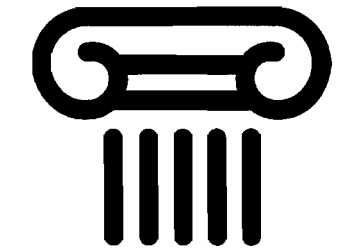

ALBERTA
LAW REFORM
INSTITUTE

FAMILY LAW PROJECT

SPOUSAL SUPPORT

Report for Discussion No. 18.2

October 1998

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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*
REMO	*Reciprocal Enforcement of Maintenance Orders* Act
RFD	Report for Discussion
SCA	*Surrogate Court Act*
SCC	Supreme Court of Canada

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LIST OF GENERAL PREMISES

[See RFD No. 18.1, Overview]

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.

LIST OF SPOUSAL SUPPORT PREMISES

PART I — SUMMARY OF REPORT

Unlike elsewhere in Canada, Alberta's spousal support law continues to be based on the historic "fault doctrine." Under the fault doctrine, a spouse's 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 spouse seeking support must show that the spouse from whom support is sought caused the marriage breakdown by committing a matrimonial offence such as adultery, cruelty or desertion. The marital misconduct of the spouse seeking support could bar that spouse from obtaining an order for support. In contrast, under modern spousal support law, a spouse's entitlement to support is based on that spouse's need for support, the ability of the other spouse to pay support and the fact of the marital relationship itself (unrelated to the commission of a matrimonial offence). The recommendations we make in this Report for Discussion (RFD) are intended to update Alberta's spousal support law by replacing out-dated concepts with modern ones.

This Report for Discussion (RFD) is one of a set consisting of RFD No. 18.1, *Family Law Project: Overview*; RFD No. 18.2, *Spousal Support*; RFD No. 18.3, *Child Support*; and RFD No. 18.4, *Child Guardianship, Custody and Access*. Taken together, their purpose is to contribute to the provision of a clear, sound, contemporary legislative framework for Alberta family law that will assist decision making by courts, litigants and other persons dealing with family law matters. If implemented, the recommendations will modernize Alberta family law by bringing it more closely into line with the federal *Divorce Act* and legislation in other provinces. Ten "General Premises" have guided us in making recommendations for reform. They are developed in RFD No. 18.1.

In RFD No. 18.2, we make recommendations with respect to the financial support rights and obligations which exist between spouses during marriage or after its dissolution. We fashion an action for "spousal support" that is independent of any other matrimonial action. We include within the meaning of "spouse" a man and a woman who cohabit together in a marriage-like relationship.

The RFD is divided into three sections. Section I (chapter 1) is introductory. Section II (chapters 2-7) develops the substantive spousal support obligation. Section III (chapters 8-13) explores matters relating to court proceedings and orders.

Section I: Introduction

1. Spousal support premises

In Chapter 1, we develop five underlying "premises" that are specific to spousal support. They are that: (1) spousal support should be dealt with separately from child support; (2) spousal support should be dealt with separately from matrimonial property division; (3) no preference should be expressed with respect to the relative support rights and obligations of past and present spouses; (4) the time when a new relationship is entered into is irrelevant to the determination of the right to and amount of support; and (5) in divorce cases, except where a provincial order that existed before divorce is superseded by an order granted in the divorce proceedings, the courts having jurisdiction over spousal support should continue to have jurisdiction under provincial legislation.

Section II: Spousal Support Obligation

1. Basic obligation

In Chapter 2, we examine the basic spousal support obligation and determine that it embodies, or should embody, seven basic characteristics. They are that the obligation: (1) flows from marriage; (2) is mutual as between the spouses; (3) is unconnected to matrimonial fault; (4) exists during marriage; (5) survives marriage breakdown; (6) is quantified by need and ability to pay; and (7) recognizes a duty of self-sufficiency. We recommend that the obligation should extend to the parties to a void or voidable marriage and to a polygamous marriage that is valid according to the law under which it was contracted. We recommend that "spouse" should be defined to include a party to a marriage or marriage-like relationship.

2. Spousal support objectives

Various theories about the objectives of spousal support have been advanced. We discuss several of them in Chapter 3 but agree with others that no single theory is adequate to fairly address the wide range of individual

circumstances that arise. We conclude that the best solution would be to adopt the objectives set out in the federal *Divorce Act*. These objectives, as interpreted by the Supreme Court of Canada in the leading case of *Moge* v. *Moge* and applied in subsequent cases, promote the equitable sharing of the economic consequences of marriage or marriage breakdown. The Alberta law would apply only in cases where the relationship between the spouses has broken down.

