. Canada

Until 1968, the *DRA* regulated spousal support, and child support, custody and access, on marriage breakdown and divorce. In that year, Parliament enacted the *Divorce Act, 1968*.[72] The enactment of the *Divorce Act* brought dual federal and provincial statutory regimes into existence in Canada.[73] The Alberta *DRA* regulates these rights, obligations and responsibilities on marriage breakdown short of divorce.

The *Divorce Act, 1968* introduced two important changes to support law in Canada. First, it was the first statute in Canada to establish formal legal equality between the sexes with respect to spousal and child support. Second, it introduced a new basis for support by moving from a fault-oriented approach to a needs and ability to pay criterion which was and continues to be the cornerstone of spousal support rights under the *Divorce Act*.[74] Both

---

[68] S.A. 1994, c. 11, s. 1(3).

[69] *Ibid.* s. 1(2), replacing *DRA*, s. 47.

[70] *Ibid.*

[71] *PCA*, *supra*, note 4, s. 32.

[72] S.C. 1967-68, c. 24, consolidated as R.S.C. 1970, c. D-8.

[73] For a discussion of the respective constitutional authority of the provincial and federal governments to legislate with respect to spousal and child support, see *infra*, chapter 3, heading C.1.

[74] The *Divorce Act. 1968* recognized lasting separation as sufficient grounds for divorce: three years

(continued...)

changes were radical in their day. The *Divorce Act, 1985*[75] eliminated consideration of the conduct of the spouses from the determination of support awards.[76]

Prior to May 1, 1997, the needs and ability to pay criterion was also the cornerstone of child support rights under the *Divorce Act*. In that year, another important amendment to the *Divorce Act* was enacted. This amendment paved the way for the introduction, on May 1, 1997, of the Federal Child Support Guidelines for the determination of child support. These guidelines standardize the amount of support payable, using the income of the non-custodial parent as a base. Judicial discretion continues to guide judges awarding child support in exceptional circumstances.

As they are in Alberta, child custody and access decisions under the *Divorce Act* are to be made in the best interests of the child. Broad factors guide the court in the exercise of its judicial discretion.[77] Consideration of a parent's past marital conduct is excluded.[78] A "friendly parent" provision requires a court to consider the willingness of one parent to facilitate contact between the child and the other parent.[79]

D. Other Provinces and Territories Compared

The provisions of Alberta's *DRA* are not radically different from the laws that existed in most Canadian provinces until the late 1970's. At that time other provinces began to modify their family law in response to changes

---

[74] (...continued)
in the case of petition by an abandoned spouse and five years in the case of a petition by a departing spouse.

[75] *Divorce Act, 1985*, R.S.C. 1985 (2nd Supp.), c. 3.

[76] This Act reduced the minimum separation time until a divorce could be granted from three or five years to one year.

[77] *Supra*, note 75, s. 16(8).

[78] *Ibid.* s. 16(9).

[79] *Ibid.* s. 16(10).

implemented under federal divorce legislation, particularly with respect to spousal support.[80]

All provinces or territories now have legislation providing for inter-spousal support.[81] The basis for awarding support under the new legislation is fundamentally different, in three significant respects, from the traditional basis for awarding alimony:

• the entitlement to spousal support is premised on need and the relationship itself (unrelated to the commission of a matrimonial offence);

• men and women are equally entitled to support (as in Alberta since 1973); and

• a spouse has a duty to support oneself as well as one's spouse.[82]

Similar changes have been introduced in legislation providing for a summary procedure leading to support, although "the thrust of the legislation . . . is still to give a deserted spouse and child a quick, cheap and simple remedy."[83]

As they do in Alberta, in other provinces both parents bear an obligation to support their child.

Prior to May 1, 1997, the needs and the ability to pay criterion formed the cornerstone of spousal and child support rights under most provincial statutes, although differences existed in the statutory criteria.[84] Since that

---

[80] As already stated, in 1973 Alberta amended the *DRA* to provide for formal legal equality between husbands and wives with respect to spousal support rights and obligations.

[81] See e.g., *Family Relations Act*, R.S.B.C. 1996, c. 128, Part 7; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 4; *Family Services Act*, S.N.B. 1980, c. F-2.2, Part VII; *Family Law Act*, S. Nfld. 1990, c. F-2, Part III; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 3; *Family Law Act*, S.O. 1990, c. F.3, Part III; *Family Law Reform Act*, R.S.P.E.I. 1995, c. 12, Part III; *Civil Code of Québec*, Art. 585, 633 and 635; *Family Maintenance Act*, S.S. 1997, c. F-6.2, s. 5; *Maintenance Act*, R.S.N.W.T. 1988, c. M-1, s. 3; and *Family Property and Support Act*, R.S.Y. 1986, c. 63, Part 3.

[82] Davies, *supra*, note 48 at 193 (c. 9, Alimony as an Independent Remedy).

[83] *Ibid.* at 243-44 (c. 12, Deserted Wives' and Children's Maintenance Legislation).

[84] See generally, Davies, *supra*, note 48 at 201-6 (c. 10, Support in Ontario, Prince Edward Island, New Brunswick and the Yukon Territory other than under the *Divorce Act*) and 236-38 (c. 11,

(continued...)

date, most provinces have enacted legislation adopting the Federal Child Support Guidelines or substituting their own guidelines for use under both the *Divorce Act* and provincial law.

With respect to custody and access, the "best interests of the child" standard applies in all provinces or territories. Often, the standard is legislated. Legislation in some provinces or territories lists factors for the court to consider in determining custody. These factors are intended to guide judges in the exercise of their judicial discretion.

---

[84] (...continued)
Support in British Columbia, Manitoba and Nova Scotia other than under the *Divorce Act*).

CHAPTER 3 ELEMENTS AFFECTING FAMILY LAW REFORM

The reform of family law is not a simple task. A number of elements complicate decision making within a province. These include: problems inherent in the subject matter, interconnections within the subject matter, constitutional limitations, federal reform initiatives, judicial innovation, and the interaction between public and private law. Appropriate decisions require an understanding of the complex interweaving of these elements which include both practical and conceptual dimensions.

A. Problems Inherent in the Subject Matter

1. Emotionally charged

Today, family law is less concerned with the formation of marriages, and more concerned with the duties of spouses toward each other and their children on marriage breakdown and divorce. Separation and divorce are traumatic events that fill the parties with stressful emotions. Despite the emotions involved, most persons are able to adequately fulfill, or reach agreement on, the responsibilities which belong to them. Where they cannot, "[j]udges have to make decisions, determining choices about future behaviour and responsibilities."[85]

2. Variable facts

No two cases are identical. The facts vary with respect matters such as:

- income level (wealthy, modest or low)
- presence or absence of children
- ages of spouses
- duration of the relationship
- division of responsibilities between the spouses during marriage and after marriage breakdown
- detriment suffered by a homemaker spouse

[85] Nigel Fricker, "Family law is Different" [1995] Fam. Law 306 at 306.

The diverse cultural expectations and family structures of various ethnic groups add to the complexities:[86]

> Patterns of family structures vary substantially between different ethnic cultures, also between different indigenous social groups.

Family law is unlike other litigation in another way. Most litigation involves finding facts about the past, whereas in family law cases judges have to anticipate or predict future events. Viewed from this perspective, it may be seen as unfortunate that "the formal structure of family litigation remains stuck in the accusatorial/adversarial mode."[87]

Given the wide variety of family circumstances that may exist, it is important that the law retain the flexibility necessary to achieve fairness in an individual case.

3. Needs of children

Families are "the major means through which societies deal with dependency,"[88] including raising children. Children are affected by family breakdown and divorce, and the rates of family breakdown and divorce are high. Indeed, "the parent-child relationship has become intense and unstable in a way that seems to be new."[89] Moreover, because of changes in household composition in recent decades, members of the extended family are seldom present to help children adjust. For this reason, family law involves particular sensitivity to the needs and best interests of children:[90]

> Children are particularly vulnerable during separating and divorce, and need secure parenting and support at a time when their parents are least able to provide it. ...

---

[86] *Ibid.*

[87] *Ibid.* at 308.

[88] Mary Ann Glendon, *The Transformation of Family Law* (Chicago and London: The University of Chicago Press, 1989) at 306.

[89] *Ibid.* at 293.

[90] Fricker, *supra*, note 85 at 306.

4. Wide-ranging opinion

Because family law deals with issues that lie close to the heart and experience of all persons, it is replete with the seeds of controversy. Opinions tend to be formed on the basis of personal experience and the experiences of individuals differ. This makes everyone somewhat of an expert in their own mind. Moreover, those opinions do not fit into a single conceptual framework. That is to say, individuals tend to define the problems differently and propose different solutions.

5. Changing times

New scientific developments, economic forces and other historic events influence the development of family law over time. Indeed, social changes in the last few decades have eroded century-old marriage beliefs and practices:[91]

> From the beginning of Canada's colonial period until the 1960s, most Canadians viewed marriage as a lifetime commitment, and the only circumstances under which a couple could live together and raise a family. In the past twenty-five years, however, attitudes toward marriage have changed profoundly. Marriage is no longer necessarily a lifetime commitment, as a large minority of couples now divorce. Many Canadians of all ages do not consider marriage a necessary prerequisite to living with a partner and have chosen common-law arrangements — sometimes temporary, sometimes permanent. Mainly for this reason, births outside of marriage are not as unusual and the legal distinction between legitimate and illegitimate has been abolished.

The change with perhaps the greatest impact on the breakdown of the traditional marital institution was the emergence of widely available, reliable birth-control methods: "This facilitated a huge decrease in fertility and family size and, in turn, gave women greater opportunity to achieve financial independence."[92]

In former times, "satisfaction of the spouses was not considered very important and dissatisfaction with a marriage was not grounds for breaking a union."[93] The traditional marital institution was a "means of passing

---

[91] Jillian Oderkirk, "Marriage in Canada: Changing Beliefs and Behaviours 1600-1990" (Summer 1994) *Canadian Social Trends* 2, at 3, adapted from Jean Dumas, *Report on the Demographic Situation in Canada, 1992* (Statistics Canada Catalogue 91-209E) and Jean Dumas and Yves Péron, *Marriage and Conjugal Life in Canada* (Statistics Canada Catalogue 91-534E).

[92] *Ibid.* at 3.

[93] *Ibid.*

assets, real or symbolic, from one generation to another."[94] More recently, marriage has come to be based on "spousal affection and fulfilment."[95] Today, with the breakdown of marriage in favour of the pursuit of personal and individual interests, divorce is rapidly becoming nearly as important a factor in marital dissolutions, and therefore, the passing of assets, as the death of a spouse.[96] Longer life spans, providing more years in which to attempt to fulfill life's many desires, may be another factor contributing to the modern increase in marriage breakdown. To sum up, "[m]arriage ... seems increasingly fragile, as marriage breakdown occurs more frequently and with increasing ease."[97]

Because of the emphasis in marriage on spousal fulfilment, there is a "tendency to make individuals, rather than family units or households, the principal subject of the law affecting families."[98] In any event, "legal theory barely possesses the concepts or vocabulary to deal with groups as such."[99]

6. Changing social attitudes

As is apparent from the previous discussion, an interplay takes place between new developments and changing times, on the one hand, and changing social attitudes, on the other. A number of changes in attitude have occurred in recent decades. These include:

- increased emphasis on gender equality (spurred by the freedom provided by birth control and the resulting massive entry of women into the labour market)

- redefinition of the roles and expectations of spouses

---

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.* at 4: "While divorce accounted for only 2% of marriage dissolutions between the two world wars, it represented 9% to 12% of dissolutions during the 1950s and 1960s. Its share climbed to 28% in the early 1970s and reached 42% in 1990."

[97] *Ibid.* at 7.

[98] Glendon, *supra*, note 88 at 295.

[99] *Ibid.* at 308.

• growing acceptance of the idea of marriage as a vehicle for individual self-fulfilment

• weakening in consensus about the morality of extra-marital sexual relations (possibly, in partial consequence of the decline in religious practice)

• attenuation of the connection between sexual intercourse and procreation

• growing acceptance of birth outside marriage

• growing acceptance of cohabitation (marriage-like relationships) as a family modality: "Marriage has become less of a prerequisite for a couple to live together and has tended to vanish from early conjugal life."[100]

Clearly, these changes have led to new concepts of family, and new questions for society, for example:

• Has the notion of a home shared by a legally married husband and wife and their children (the "nuclear" family) become too limited?

• Should a unit consisting of partners who cohabit in a marriage-like relationship be recognized as a family?

• Must the partners be of opposite sex?

• To what extend do blood ties enter into the notion of family?

• How do children born outside marriage fit in?

• How do the children of divorce fit in?

• Ought the term "family" to include adult relatives who are dependent on others for their care and provision?

---

[100] Oderkirk, *supra*, note 91 at 7:

> For three centuries, Canadians considered marriage necessary for establishing a conjugal relationship and, accordingly, people's first marriage coincided with the beginning of their first union. However, with each new generation born since World War II, marriage has become a less and less common part of early conjugal life.

• Should "family" be somehow defined in terms of an economic commitment to the shared well-being of a finite unit?

• Would social commitment provide a better test?

7. Changing demographics

The effects of new developments, changing times and changing social attitudes are reflected in changing demographic patterns. Appendix A summarizes statistical data that tracks the trends over past decades with respect to: marriage rate, marriage age, divorce rate, remarriage, births outside marriage, fertility rate, family living, married couples, common law relationships, lone parent families, children's living arrangements and custody awards.

8. Law as a response

The new developments, changing times and changing social attitudes are also reflected in changing laws. The changes in family law that occurred during the late 1970s and early 1980s provide an example:[101]

> The late 1970s and early 1980s was a period of profound change in family law in Canada. There were enormous changes in attitudes towards the role of women in the family, the labour force and in society. There was a growing secularization and pluralism of values, and a continuing rise in the divorce rate. These social developments culminated in a number of legislative reforms, as well as changes in the common law, that resulted in a transformation of the law governing traditional marital relationships, as well as growing legal recognition of the existence of non-marital unions. The new laws were premised on formal gender equality, and gave women significant new property rights upon divorce. Notions of marital fault were eliminated or reduced in importance for dealing with such issues as the granting of a divorce and spousal support, but there was also a greater emphasis on spouses becoming self-supporting after separation.

In most Canadian jurisdictions, although not entirely in Alberta, "[t]he concept of 'illegitimacy,' which penalized children born out of wedlock,"[102] has been resolved by statutorily abolition. Today, courts and legislators are grappling with issues relating to the legal rights, obligations and responsibilities of persons living in marriage-like relationships, and the extent to which they should be equated to the rights, obligations and

---

[101] Bala and Miklas, *supra*, note 65, at 10-11.

[102] *Ibid.*

responsibilities of married persons. The issues arise with respect to both opposite sex couples and same sex couples. They are also grappling with questions about the legal relationship between children and grandparents, stepparents and others who play a role in their lives.

B. Interconnections within Subject Matter

Many interconnections exist between spousal support, child support and child guardianship, custody and access. The complexity of these interconnections poses problems for the existing law and complicates the reform choices. The following questions highlight some of the connections:

• Where insufficient money is available, should spousal support take priority over child support, should child support take priority over spousal support or should the respective needs of spouses and children be met in proportion to the dollars available?

• What account should be taken of the needs of the person bearing the support obligation?