3. Factors to consider

Different approaches could be taken to the enactment of laws designed to achieve the spousal support objectives. In Chapter 4, we consider the advantages and disadvantages of various approaches before recommending the enactment of the factors contained in the *Divorce Act*. This recommendation fosters our General Premise that consistency with the federal legislation is desirable.

4. Relevance of spouse misconduct and other substantive issues

In Chapter 5, we examine five other issues relating to the substantive law of spousal support. We make recommendations: (1) to eliminate spousal misconduct affecting the marital relationship from consideration in the determination of spousal support rights and obligations; (2) to take into consideration the impact of other relationships and support obligations on the ability of a spouse to pay support; (3) in keeping with the *Divorce Act*, to legislate that child support takes priority over spousal support; (4) to include prenatal, birth and postnatal support for the mother, whether or not the child survives the birth; and (5) to abolish certain common law rights given to a wife as agent of her husband.

5. Domestic contracts

What effect should a written agreement made between the spouses have on the jurisdiction of the court to make a spousal support order? If the court is able to make an order, what effect should the order have on the provisions in the contract? We address these questions in Chapter 6. A domestic contract may be entered into either before or during marriage while the parties are living together (a "marriage contract"), before or during cohabitation in a marriage-like relationship (a "cohabitation agreement"), or during or after the parties to a marriage or marriage-like relationship cohabit (a "separation agreement"). Subject to two modifications, we endorse the recommendations

on domestic contracts that we made in ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*. The first modification is that either spouse should be able to apply for relief from the spousal support provisions in the domestic contract. The second modification is that the court should be able to make an order to vary, discharge or temporarily suspend and again revive the spousal support provisions in the contract. Apart from these modifications, the court should be able to disregard any provision of a domestic contract where it was entered into without independent legal advice, where the removal of barriers that would prevent a party's remarriage was a consideration in making the agreement, or where cohabitants subsequently marry each other. The court should also be able to disregard any provision in a marriage contract or a cohabitation agreement where changes in the circumstances of the parties make it unjust to enforce the provision.

6. Unmarried cohabitants

In Chapter 7, we ask: should persons living together in a marriage-like relationship have the same support rights and obligations as marriage partners? The Supreme Court of Canada judgment in the case of *Miron* v. *Trudel* pointed in the direction of an affirmative answer. The Court of Appeal of Alberta, in the case of *Taylor* v. *Rossu*, determined that the spousal support provisions in Parts 2 and 3 of the *Domestic Relations Act* infringe the *Canadian Charter of Rights and Freedoms* by unjustifiably discriminating against unmarried cohabitants. Because the issues are complex, instead of rewriting the existing provisions or striking them down effective immediately, the Court gave the government one year to legislate provisions that comply with the *Charter*. Our recommendations should help. We recommend that "cohabitants" be included in the definition of "spouse" for the purpose of spousal support. We define a "cohabitant" to mean "either of a man and woman who are not married to each other and who, immediately preceding the breakdown of the relationship, continuously cohabited (a) in a conjugal relationship with each other for at least three years, or (b) in a relationship of some permanence if there is a child of the relationship."

Section III: Court Proceedings

1. Applicants

Questions exist about who may apply for a spousal support order. In Chapter 8, we recommend that the spouse or a person acting on behalf of, or in the place of the spouse should be able to apply for a support order, an interim order or a variation order. This description is broad enough to include the government as an applicant where it is subrogated to the support rights of a social allowance recipient. In addition, the personal representative of a deceased spouse should be able to apply to vary an order that requires the deceased spouse to pay support.

2. Spousal support order

The *Divorce Act* and legislation in other provinces confer wide powers on courts making support orders to order relief of various sorts. They include the power to order one spouse to secure or pay, or secure and pay, periodic or lump sum support, or both, for the other spouse's support. We recommend that Alberta courts should have similarly wide powers. We also recommend that, in furtherance of the spousal support obligation, the court should be able to make certain orders with respect to interests in property. These include the power:

to order a conveyance or transfer, or to vary an existing settlement, of property;

to order a party to execute a conveyance or transfer;

to grant an order for the exclusive possession of the matrimonial home, or part of it, and exclusive use of any or all household goods;

to order a party to continue to pay the premiums on a life insurance policy, pension plan or other benefit plan, or to assign the benefit of the policy to the other spouse;

to order that an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan be revoked; and

to order remedies that protect against gifts or transfers of property owned by a spouse for inadequate consideration.