• Should a cohabitational relationship be treated as a "marriage" for the purposes of spousal support?

• Should the obligation to support a former spouse take precedence over the obligation to support a newly acquired dependent partner or the children of that partner?

• If children are born into the new relationship of a non-custodial parent, do children of a former relationship or children of the current relationship have priority for support?

• Should the financial resources of a newly acquired spouse be relevant to the adjudication of the support rights of a former spouse or children of a former relationship?

• Should the child support obligations of a non-custodial parent be affected by the custodial parent's remarriage in the event that the dependent children become members of a re-constituted family?

• Should a non-custodial parent's access to a child hinge on compliance with a child support order?

• Should the law formally recognize the role played by stepparents in bringing up children by giving stepparents guardianship, custody or access rights?

• Should responsibility for child support shift to the stepparent?

• If a child can look to both the biological and "psychological" parents for financial support, how are their respective obligations to be measured?

• Where do grandparents fit in the overall picture?

Questions such as these present problems for legislators and the courts as they seek to balance the rights, obligations and responsibilities of family members in a multitude of situations. To illustrate, the Alberta government expanded the mandate of the MLA Committee established to review Alberta's maintenance enforcement to include issues relating to child access.[103] Those issues, in turn, led to recommendations for a new "shared parenting" model that would govern how orders are made. In the Committee's view, its "shared parenting" model, which would replace the existing "custody and access" model, would give "real force to the concept of a child focussed system."[104]

It is important to keep such interconnections in mind when considering the family law reform issues explored in the ALRI RFD No. 18.2 on *Spousal Support*, RFD No. 18.3 on *Child Support* and RFD No. 18.4 on Child Guardianship, Custody and Access.

C. Effect of Constitutional Boundaries

Three areas of difficulty arising from Canada's constitutional framework have surfaced repeatedly in this project. They are: the constitutional division of legislative powers between the federal and provincial governments; limitations on the powers of provincially-appointed judges; and the

---

[103] Alberta Justice, *MLA Review of the Maintenance Enforcement Program and Child Access* (June 1998).

[104] *Ibid.* at 34.

inconsistent expression of family law concepts and the use of terminology in legislation enacted by governments in different jurisdictions.

1. Divided federal/provincial powers

Legislative jurisdiction over family law is divided between the provincial legislatures and the Parliament of Canada. That is to say, for some situations, the Parliament of Canada has the power to make the laws; for other situations, the provincial legislatures have the power. The division of powers is entrenched in the *Constitution Act, 1867*.[105]

a. Matters under federal legislative authority

Section 91(26) of the *Constitution Act, 1867* confers exclusive authority on the Parliament of Canada to make laws in relation to "marriage and divorce."[106]

This federal legislative jurisdiction includes jurisdiction over corollary relief by way of orders for spousal and child support on or after divorce and orders for the custody, care and upbringing of the children of divorcing or divorced spouses. Current federal legislation regulating spousal and child support is found in sections 15.1, 15.2, 15.3 and 17 of the *Divorce Act*. Sections 16 and 17 govern custody and access. (Section 17 deals with variation proceedings.)

b. Matters under provincial legislative authority

Section 92(13) of the *Constitution Act, 1867* confers exclusive authority on the provincial legislatures to make laws in relation to "property and civil rights within the province."

The provincial jurisdiction over property and civil rights includes the power to make laws:

---

[105] U.K., 30 & 31 Vict., c. 3 [formerly *British North America Act, 1867*]. The present division of legislative powers under sections 91 and 92 of the *Constitution Act, 1867* is not a foregone conclusion. In the constitutional debates of 1979 and 1980 which preceded the repatriation of the Canadian Constitution in 1982, the federal government tentatively agreed to transfer legislative jurisdiction over "marriage and divorce" to the provinces. Provincial opposition which originated with Manitoba, blocked the implementation of this federally-inspired proposal.

[106] The federal power embraces the substantive law. By way of qualification of the above jurisdiction, s. 92(12) grants exclusive legislative power to the provincial legislatures to enact laws relating to the "solemnization of marriage." The provincial power has to do with form.

• requiring one spouse to support the other during the subsistence of a marriage or on divorce[107] or annulment[108]

• requiring the parents to support their children

• governing the relationship between parent and child, including guardianship, custody and access

The jurisdiction over the parent and child relationship exists irrespective of the marital status of the child's parents.

In the exercise of its jurisdiction over spousal and child support, the Alberta provincial legislature has enacted the *DRA*, Part 2 (judicial separation), Part 3 (alimony and maintenance) and Part 4 (protection orders), the *MOA* and the *P&MA*. In the exercise of its jurisdiction over child guardianship, custody and access, Alberta has enacted the *DRA*, Part 7 (guardianship and custody of minors) and Part 8 (establishing parentage); the *CWA*, Part 5 (private guardianship); the *PCA*, Part 3, section 32 (custody and access); and the *Surrogate Court Act*, sections 10 and 13 (guardianship).

---

[107] With regard to support, in two cases in the late 1970's the Supreme Court of Canada refused to determine the constitutional validity of provincial legislation that specifically regulated support on divorce: Davies, *supra*, note 48, citing *Vadeboncoeur* v. *Landry*, [1977] 2 S.C.R. 179 at 187-88 and *Glassco* v. *Cumming*, [1978] 2 S.C.R. 605 at 610-11. Previously, in 1938, the Supreme Court of Canada held that the subject matter of the *Deserted Wives and Children's Maintenance Act* (Ontario) was entirely within the control of the provincial legislatures: *Reference Re Adoption Act, Children's Protection Act, Children of Unmarried Parents Act, Deserted Wives and Children's Maintenance Act*, [1938] S.C.R. 398, 71 C.C.C. 110, [1938] 3 D.L.R. 497 at 402 (S.C.R.), *per* Duff, C.J. Since then, appellate courts in Alberta and Manitoba have recognized that, except where they are corollary to divorce, alimony and maintenance are matters of "property and civil rights" within the exclusive jurisdiction of the provincial legislatures: *Whyte* v. *Whyte* (1969), 7 D.L.R. (3d) 7 at 10 (Man. C.A.); *Heikel* v. *Heikel* (1970), 12 D.L.R. (3d) 311 (Alta. S.C.) (App. Div.). These judgments were referred to with apparent approval by the Supreme Court of Canada in *Zacks* v. *Zacks*, [1973] S.C.R. 891, [1973] 5 W.W.R. 289, 35 D.L.R. (3d) 420, 10 R.F.L. 53 at 429 (D.L.R.).

[108] With the enactment of the *Divorce Act*, in the case of married persons, the powers which provincial statutes give to the courts to order spousal and child support generally exist only while the parties are still legally husband and wife. The *DRA*, s. 22, however, gives such a power after a declaration of nullity of marriage, and the exercise of such jurisdiction has been judicially endorsed in Ontario and Alberta: *Rose (Abrams)* v. *Rose* (1970), 8 D.L.R. (3d) 45 (Ont. S.C.); *Liptak* v. *Liptak*, [1974] 1 W.W.R. 108 (Alta. S.C.).

c. Overlapping jurisdiction

The co-existence of provincial and federal legislative authority over spousal support, child support, and child custody and access has generated questions concerning complementary, competing and conflicting jurisdictions.

As has been seen, the federal authority over divorce includes ancillary relief with respect to spousal support and child support, custody and access. The provincial authority includes spousal and child support (except where it is corollary to divorce[109]), child support for children who are not "children of the marriage" of a divorcing or divorced couple, and child guardianship, custody and access. In consequence of this constitutional division of powers, on marriage breakdown, married persons may pursue a claim for spousal or child support, or for custody or access to children of the marriage either under provincial statute or by way of a claim for corollary relief under the federally-enacted *Divorce Act*. In contrast, the upbringing of a child whose parents are not married to each other is a provincial matter and parents in this situation must pursue claims for support, custody or access to their children under provincial statute.

By virtue of constitutional doctrine, only when provincial and federal legislation are functionally incompatible will the legislation enacted by the level of government having exclusive constitutional authority prevail.[110]

In any event, consistency between the two bodies of law is desirable.[111]

2. Limitations on powers of provincially-appointed judges

Generally, a government can specify the court or courts that will have jurisdiction to decide matters that fall within its legislative competence. However, section 96 of the *Constitution Act, 1867* has been judicially interpreted to restrict the exercise of comprehensive jurisdiction by provincially-appointed judges.

---

[109] *Supra*, note 107.

[110] Where custody and access are concerned, such conflict is extremely difficult to establish because courts apply the same criterion of the "best interests of the child" in all custody and access disputes, regardless of the statutory basis of the application.

[111] See *infra*, chapter 4, heading B.3.

Section 96 requires that "Judges of the Superior, District, and County Courts in each Province" be appointed federally, by the Governor-General. The judicial interpretation of this section prevents both Parliament and the provincial legislatures from conferring jurisdiction on a provincially-appointed judge to adjudicate matters that fall within the type of jurisdiction exercised by "Superior, District or County Courts" at the time of confederation in 1867. The judges of the "superior courts" — in Alberta, the Court of Queen's Bench, the Court of Appeal and the Surrogate Court — are appointed federally. The judges of the Provincial Court of Alberta are appointed provincially.

The precise extent of the constitutional restriction is uncertain. Case law establishes that provincially-appointed judges may exercise jurisdiction over:

• guardianship, custody and access[112] (although provincially-appointed judges do not have the *parens patriae* jurisdiction that empowers superior courts to protect children by filling in gaps in legislation)

• periodic spousal or child support (but possibly not lump sum support, or support orders that affect interests in real property, including orders for occupancy or exclusive possession of the family residence or the use of its contents)[113]

• the enforcement of support orders (but possibly not remedies that affect interests in real property)

Although it is probably not constitutionally possible to confer jurisdiction over all family law matters on provincially-appointed judges, the courts now adopt a purposive approach in interpreting the *Constitution Act, 1867*. This approach allows the courts to take into account the effect of societal changes that have taken place since 1867. As a result, the courts seem to be increasingly open to recognizing jurisdiction in provincially-appointed judges. Where the case law is unclear about the constitutional

---

[112] *Reference Re Section 6 of the Family Relations Act, S.B.C. 1978, c.20*, [1982] 1 S.C.R. 62, [1982] 3 W.W.R. 1, 40 N.R. 206, 36 B.C.L.R. 1, 26 R.F.L. (2d) 113, 131 D.L.R. (3d) 257; see also *Re Lamb and Lamb* [1985] 1 S.C.R. 851, 59 N.R. 166, 46 R.F.L. (2d) 1, 20 D.L.R. (4th) 1.

[113] *Reference Re Section 6 of the Family Relations Act, ibid.*

limits imposed on provincially-appointed judges by section 96, we think (as we did in 1978[114]) that the provincial legislation should be framed so that it will apply as widely as may ultimately prove to be open to the province and its judges. That is to say, we think that generally it would be appropriate for legislators to proceed on the assumption that the jurisdiction exists.

3. Confusion of terms

Because legislative power is constitutionally divided, legislators in different jurisdictions — both federal and provincial — enact their own bodies of law. At times, the laws rest on different conceptual foundations. At other times, the concepts are similar but the language that activates the concepts is conflicting and at odds. Examples of the mixed uses of words are:

- "support," "alimony" and "maintenance"[115]

- "guardianship" and "custody"[116]

D. Impact of Federal Family Law

As stated in chapter 2, Parliament first enacted divorce legislation in 1968. Today, as many as two-fifth of all marriages end in divorce. Where proceedings have been commenced under the *Divorce Act*, that Act takes precedence in matters of spousal and child support, and child custody and access. That is because the *Divorce Act* permits spouses to file a petition for divorce immediately upon separation, and the divorce court (in Alberta, the Court of Queen's Bench) may grant interim relief any time after filing.[117] Thus, federal law has come to have a significant impact on provincial law. In short, when the issue is looked at from a practical viewpoint, the federal provisions predominate.

One issue that arises is whether federal and provincial laws should produce different results. Some differences may be justified because federal laws are conditioned on divorce whereas, at least from a legal perspective,

---

[114] ALRI Report No. 27, *Matrimonial Support* (March 1978) at 11.

[115] See RFD No. 18.2 at 11.

[116] See RFD No. 18.4, Chapter 3, heading B.1 at 34.

[117] *Divorce Act*, *supra*, note 75, s. 15.

the related provincial laws are founded on the continuing existence of a marriage. Despite the fact that some differences may be justified, it is questionable whether this distinction justifies fundamental differences of approach if in fact the marriage has broken down irretrievably.

To illustrate the issue: the federal government has introduced child support guidelines for use in divorce cases. The guidelines are established by regulation under the *Divorce Act*. Numerical amounts payable by the non-custodial spouse are set out in a table developed from a formula that is based on a set of predetermined assumptions. The new federal approach contrasts with the approach to child support taken formerly under federal and provincial family law statutes. These statutes gave judges awarding child support considerable discretion to respond to the unique circumstances of each individual case. In the exercise of this discretion, the Court of Appeal of Alberta has laid down principles and a "litmus test" to guide trial court judges who are determining child support amounts under provincial legislation.[118] Although in many ways similar, these principles and the awards they produce differ from the assumptions on which the federal child support guidelines are based and the amounts set out in the tables. What should Alberta do? Should Alberta child support law continue to be based on judicial discretion or should the Alberta law be reformed to conform with the *Divorce Act*? If the Alberta Legislature does not adopt the federal approach, children in similar circumstances may receive different levels of support depending on whether support is sought under provincial or federal law.[119]

In another example, Parliament has established a Special Joint Committee on Child Custody and Access. This Committee "will assess the need for a more child-centred approach to family law policies and practices that emphasizes joint parental responsibilities, child-focused parenting arrangements and the best interests of the child."[120] It is due to report by November 30, 1998. If Parliament were to enact changes to the *Divorce Act* on the basis of the recommendations made by this Committee, should Alberta

---

[118] *Levesque* v. *Levesque*, [1994] 8 W.W.R. 589.

[119] Notably, most provinces have chosen to follow the federal lead and adopted the federal guidelines for application under provincial law, or legislated their own guidelines and sought federal authority to apply these guidelines in divorce cases brought within their province.

[120] CCH Family Law newsletter, winter 1997. The House of Commons gave its approval to the motion to create the Committee on Nov. 18, 1997.

revise its legislation in order to bring its laws into harmony with the federal law? Would it ever be appropriate for Alberta to enact legislation that proceeds on a different conceptual basis? As with child support, federal and provincial family laws that proceed on different bases may impose different results on parents and children in similar circumstances.

E. Judicial Innovation

In our system of justice, judges have always had a lawmaking role. At common law, they break ground on a case-by-case basis, working from principles established by precedent. The judgments of appellate courts lend more weight to precedent than the judgments of courts of first instance. The child support principles established by the Alberta Court of Appeal to be followed by Alberta judges provide a recent example of the common law process in action.[121] Common law developments may reinforce the direction of legislative law reform or they may diverge from it, as could happen if Alberta judges were to apply the federal child support guidelines in divorce cases and the judicially-established "litmus test" in cases arising under Alberta law.[122]

Judges are also responsible to interpret the Canadian constitution and statutes and apply them to the facts of individual cases. Judgments interpreting the *Canadian Charter on Rights and Freedoms*[123] are requiring legislators to remove discrimination in the law relating to persons who are married and persons who cohabit in a marriage-like relationship.