In addition, we make recommendations for the registration of spousal support orders and orders that affect interests in real or personal property. Finally, we recommend that the court should have discretion to grant a consent order without holding a hearing, and to incorporate in its order all or part of a provision in a written agreement previously made by the parties.

3. Variation order

Over time, the circumstances of the parties may change or evidence that was not previously available may come to light. For this reason, the court must have power to vary a spousal support order. In Chapter 10, we recommend that the court should have power to make an order discharging, varying or suspending, prospectively or retroactively, a spousal support order or any provision in it. On an application for a variation order, the court should consider the same factors and pursue the same objectives as it would in an application for a spousal support order. The court should also be able to exercise the same discretion and powers of disposition that it had on the original application. Any court having jurisdiction over spousal support should be able to make, vary and enforce its own orders. To achieve this result, the *Maintenance Enforcement Act* should be amended to confer the same powers of enforcement on courts with jurisdiction over spousal support to the fullest extent constitutionally allowable.

4. Interim support order

Interim support orders allow the court to fill the spousal support gap until the issue of support is determined in the application for a support order. In Chapter 11, we consider limiting the powers of the court with respect to interim support, but decide against it. We recommend that the court should have the same discretion and powers of disposition and should consider the same factors and pursue the same objectives as does with respect to a spousal support order.

5. Duration of order

A spousal support order may limit its duration by its terms. Alternatively, the law may provide that an order shall terminate on the happening of a certain event. In Chapter 12, we examine policy issues relating to the

duration of a spousal support order. With respect to the terms of a spousal support order, we recommend that the court should have discretion:

to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings;

to order the payment of support for a definite or indefinite period or until the happening of a specified event and to impose terms, conditions or restrictions in this connection;

where a declaration of nullity or a decree absolute of nullity is granted or a marriage-like relationship has terminated, to order that, upon strict compliance with the order, spousal support is final and not capable of variation.

With respect to the operation of law, we recommend that a spousal support order should survive the death of the spouse having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the *Family Relief Act*. The order should terminate:

on the death of the spouse receiving support, except where the court expressly declares otherwise (arrears of support accumulated while the spouse was alive should continue to be enforceable);

if the spouses resume cohabitation for more than ninety days; and

on the remarriage of the spouse receiving support, except where the court orders to the contrary, but not automatically where that spouse enters a cohabitational relationship.

The jurisdiction of the court under Alberta law should continue in effect unless and until a court makes a spousal support order in a proceeding under the *Divorce Act*. The same provisions with respect to duration should apply to a variation order. An interim order should take effect in accordance with its terms until the order is varied or the application for a spousal support order or an appeal is adjudicated.

6. Related court powers

Courts exercising jurisdiction over spousal support should have certain additional powers. We makes recommendations for these in Chapter 13. Our recommendations include the power of the court:

to order the payment of support into court or to a third party for the benefit of the spouse receiving support;

to require advance financial disclosure by the spouses or by a spouse's employer, partner or principal;

to order that any financial information disclosed be kept confidential;

to require a person or public body to disclose information indicating the whereabouts of a spouse;

to direct some degree of privacy in a spousal support proceeding and to prohibit the publication or broadcasting of information that comes out in the proceeding;

generally, to impose terms and conditions in an order; and

to make an order for the payment of costs, including, on an interim application, an order for interim costs and disbursements.

An order to disclose financial information or information about a spouse's whereabouts should bind the Crown. Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court should be able to apply the Alberta Rules of Court. Any new spousal support legislation should operate retroactively.

PART II — REPORT

SECTION I — INTRODUCTION

CHAPTER 1 BACKGROUND

A. Family Law Project

This report is designed to be read in conjunction with ALRI Report for Discussion (RFD) No. 18.1, *Family Law Project: Overview*. RFD No. 18.1 shapes the framework for consideration of the issues raised in this RFD on *Spousal Support* and the companion RFDs on *Child Support and Child Guardianship, Custody and Access*.

RFD No. 18.1 provides background information that is common to all four RFDs. Its contents include:

- a description of the project – how it is organized, its history and scope, related ALRI work, and other relevant considerations;
- an exposition of problems common to family law reform efforts;
- a discussion of the constitutional division of legislative and judicial powers;
- consideration of the impact of federal family law and policy on provincial law; and
- development of the general premises that guide our recommendations for family law reform.

B. Scope and Organization of this Report

This report concerns the private law obligation of spouses to support each other.

In our *Family Law Project (Phase 1)*, in ALRI Report No. 65 on *Family Relationships: Obsolete Actions*, we recommended the abolition of the actions for judicial separation and restitution of conjugal rights in favour of an action for spousal support that is independent of any other matrimonial action. In this report, we will make recommendations to fashion that independent action. Our primary objective is to modernize Alberta's alimony and

maintenance law — law which relies on out-of-date concepts such as desertion, necessity and the absence of marital fault.

This report is divided into three sections. Section I introduces the topic. To this end, Chapter 1 provides background information on the scope of the report, the meaning of support, the statutory framework operating in Alberta, the relationship between spousal and child support and the premises underlying the formulation of recommendations.

Section II addresses the spousal support obligation. It includes: Chapter 2, which embodies a discussion of the nature of the spousal support obligation; Chapter 3, which elaborates on the objectives of spousal support orders and the quantification of support awards; Chapter 4, which describes various legislative approaches that can be taken to the quantification of spousal support; Chapter 5, which explores four related issues—the relevance to spousal support of spousal misconduct, the impact of new families, the recovery of prenatal and birth expenses and the operation of the law of agency with respect to spouses; Chapter 6, which examines the effect of domestic contracts on the jurisdiction of the court; and Chapter 7, which compares the position of unmarried cohabitants in relation to spousal support law.

Section III addresses matters relating to court proceedings for spousal support. It includes: Chapter 8, which defines the persons who may apply for spousal support; Chapters 9, 10 and 11, which set out the central powers a court requires in relation to a spousal support order, variation order (including enforcement) or interim support order; Chapter 12, which considers the question of the duration of a support order; and Chapter 13, which deals with the additional powers a court should have in spousal support proceedings. As stated in RFD No. 18.1, as a general matter, this Project does not cover issues relating to court jurisdiction in family law matters, the assignment of jurisdiction to one court or another, or the general powers and procedures that operate in a court.

C. Meaning of "Support"

The term "support" is used to signify financial support rights and obligations which exist between two persons in a family relationship.

The term "spousal support" is used to signify financial support rights and obligations which exist between spouses during marriage or after its dissolution. The expression "spousal support" may, in the appropriate context, include former spouses and persons whose cohabitational relationship is characterized as "spousal" even though they are unmarried.

Using the term "support" will avoid confusion with two terms used in the existing law: "alimony" and "maintenance." These terms appear in Parts 3 and 4 of the *Domestic Relations Act (DRA)*,[1] but their common usage rarely coincides with their technical meaning. "Alimony" means spousal support payments ordered by the Court of Queen's Bench during the subsistence of a marriage. Maintenance has two meanings. First, in contrast to alimony, "maintenance" means support payments ordered after divorce or nullity of marriage. Second, "maintenance" means orders for spousal or child support granted during the subsistence of a marriage by the Provincial Court of Alberta.

D. Statutory Framework

1. Support obligation

In Alberta, the *Maintenance Order Act (MOA)* renders spouses primarily liable to support each other during the currency of the marriage.[2] The obligation arises with respect to a spouse who is disabled or destitute.[3]

The provisions in the *MOA* originated with the England's *Poor Law Acts* commencing in 1576. The *Poor Law Acts* had the purpose of relieving the burden to support destitute persons which was borne by the local parish.

2. Marriage breakdown, nullity and divorce

The *DRA* governs spousal support in the context of marriage breakdown, nullity and divorce. It was first enacted by the Alberta legislature in 1927. Until 1927, the *Matrimonial Causes Act* enacted in England in 1857 was in

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

[2] *Maintenance Order Act*, R.S.A. 1980, c. M-1, s. 2. The maintenance obligation is owed to "an old, blind, lame, mentally deficient or impotent person" or "any other destitute person who is not able to work." It includes obligations to supply adequate food, clothing, medical aid and lodging.