In addition, judges have responsibilities concerning judicial process and courtroom management. In Alberta, family law matters are dealt with separately from other litigation. The Court of Queen's Bench has issued a set of Family Law Practice Notes that cover a wide range of procedural matters:

• parenting after separation — this practice note requires plaintiffs and defendants to any proceeding where custody, access or child support is in issue to attend a seminar on parenting after separation before the case is heard (with some exceptions)

---

[121] *Levesque* v. *Levesque*, *supra*, note 118.

[122] *Ibid.*

[123] *Constitution Act, 1982*, enacted by *Canada Act*, 1982, c. 11, Schedule B (U.K.), reproduced in R.S.C. 1985, Appendix II.

• notice to disclose — this practice note specifies financial information to be provided by the parties to a family law proceeding involving spousal or child support or matrimonial property matters

• family law chambers — this practice note divides family law chambers applications on the basis of the time the application is likely to take to be heard, calls for the completion of designated information and data sheets, limits the number of affidavits that may be filed and details other procedural expectations

• *ex parte* restraining orders — this practice note spells out the procedure to be followed in an *ex parte* application for a restraining order

• family law pre-trial conferences — this practice note requires that a pre-trial conference be held before a trial date can be obtained, specifies the objectives of the conference (which has both a settlement component and a case management component), and states the procedures and practices that will apply

• notice to reply to written interrogatories — this practice note gives a procedure for requiring written interrogatories to be provided in a family law proceeding

F. Interaction between Public and Private Law

Public interest concerns have inspired various legislative measures that affect private law obligations. The *MOA*, as originally enacted in 1921,[124] explicitly recognized the need to conserve public expenditures. This Act imposes liability for support on the husband, wife, or parent of a destitute person who is unable to work.

In the interests of conserving public funds, the state may provide resources to aid in enforcing the private support obligation. Under the *MOA*, a support application may be made by the municipal or provincial authority responsible for providing social assistance or by the person entitled to

---

[124] S.A. 1921, c. 13, s. 5.

support. Under the *P&MA*, the Director may assist a parent to bring an application for child support.

The state may encourage certain behaviours by making concessions in the public law. For example, under the federal *Income Tax Act*, when periodic spousal support is payable pursuant to a written separation agreement or court order, the payor may deduct those payments from their income before tax and the payee must include the payments in their taxable income.[125] This concession is intended to leave the couple with more dollars for support — because the payor usually has a higher income than the payee, if left in the payor's hands those dollars would be taxed at a higher rate. This provision for "income-splitting" clearly represents a public dimension of spousal support rights and obligations.

An obvious public involvement arises when a spouse or parent fails to discharge a support obligation. If a family does not support its own members, the state may bear responsibility for them. Family members who become dependent on some form of public assistance impose a burden on taxpayers generally. When the state provides social assistance to the family dependants, it may want to recoup the payments from the person with the obligation to pay. In Alberta, public assistance authorities are subrogated to the rights of socially-assisted persons to receive support from their spouses or parents.[126]

In the area of child upbringing, the *CWA* makes provision as a matter of public law for the protection of children whose parents, or other family members, are unable or unwilling to look after them as a matter of private law.

Our family law project is limited to the reform of the private law regulating spousal and child support and the upbringing of children. Because of the close relationship between private law and public law, it is important that our recommendations show an understanding of the interrelationship

---

[125] *Canada Income Tax Act*, R.S.C. 1985 (5th Suppl.), in force March 1, 1994, especially ss. 56(1)(b) and (c.2), 56.1, 60(b) and 60.1.

[126] *SDA*, *supra*, note 9, s. 14.

between the public and private aspects of spousal and child support, and child care, control and protection.

G. Conclusion

Recommendations for the reform of family law must take into account the impact of these diverse elements and the interrelationships among them.

CHAPTER 4 PROBLEMS WITH ALBERTA'S FAMILY LAW STATUTES

In addition to the elements that affect family law reform in general, several problems arise under Alberta statutes. These include: obsolescence; fragmentation, overlap and inconsistency; complications caused by different court jurisdictions; and inequalities in the law relating to children. Law reform proposals should attempt to eliminate these problems, or at least reduce them to a minimum.

A. Obsolescence

Many of the statutory provisions in Alberta embody outdated concepts and terms. For example, the *DRA* ties a spouse's entitlement to financial support to the absence of fault in bringing about the marriage breakdown. The *DRA* also links parental unfitness to marital fault: a parent can be declared unfit to have custody only if that parent's misconduct provided the grounds for an order for judicial separation or divorce.[127] Although judicial opinion has been expressed that the *P&MA* is not penal in nature,[128] the procedure for obtaining support under the *P&MA* and the *DRA*, Part 4, still smacks of its fault-based, quasi-criminal origins.

We think it desirable that Alberta family law statutes use modern language and reflect current values.

B. Fragmentation, Overlap and Inconsistency

Alberta family law statutes have grown in a piecemeal fashion over many years. The treatment of family law matters is fragmented and the provisions in different statutes sometimes overlap or are inconsistent with one another. In Alberta, for example, three sets of dissimilar provisions govern child support.[129] Three statutes containing differently worded sections empower

---

[127] *DRA*, *supra*, note 1, s. 54.

[128] *S. (D.D.)* v. *H. (R.)* (1993), 104 D.L.R. (4th) 73), 10 Alta. L.R. (3d) 225, 141 A.R. 44, 47 R.F.L. (3d) 229 (C.A.) (alternate cite: *Alberta (Director, Parentage & Maintenance Act)* v. *H.(R.)*).

[129] *DRA*, *supra*, note 1; *PCA*, *supra*, note 4; and *P&MA*, *supra*, note 3.

three different courts to make guardianship orders.[130] The fragmentation is difficult to justify. It makes the law hard to locate and difficult to know and understand.

1. Desirability of a uniform and coherent family law regime

Ideally, the law set out in Alberta statutes would assist the public at large to know the nature of the relationships, rights and responsibilities involved. We think that improved knowledge and understanding holds the potential to reduce litigation and, consequently, court costs. At the very least, the existing statutory provisions should be consolidated in a single enactment for the purpose of promoting uniform standards, criteria and procedures in all Alberta courts that exercise jurisdiction over spousal support and child support, guardianship, custody and access.

2. Fragmentation, overlap and inconsistency among Alberta statutes

Consistency among Alberta statutes is desirable for many reasons. As we stated in 1978, in ALRI Report No. 27:[131]

> (1) The law should be as simple and clear as its subject matter permits. To have divergent statutes dealing differently with different parts of the subject matter of support will inevitably detract from simplicity and clarity and must cause difficulty for the citizen who wishes to understand their legal rights and obligations.
>
> (2) Unless family law is based on one philosophy and designed according to one coherent plan, it will have no demonstrable rationale and will not be consistent.
>
> (3) The law should not provide an inducement to select one matrimonial remedy over another and, in particular, should not provide an inducement either to divorce or not to divorce.

These reasons, which were articulated in connection with spousal support, apply with similar force to child support, custody and access decisions.

We will give some examples of fragmentation, overlap and inconsistency in Alberta's existing legislation. (Differences in the assignment of court jurisdiction over spousal support, child support and child guardianship, custody and access are discussed under heading C., which is entitled Complications Caused by Different Court Jurisdictions.)

---

[130] *DRA*, *supra*, note 1; *CWA*, *supra*, note 5; and *SCA*, *supra*, note 6.

[131] ALRI Report No. 27, *supra*, note 114 at 12-13.

First, different statutory provisions contain different criteria for determining the right to child support. Under the *DRA*, child support may be granted to "children of the marriage." Under the *P&MA*, it may be granted to children born of parents who are not married to each other where those children cannot otherwise bring themselves within the category of children of the marriage. Statutory differences also exist with respect to the determination of the amount of support. For example, the standard by which child support is to be quantified is specified in the section on deserted wives and children, but not in other sections of the *DRA*.[132] The standard is also specified in the *P&MA* but in different wording.[133]

Second, in the *DRA*, the application of the statutory provisions relating to custody and access is limited to "children of the marriage." Although the expression "children of the marriage" may include children who have been accepted by a married couple as part of their family, ordinarily it does not include children born outside marriage.

Third, child guardianship, custody and access law exists within a larger legislative framework that includes other Alberta law relating to the care and protection of children and adults who are not competent to look after themselves or to manage their property. Attention should be paid to consistency among these provisions.

Fourth, where parentage needs to be established, different standards apply to proof of parentage: the court may name more than one person of the same sex as a parent for the purposes of a support order under the *P&MA* but not under the *DRA*.

Perhaps one of the main contributions that can be made is to rationalize the provincial law by using principle to unite the diverse bits and pieces of family law that now exist in different statutes.

---

[132] *DRA*, *supra*, note 1, s. 27(4). Under this section, the judge may order the payment of a sum of weekly, semi-monthly or monthly support "that the judge considers reasonable, having regard to the means of both the spouses."

[133] *P&MA*, *supra*, note 3, s. 16(4). This section requires the Court to "fix an amount to be paid for the maintenance of a child that will enable the child to be maintained at a reasonable standard of living having regard to the financial resources of each of the child's parents."

3. Effect of Divorce on Alberta statute law

In chapter 3, we pointed out that in addition to relief under the *DRA*, spouses and children may obtain relief corollary to divorce under the federal *Divorce Act* and that differences exist between the federal and provincial statutory provisions. We questioned whether provincial law should be founded on a different understanding of family relationships or whether it should conform to the model established federally.

Although strict conformity of provincial family law regimes with the federal *Divorce Act* may be an unrealistic goal for Canada, a high degree of compatibility is attainable. In fact, provincial and federal support, custody and access laws have co-existed throughout Canada since 1968 without major conflict.

In our view, on separation and marriage dissolution, provincial compatibility with the objectives in the federal *Divorce Act* should be promoted in the areas of spousal support, child support, and child custody and access. The promotion of compatibility will help reduce conceptual differences and discourage multiplicity of proceedings, outcomes which we see as desirable. Such harmonization would reflect the reality that, in these matters, court applications under provincial legislation are not instituted by spouses who are living together in a viable relationship. They are triggered by spousal separation.

We think it would be wise to ensure that the provincial legislation providing remedies in the areas of spousal support, child support and child custody and access is compatible with the provisions in the *Divorce Act*.

4. Influence of law in other provinces or territories

Diversity exists among the various provincial and territorial family law statutes. For example, provincial statutory support regimes differ with respect to the relevance, if any, of the past conduct of the spouses. The regimes also differ with respect to the availability of court-ordered support for unmarried cohabitants of the opposite sex. Alberta lags behind the other provinces in its continued adherence to a spousal and child support regime that is conditioned on proof of the commission of a matrimonial offence and the continuation of the marital fault concept in decision making about the child's upbringing.

While existing variations in legislation in other Canadian provinces or territories make uniformity impossible, we think it desirable that Alberta legislation have a high degree of consistency with legislation in other Canadian provinces or territories.

C. Complications caused by different court jurisdictions

Complications for family law reform are caused by different court jurisdictions. We note these, in the interests of the fullness of our description of the problems under the existing Alberta legislation, and suggest that they should be rationalized.[134] However, our recommendations do not extend into this area.

1. Statutory assignment of jurisdiction

Statutory inconsistencies exist with respect to the jurisdiction of the courts deciding family law matters in Alberta. Court jurisdiction is spread among the Court of Queen's Bench, the Provincial Court (Family Division) and, to a lesser extent, the Surrogate Court. In at least one instance, the Alberta Legislature has assigned exclusive jurisdiction over a family law matter to the Court of Queen's Bench where it was constitutionally unnecessary to do so, leaving an awkward gap in the jurisdiction of the Provincial Court (Family Division). In other instances, acting within its constitutional confines, the Legislature has assigned closely analogous, but not identical, jurisdiction over a family law matter to more than one court, causing anomalous inconsistencies in the application of the law.

We will give two illustrations of the existing jurisdictional maze.

First, the jurisdiction to grant support under the *MOA*, the *P&MA* and the *DRA*, Part 3 (alimony and maintenance) and Part 7 is vested in the Court of Queen's Bench[135] whereas the jurisdiction to grant support to a deserted

---

[134] See *supra*, Chapter 3, heading C.

[135] *MOA*, *supra*, note 2, s. 4; *P&MA*, *supra*, note 3, s. 1(c); and *DRA*, *supra*, note 1, s. 1.

spouse or child under Part 4 (protection orders) of the *DRA* is vested in the Provincial Court,[136] as is the authority to make an interim support order.[137]

Second, the *DRA*, Part 7 (guardianship and custody of minors), confers jurisdiction on the Court of Queen's Bench of Alberta[138] and on a judge of the Surrogate Court of Alberta sitting in chambers.[139] Under Part 8 (establishing parentage) jurisdiction lies only in the Court of Queen's Bench.[140] As its title indicates, the *SCA* gives guardianship jurisdiction to the Surrogate Court.[141] The *CWA*, Part 5 (private guardianship), gives jurisdiction to the Provincial Court of Alberta.[142] The *PCA*, Part 3 (custody and access), of course, does likewise.[143] In the public law sphere, the *CWA* gives provincially-appointed judges jurisdiction over guardianship, custody and access in child protection proceedings.

Adding to the jurisdictional diversity, as part of its constitutional jurisdiction to legislate over marriage and divorce, the federal government has power to name the court that will deal with these matters. It has named the Court of Queen's Bench of Alberta.[144]

2. Jurisdiction of provincially-appointed judges

In chapter 3, we noted that constitutional limitations restrict the powers exercisable by provincially-appointed judges. This restriction may explain some of the statutory demarcations but it does not explain all of them. The need for rationalization is strong. Moreover, in our view, acting within the clear limits of the constitution, room exists for significant expansion of the jurisdiction exercised by provincially-appointed judges under Alberta

---

[136] *DRA*, *supra*, note 1, s. 27(2).

[137] *PCA*, *supra*, note 4, s. 31.

[138] *Ibid.* s. 1.

[139] *Ibid.* s. 45.

[140] *DRA*, s. 1.

[141] *SCA*, s. 1(c).

[142] *CWA*, *supra*, note 5, s. 1(g).

[143] *PCA.*, *supra*, note 4, s. 32.

[144] *Divorce Act*, *supra*, note 75, s. 2.

statutes. Room also exists for the centralization of authority over family law matters.

3. Differing rights and remedies in different courts

Adding to the confusion in Alberta, similar orders are available under different procedures in different courts. Some of the differences are founded on obsolete distinctions; others are simply anomalous.

Spousal support, for example, may be granted by the Court of Queen's Bench in the exercise of its plenary jurisdiction over family matters. This jurisdiction is available to any spouse who has the grounds for a matrimonial action. Alternatively, it may be granted by the Provincial Court in the exercise of its summary jurisdiction to award support but only to a "deserted spouse" against the spouse who deserted.

An application for child support under the *DRA* may be brought in the Court of Queen's Bench, before a judge of the Surrogate Court sitting in chambers, or in the Provincial Court (Family Division). Proceedings before the Court of Queen's Bench are plenary; proceedings before the Provincial Court are summary. An application for child support under the *P&MA* must be brought in the Court of Queen's Bench in a summary proceeding, meaning that access to support through a plenary procedure is probably available only to children of the marriage.