[3] *Ibid.*

effect. The scope of operation of the alimony or maintenance provisions in the *DRA* was affected by the enactment federally of the *Divorce Act*.[4] The statutory evolution of these pieces of legislation is described in ALRI RFD No. 18.1 [*Overview*], Chapter 5.

E. Premises Underlying Recommendations on Spousal Support

1. Relationship between Spousal Support and Child Support

Views vary about the approach which should be taken to translate the different theoretical foundations underlying spousal and child support into support awards. Some commentators claim that it is necessary "to separate child support from spousal support so that financial provision for children is not seen simply as . . . another weapon with which to fight the other side."[5] Other commentators claim that the practical consequences of spousal and child support to the persons involved are not readily separable.[6]

In the divorce context, the Supreme Court of Canada has stated that the legal principles regulating spousal support must be kept separate and distinct from those regulating child support.[7] The principle enunciated by the Supreme Court is that spousal support should be neither ordered nor increased simply because the spouse who is seeking or receiving support has custody of a child. The *Divorce Act* now provides for the priority of child support over spousal support yet still apportions between the spouses any financial consequence arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.[8] This is so because the duty to support a child financially is an obligation owed by

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[4] R.S.C. 1985 (2nd Supp.), c. 3. The *Divorce Act* was enacted initially in 1968, S.C. 1967-68, c. 4, consolidated in R.S.C. 1970, c. D-8, and subsequently re-enacted as the *Divorce Act 1985* [hereinafter *Divorce Act*].

[5] Jennifer Levin, quoted in John Eekelaar and Mavis MacLean, "Financial Provision in Divorce: A Reappraisal" in Freeman, M.D.A. (ed.), *The State, The Law and The Family* (London: Sweet & Maxwell, 1984), c. 11; see also Ellen B. Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda," (1993) 6 Can. J. of Women and the Law 371.

[6] Eekelaar and Maclean, *ibid,* at c. 13. See generally, John Eekelaar and Mavis Maclean, *Maintenance After Divorce* (Oxford: Clarendon Press, 1986).

[7] *Richardson* v. *Richardson,* [1987] 1 S.C.R. 857, 22 O.A.C. 1, 7 R.F.L. (3d) 304, 38 D.L.R. (4th) 699.

[8] *Divorce Act*, ss. 15.3(1) and 15.2(6)(b).

both parents to their child. It is not an obligation owed by one parent to the other parent. For this reason, it should be discharged, where necessary, through an order for child support and not an order for spousal support unless there is a consequence to a spouse over and above the obligation to support a child.[9]

In reaching this conclusion, the Supreme Court of Canada has acknowledged that segregating spousal and child support has an air of artificiality.[10] Child support obligations are often identified as a factor to be considered when assessing spousal support.

Supporters of the opposing view point out that the financial position of a child and the child's custodial parent are for practical purposes identical: the child and the custodial parent share the same standard of living.[11] As stated in a British Columbia judgment, "The family unit cannot be divided into parts so that the standard of living of the children increases [or decreases] while that of the [parent], who maintains and cares for them, remains the same." An Alberta judgment makes the point in these words:[12]

> While it may make sense in principle to differentiate between the enforceability of separation agreements as they affect child maintenance as opposed to spousal maintenance, I wonder whether as a practical matter we may not to some extent be deluding ourselves when we do this. A family is an indivisible economic unit. When a needy spouse is denied maintenance because she has unwisely, but freely bargained her rights away, the children who live with that spouse inevitably are affected adversely.

It is arguable that preservation of a clear distinction between spousal and child support may contribute to the disparity in standards of living between custodial and non-custodial households and the reduced standard of living that many women and children experience consequently on marriage

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[9] *Ibid.*

[10] *Ibid.* Prior to its amendment in 1997, the predecessor to section 15.2(4)(c) of the *Divorce Act* expressly required the court to have regard to "any . . . agreement or arrangement relating to the support of the spouse or child" in making an order for spousal or child support.

[11] Eekelaar and Maclean, *supra*, note ?.

[12] *Jull* v. *Jull*, *ibid.*, quoting from the trial judgment of Wilson, J.

breakdown.[13] Many would say that the law of spousal support should take into consideration the "economic disadvantages" associated with caring for children. Child care responsibilities may affect the earning ability of the spouse having custody. Various factors may reduce the scope of that spouse's "economic choice," factors such as "the necessity of remaining within proximity of schools, not working late, remaining at home when the child is ill, etc." A custodial parent may be more inclined than a non-custodial parent to "do without" in order to pick up the "extra costs" of child care that are not anticipated when child support is determined.[14]

As stated in the ALRI RFD No. 18.1 we have decided to deal with spousal and child support separately. This is partly to emphasize that spousal support and child support proceed from different theoretical foundations, and partly to facilitate discussion of the issues in manageable portions. Our decision is buttressed by the recent *Divorce Act* amendments and the enactment of the Federal Child Support Guidelines. These changes require that child support be determined separately from spousal support under the *Divorce Act*.[15]

Spousal Support Premise No. 1

Spousal support should be dealt with separately from child support.

2. Relationship to matrimonial property

Under the constitutional division of legislative jurisdiction, property and civil rights are matters for the provincial legislature whereas "marriage and divorce" is a matter for the Parliament of Canada.[16] "Property" includes matrimonial property. "Divorce" includes support corollary to the federal divorce power.

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[13] Zweibel, *supra*, note 5 at 374.

[14] *Ibid.* at 390-391, citing Miriam Grassby, "Women in Their Forties: The Extent of Their Rights to Alimentary Support," (1991) 30 R.F.L. (3d) 369 at 396.

[15] The Federal Child Support Guidelines were enacted pursuant to *Divorce Act* amendments which received royal assent on February 19, 1997 (S.C. 1997, c. 1). The Guidelines, which were approved by a Special Committee of Council on April 8, 1997, took effect May 1, 1997.

[16] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 92(26) and 91(13), respectively [Formerly *British North America Act*].

Under Alberta's *Matrimonial Property Act* (*MPA*),[17] on marriage breakdown a spouse may apply to the Court of Queen's Bench of Alberta for an order for the distribution of the net property gains that have accrued to the spouses during the subsistence of their marriage. There is a statutory presumption that gains will be equally divided between the spouses, but this presumption may be displaced by the exercise of judicial discretion in accordance with certain prescribed statutory criteria.[18]

The value of property owned by a spouse claiming support affects that spouse's need for support from the other. The amount of property owned by a spouse from whom support is claimed affects that spouse's means. Therefore a division of matrimonial property between spouses on marriage breakdown or dissolution will affect the amount of support to be paid by one to the other. In a small number of cases, the division may eliminate any need for spousal support. In a greater number, it may reduce but not eliminate the need of one and the means of the other. The empirical data currently available suggests that spousal rights to property division on marriage breakdown or divorce cannot provide long-term financial security for young mothers or middle-aged wives who have discharged homemaking roles and been financially dependent on their breadwinning husbands during marriages of any duration—short, medium or long.[19]

Because in most cases there will be a need for support after the division of matrimonial property, we have concluded that the existing distinctions between spousal support and matrimonial property should be continued. Both federal and provincial legislation dealing with support must be sufficiently flexible to accommodate cases where a property division has substantially affected the resources of each spouse, cases in which there is no property to divide, and all cases in between. The relevant legislation must

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[17] R.S.A. 1980, c. M-9.

[18] *Matrimonial Property Act*, *ibid.*, ss 7-8.

[19] Department of Justice, Canada, *Evaluation of the Divorce Act, 1985 — Phase I: Collection of Baseline Data*, June 1987, Principal Investigator, Professor C. James Richardson; *Phase II: Monitoring and Evaluation*, May 1990. *See also*: *Moge* v. *Moge*, *infra*, note 29, per L'Heureux-Dubé; Canadian Institute for Law and the Family (CRILF), University of Calgary, *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Calgary: CRILF, 1989).

also be flexible enough to allow for a variation of a pre-existing support order at the time of, or after, a division of property.

Spousal Support Premise No. 2

Spousal support should be dealt with separately from matrimonial property division.

3. Relationship between past and present families[20]

On marriage breakdown or marriage dissolution, it is not uncommon for one or both spouses to enter into a new cohabitational relationship or remarry. A new partner may have spousal or child support rights or obligations from a previous relationship. Where the formation of new relationships and the creation of reconstituted or blended families strains limited financial resources, fundamental policy issues arise.

a. Complexity of issues

Sequential family relationships raise numerous questions for spousal support. The answers to the questions may differ depending on which spouse has formed the new relationship—the spouse having the support obligation or the spouse seeking support. In assessing support rights and obligations, should it make a difference when the new relationship was formed—whether during the subsistence of the marriage, before or after marriage breakdown, or after dissolution? Should support ordered under provincial legislation on marriage breakdown or in a nullity proceeding survive the remarriage of the spouse receiving support? Should the answer differ with the purpose for which the support was ordered or the type of order that was granted (*e.g.*, a periodic payment for an indefinite period or a lump sum payment)? To what extent, if at all, should the payment of periodic spousal support be affected by the remarriage of the person having the support obligation? Should the financial resources of a partner be relevant to the adjudication of the support rights of the former spouse?