The *DRA* specifically authorizes the Court of Queen's Bench to make orders settling property for the benefit of children of the marriage.[145] The powers arise on the granting of an order for judicial separation, nullity or restitution of conjugal rights. No comparable provision is made in the *P&MA* with respect to the support of children born of parents who are not married to each other. The Provincial Court does not have an equivalent power.

The statute law governing an application for guardianship before the Court of Queen's Bench or a judge of the Surrogate Court under the *DRA* differs from that governing an application to the Provincial Court under the *CWA*.

---

[145] *DRA*, ss. 13, 21, 23 and 24(a).

We think it important that Alberta law ensure effective remedies on family breakdown, with family being generously defined.

4. Choice of court

Under a common regime of substantive family law, the parties should be able to choose the court in which they want to proceed.

D. Inequalities in the Law Relating to Children

In some situations, Alberta law treats children born outside marriage differently from the children of a marriage. For example, legislation gives the Provincial Court of Alberta jurisdiction to hear applications for the support of the children of a marriage brought under the *DRA*, Part 4. However, applications for the support of children born outside marriage (and who have not been accepted within a marriage) must be brought in the Court of Queen's Bench under the *P&MA*. Because of this difference, the Provincial Court does not have jurisdiction to resolve child support and custody and access issues for children born outside marriage although it could do so for children of a marriage. This means that parties who start out in the Provincial Court must go the cost and inconvenience of bringing another proceeding in the Court of Queen's Bench in order to resolve child support.

It follows from the guarantee of equality rights in section 15 of the *Charter* that children who have a parent in common are equally entitled to know and be supported by that parent, regardless of the sequence of non-marital, cohabitational or marital relationships that a parent may have entered into.[146] This position is consistent with the recommendations we made in the ALRI reports on the *Status of Children*[147] for the equality of children regardless of their birth within or outside marriage. A number of provinces have extended jurisdiction over unmarried parents and their children to provincially-appointed judges. We agree with this extension: in our view, *Charter* equality requires that children should have equal rights regardless of the forum in which the case is heard.

---

[146] But see *Levesque* v. *Levesque*, *supra*, note 118.

[147] *Supra*, note 16.

CHAPTER 5 GUIDING PREMISES

Consideration of the elements affecting family law reform, discussed in chapter 3, and of the problems with Alberta's family law statutes, discussed in chapter 4, has led us to adopt ten general premises. These premises have guided us in making the recommendations for the reform of family law in Alberta that are contained in ALRI RFD No. 18.2 on *Spousal Support*, ALRI RFD No. 18.3 on *Child Support*, and ALRI RFD No. 18.4 on *Child Guardianship, Custody and Access*. (Additional premises, specific to spousal support, are developed separately in RFD No. 18.2.)

The ten general premises are:

GENERAL PREMISE 1
Compatibility with federal Divorce Act. Alberta legislation should be compatible with the federal *Divorce Act*.

GENERAL PREMISE 2
Inclusiveness. The substantive law and remedies embodied in Alberta legislation on family matters should be as inclusive as is constitutionally open to a province or territory.

GENERAL PREMISE 3
Effective remedies. Alberta legislation should ensure that effective remedies are available on separation.

GENERAL PREMISE 4
Equality among children. Rights and responsibilities relating to children should be based on the relationship between parent and child rather than the relationship between the child's parents.

GENERAL PREMISE 5
Individual fairness. The law should retain the flexibility necessary to achieve fairness in an individual case.

GENERAL PREMISE 6
Consistency with other Alberta legislation. Alberta legislation on spousal

support and child support, guardianship, custody and access should be consistent with other Alberta law.

GENERAL PREMISE 7

Consistency with legislation in other Canadian provinces and territories. In developing legislation for Alberta, policy makers should consider whether it is desirable for Alberta legislation to be consistent with legislation in other Canadian provinces or territories.

GENERAL PREMISE 8

Uniform substantive law regime. Alberta legislation should create a uniform and coherent regime of substantive family law.

GENERAL PREMISE 9

Choice of court. Given the existing court structure, Alberta legislation should allow parties to choose the forum in which the remedy is sought: Provincial Court, Family Division, or Court of Queen's Bench.

GENERAL PREMISE 10

Public v. private law. The recommendations for the reform of family law must show an understanding of the interrelationship between private and public law rights and responsibilities.

Changing family demographics in Canada[1]

1. Marriage rate

The marriage rate is dropping — 9.2 marriages per 1000 population in 1972 (the record high) compared with 5.3 marriages per 1000 population in 1996. (Marriages in Alberta have followed the national pattern although the marriage rate in Alberta is higher than the national average.[2])

2. Marriage age

• Young adults are waiting longer to marry — the median age at first marriage has increased significantly, from 23.7 in 1965 to 29 in 1992 for grooms, and from 21.2 in 1965 to 27 in 1992 for brides.[3] It is not surprising, then, that the proportion of young people in their twenties and early thirties who are not married is growing: by between 15% to 20% for those under 30 years of age and by between 8% to 10% for those between 30 and 34 years. The proportion of people over age 30 who are marrying for the first time has also increased. The proportion of people who are expected to marry at some point has decreased.[4]

• Today, first marriages are not only less prevalent, they are also taking place later. By 1992, the average age at first marriage was 29 for men and 27 for women. This is an increase, for both genders, of three years since 1989 and four years since 1980. In contrast, during the 1960s and most of the

---

[1] We appreciate the help received from Jeannine Bednar who compiled statistics while working as an ALRI summer research student in 1997 and voluntarily updated them for us in 1998.

[2] Alberta Vital Statistics, *Alberta Statistical Review*, 4th Quarter 1992, Table 1.5, taken from www.statcan.ca, under Families, found on June 10, 1997.

[3] Jillian Oderkirk, "Marriage in Canada: Changing Beliefs and Behaviours 1600-1990" (Summer 1994) *Canadian Social Trends* 2 at 5, adapted from Jean Dumas, *Report on the Demographic Situation in Canada, 1992* (Statistics Canada Catalogue 91-209E) and Jean Dumas and Yves Péron, *Marriage and Conjugal Life in Canada* (Statistics Canada Catalogue 91-534E); Statistics Canada, *Families in Canada, Focus on Canada* at 13.

[4] Cam Stout, "Common Law: A Growing Alternative" (Winter 1991), 23 *Canadian Social Trends* 18 at 18, 20; R. Beaujot, " Notes on Society" (1988), 13 *Canadian Journal of Sociology* 305 at 306; R. Beaujot, *Population Change in Canada, The Challenges of Policy Adaptation,* (Toronto: McLelland & Stewart, 1991) at 239; Statistics Canada, *A Portrait of Families in Canada* (Target Groups Project, 1994) at 11.

1970s, the average age at first marriage remained stable at 25 for men and 23 for women.[5]

3. Divorce rate

Since the *Divorce Act, 1968* came into effect, the divorce rate has risen from 0.548 divorces per 1000 population in 1968 to a peak of 3.55 divorces per 1000 population in 1987 and gradually reducing to 2.6 divorces per 1000 population in 1995. (Alberta has the highest divorce rate in Canada. In 1992, about 1.4% of married couples in Alberta got divorced. In 1990 alone, divorces affected over 8000 dependent children who were living at home. Nearly half of the divorces involved no dependent children.[6])

4. Remarriage

The rising divorce rates have led to an increase in remarriage: "Since the late 1960s, divorce has become more common and divorce rates have risen substantially."[7]

5. Births outside marriage

The number of live births to unmarried women (that is, births outside marriage) has increased dramatically: from 2% of all births in 1921, holding at between 4% to 5% during the 1940s, 1950s and 1960s, then growing to 9% in 1971, 14% in 1981 and 27% in 1991.[8]

6. Fertility rate

The fertility rate has declined substantially, from a peak of 3.9 births per woman in 1959, to 1.66 births per woman in 1993 (see table 6).[9]

7. Family living

• The proportion of Canadians living in families has been relatively stable, fluctuating between 89.4% in 1971, and 83% in 1986.[10]

---

[5] Oderkirk, *supra*, note 3 at 5.