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[20] The analysis that follows draws heavily upon a study entitled *Income Support Systems for Family Dependants: Fundamental Policy Issues*, which was prepared by Julien D. Payne, Q.C., LL.D. for the ALRI, June 5, 1982, at II-109 to II-148. For ready access to this material, see *Payne's Divorce and Family Law Digest*, (Don Mills, Ont.: De Boo, 1986-1994) at 82-741/67: The Formation of New Relationships: Present and Prospective Judicial and Legislative Responses.

b. Variety of relationships

i. Nature of the new relationship: remarriage or cohabitation?

The new relationship may consist of remarriage or cohabitation. Both kinds of relationship involve economic consequences. Depending on its nature, the new relationship may remove a financial need that arose on the breakdown or dissolution of a previous marriage or cohabitational relationship; it may reinforce that need; or it may create a new financial dependence where, for example, children are born of the new relationship. Some new relationships will be of short duration; others will last as long as or longer than the previous marriage; still others will survive until the death of one of the parties.

ii. Existing or former marriage: valid, voidable or void?

The marriage of the spouses may be valid, voidable or void. The meanings of these terms are defined in Chapter 2, under heading D.

c. Scope of provincial jurisdiction

It is appropriate to consider the effect of reconstituted families on support in the provincial context.

With respect to spousal support, many of the questions about the consequences of the formation of new relationships may fall within the ambit of federal divorce legislation. But they cannot all be so easily dismissed. The formation of new relationships during the subsistence of a marriage and the assumption of additional family obligations may be indicative of marriage breakdown but does not necessarily mean that an action for divorce has been commenced or completed. Provincial legislation could, and does, empower courts to make a support order in this circumstance. Provincial jurisdiction embraces cases where the divorce court has remained silent on the issue of support rights and obligations but a support order was made under provincial legislation prior to the divorce. Provincial jurisdiction continues where no support order is made on divorce and no prior support order exists. Provincial legislation could, and does, empower courts to make a support order where a marriage is a nullity.

d. Priority of past or present family

In the context of divorce, there has been a conflict of judicial opinion on the question whether a divorced spouse should be relieved of court-ordered

obligations to the first family by reason of newly-acquired obligations to a second family:[21]

> At one extreme, some courts have concluded that the primary responsibility is owed to the first family. At the opposite extreme, other courts have held that the new family should take precedence where the obligor cannot support both families, because it is in the public interest for the new family to succeed. Between these two extremes, a middle ground has been adopted whereby the courts assume no *a priori* preference for either family.

Where child support is concerned, the Alberta Court of Appeal has stated that any subsistence adjustment in favour of a parent from whom child support is sought should "not drive the [child support] award so low that the subsistence level of the other parent, or the child, falls below that of the parent seeking the adjustment." The Federal Child Support Guidelines give the court discretion to depart from the guidelines where a spouse or child would otherwise suffer undue hardship.[22]

As has been shown, family situations differ markedly. For this reason, we do not think it wise to lay down rules that favour one family over another automatically. More than this, we think that any statutory provision purporting to give one set of family dependants strict priority over other family dependants would run contrary to the equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.

This reasoning leads us to our third premise. It is that our recommendations for family law reform should express no preference with respect to the relative support rights and obligations of past and present spouses.

Spousal Support Premise No. 3

No preference should be expressed with respect to the relative support rights and obligations of past and present spouses.

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[21] Julien D. Payne, "Spousal Maintenance in Divorce Proceedings" (1984), 41 R.F.L. 376 at 405-06. *See also* Julien D. Payne, "The Formation of New Relationships: Present and Prospective Judicial and Legislative Responses" in *Payne's Divorce and Family Law Digest*, *ibid.* ; Judge Norris Weisman, "The Second Family in the Law of Support" (1984), 37 R.F.L. (2d) 245 *et seq.*

[22] Federal Child Support Guidelines, *supra* note 15, s. 10.

e. Time when new relationship formed

As has been seen, the new relationship may be formed either before or after the former relationship has broken down. In the case of marriage, it may be formed after marriage breakdown but before dissolution or it may be formed after dissolution.