[6] Premier's Council in Support of Alberta Families, *Facts on Alberta Families* (October 1992 update) at 2; Statistics Canada, *The Daily* (June 13, 1995) at 2-3.

[7] Oderkirk, *supra*, note 3 at 4.

[8] 1996 Census data on births outside marriage was not obtained.

[9] C.F. Grindstaff, "Canadian Fertility, 1951-1993: from Boom to Bust to Stability?" (Winter, 1995) *Canadian Social Trends* 12 at 13; R. Beaujot, "Notes on Society," *supra*, note 4 at 307; *Families in Canada*, *supra*, note 3 at 20.

[10] Statistics Canada, *Basic Facts on Families in Canada, Past and Present* (1994) at 11; Premier's Council in Support of Alberta Families, *Facts on Families* (1995 ed.) at p. 10; and *Facts on Families* (October 1992 update) at 2.

• The proportion of families with children at home declined about 8% between 1971 and 1991 (and about 10% between 1961 and 1991).[11]

• Common-law couples and lone-parent families have fewer children on average than married couples.[12] A higher proportion of common-law couples than married couples do not have children at home.[13]

8. Married Couples

The percentage of married couple families decreased between 1981 and 1991, from 83% of all families to 77%. In 1991, married couple families constituted 77.3% of all families in Canada (with and without children) whereas in 1996, they constituted only 73.7%.[14] In 1996, married couple families constituted the large majority of families, although their proportion has declined from 80% of all families in 1986 to 74% in 1996 due to substantial increases in both common-law and lone-parent families.[15]

9. Common law relationships

• The percentage of common law families is increasing: between 1981 and 1991, from 5.6% of all families to 10% (8% in Alberta); and between 1991 and 1996. In 1991, common-law families constituted 9.8% of all families whereas in 1996 they constituted 11.7%. The increase has been especially great among 40-44 year olds.[16]

• Between 1991 and 1996 the rate of increase in common-law families was about 16 times that for married couple families.[17]

• The majority of first unions are now common-law. Between 1990 and 1995, over half (57%) of first conjugal unions formed were common-law.[18]

---

[11] R. Beaujot, *Population Change in Canada, supra*, note 4 at 249; *Families in Canada, supra*, note 3 at 19- 20; Statistics Canada, *Children and Youth: An Overview* (Ottawa: Minister of Industry, Science and Technology, 1994) at 1.

[12] M.S. Devereaux, *Decline in the Number of Children* (Autumn 1990) *Canadian Social Trends* 32 at 34; *Families in Canada, supra*, note 3 at 17, 20.

[13] *Families in Canada, ibid.* at 18.

[14] Statistics Canada, Census 96, "Marital Status, Common-law Unions and Families — Highlights, " Statistics Canada, *The Daily* (October 14, 1997) (Catalogue no. 11-001E).

[15] *Ibid.*

[16] Stout, *supra*, note 4 at 19; Statistics Canada, *Population Dynamics in Canada, Focus on Canada* (1994) at 58.

[17] *Supra*, note 14.

[18] Pierre Turcotte and Alain Bélanger, "Moving in Together: The Formation of First Common-law Unions" (Winter 1997), 47 *Canadian Social Trends* 7 at 8.

• Common law unions are often a prelude to marriage.[19]

10. Lone parent families

• In 1991, lone-parent families constituted 13% of all families whereas in 1996 they constituted 14.5%.

• About 80% of lone parent families are headed by females.[20] In 1984, among women aged 18-64 who had children, 26% had experienced lone parenthood. The average duration of the episodes of lone-parenting was 5.5 years. Among the women who had been single parents, 12% had had two or more periods in which they were single-parents.

• Of all families with children at home, the percentage lone parent families has been growing steadily: from 12.9% in 1971 to 16.6% in 1981, 18.8% in 1986, and 22% in 1995. (In Alberta, the figure has grown from 7% in 1971 to 15% in 1986 and 17% in 1991. Of these, 86.8% are headed by a woman and 13.2% by a man.)

• As of the 1996 Census, there were 1.1 million lone-parent families.[21] Since 1991, they have increased at four time the rate of husband-wife families.[22]

11. Children's living arrangements

• Between 1991 and 1996, the number of children living in families increased 6.3%. There was almost no increase in children living in families of married couples, in contrast to strong growth among children who lived with common-law couples (+52%) and lone parents (+19%). Almost one in every five children in Canada lived with a lone parent in 1996.[23]

• The majority of children live at home in married-couple families, although the proportion of married-couple families with children has dropped from 48.1% of all families in 1991 and 45.1% in 1996. The proportion of common-law families with children living at home is on the rise, growing from 4% of all families in 1991 to 5.5%.[24] The proportion of lone-parent families with

---

[19] Oderkirk, *supra*, note 3 at 7.

[20] *Basic Facts*, *supra*, note 10 at 14; *Families in Canada*, *supra*, note 3 at 17.

[21] *Supra*, note 14.

[22] *Ibid.*

[23] *Ibid.*

[24] "[M]ore and more children are being born into common-law families and as a result, divorce indices increasingly underestimate union breakdown and the formation of lone-parent families:" Oderkirk, *supra*, note 3 at 7.

children living at home is also on the rise, growing from 13% of all families in 1991 to 14.5% in 1996.[25]

• In 1991, 97% of children under age 15 lived in a family (husband-wife, common law or single parent).[26]

• The proportion of children living in lone-parent families doubled between 1981 and 1991, and the number of children living in common law families more than doubled.[27]

• In 1994, 79% of children under 12 lived with both their biological parents, 4% lived with one biological parent and a stepparent, and 16% lived with a lone-parent.[28]

• In 1991, among children under 15 years of age living in families, 83.8% lived in two-parent families (7% lived in common law families), and 13.8% lived in lone-parent families.

• In 1994, about 9% of Canadian children under 12 lived in a step family. Almost half of those children were stepchildren, and the rest were born or adopted into step families.[29]

12. Custody awards

The proportion of children involved in custody decisions who were awarded to joint custody increased significantly from 1.2% in 1986 to 14.3% in 1990. The proportion of the children who were awarded to their mother's custody declined slightly from 78.8% in 1978 to 73% in 1990. The proportion of the children who awarded to their father's custody declined from 16.0% in 1980

---

[25] *Supra*, note 14

[26] *Portrait of Families*, *supra*, note 4 at 15.

[27] Statistics Canada, *The Daily* (Wednesday, June 19, 1996), taken from www.statcan.ca, under Families, on June 10, 1997; *Children and Youth*, *supra*, note 11 at 14, 16, 17; A. Cragheur and M.S. Devereaux, "Canada's Children" (Summer 1991) *Canadian Social Trends* 2 at 4.

[28] Statistics Canada, "Canadian Children in the 1990s: Selected Findings of the National Longitudinal Survey of Children and Youth" (Spring 1997), 45 *Canadian Social Trends* at 3; Statistics Canada, *The Daily* (Thursday, October 17, 1996), taken from www.statcan.ca, under Families, on June 10, 1997; Statistics Canada, *The Daily, supra*, note 27.

[29] Statistics Canada, "Canadian Children in the 1990s," *ibid.* at 9; Statistics Canada, *The Daily, supra*, note 27.

to 12.2% in 1990.[30] The number of children involved in custody decisions declined from over 65, 000 in 1982 to 48, 500 in 1990.[31]

[30] *Basic Facts, supra*, note 10 at 17.

[31] *Portrait of Families, supra*, note 4 at 11.