In assessing the support rights and obligations that arise from a valid or voidable marriage, it is arguable that a distinction should be made between new relationships that are formed before marriage breakdown or dissolution rather than after. In the case of a void marriage, either party is free to form a new relationship or to remarry without benefit of a court order declaring the marriage void. In assessing the support rights and obligations that arise from a void marriage, it is arguable that conduct prior to a court order of nullity should be looked at in a different light. On the other hand, the factual circumstances and the reliance placed by at least one spouse on the belief that the marriage is valid may be similar in cases of void and voidable marriages.

In Phase 1 of this project, we recommended the abolition of remedies rooted in matrimonial fault.[23] In our view, such remedies do not provide a relevant basis for deciding the right to and amount of support. To the contrary, there should be no element of reward or punishment in the award or denial of support or the quantification of the amount of support. We do not think that responsibility for the breakdown of a relationship can be properly apportioned between the partners, nor do we think it possible to quantify spousal support by reference to the conduct of the parties.

We have concluded, in general, that the conduct of the spouses in repudiation of their marriage, including their sexual conduct, should not affect the determination of spousal support rights and obligations.[24] This reasoning leads us to the premise that the time when the new relationship was formed is irrelevant to the right to and amount of spousal support.

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[23] ALRI Report No. 65, *Domestic Relations Act—Family Obligations: Obsolete Actions* (March, 1992).

[24] The issue of the relevance of misconduct to the objectives of spousal support is examined in greater detail in Chapter 5, heading A. There a distinction is made between two kinds of misconduct—conduct repudiating the marriage and conduct having economic implications.

Spousal Support Premise No. 4

The time when a new relationship is entered into, whether before or after marriage breakdown, is irrelevant to the determination of the right to and amount of spousal support.

4. Relationship to Divorce

The *DRA* currently includes provisions relating to spousal support after divorce.[25] These statutory provisions pre-date the enactment of the *Divorce Act* in 1968. This was the first comprehensive divorce statute enacted by the Parliament of Canada. Prior to 1968, corollary relief in divorce proceedings had been regulated throughout Canada by provincial statute.

In ALRI Report No. 27, we concluded that provincial legislation should be framed so that it will apply to all fields which may ultimately be open to it. We included in that proposition the continuation after divorce of pre-existing orders.[26] We also think that in the absence of a spousal support order in divorce proceedings, the courts in Alberta should continue to have jurisdiction under provincial legislation.[27]

Spousal Support Premise No. 5

In divorce cases, except where a provincial order that existed before divorce is superseded by an order granted in the divorce proceedings, the courts having jurisdiction over spousal support should continue to have jurisdiction under provincial legislation.

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[25] *DRA*, s. 22.

[26] ALRI Report No. 27, *Matrimonial Support* (March 1978), at 125-26.

[27] See Chapter 12 on Duration of Support, heading A.2.B for discussion of this exception. See also Rec. No. 37.

CHAPTER 2 BASIC OBLIGATION

In this report we make recommendations for an action for spousal support that is independent of any other matrimonial action.

A. Existing Law

Alberta legislation with respect to spousal support rights and obligations arising from marriage is found in the *MOA* and *DRA*. Federal legislation is found in the *Divorce Act*.

1. Alberta

a. Maintenance Order Act

The *MOA*, first enacted in 1921,[28] imposes primary liability on a husband or wife to provide "maintenance, including adequate food, clothing, medical aid and lodging" to a spouse who is old, blind, lame, mentally deficient, impotent, or destitute and unable to work.[29] This Act has as its purpose the protection of the public purse. The genesis of this statute dates back to the English *Poor Relief Act, 1601*, an enactment in the chain of legislation that commenced in 1576. The obligation is enforced by application to the Court of Queen's Bench.[30] Before making an order, the Court must be satisfied that the liable spouse is able to pay.[31] Wilful failure to comply with the terms of the order is an offence punishable by fine up to $500 or, on default, imprisonment for up to 3 months.

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[28] S.A. 1921, c. 13, now R.S.A. 1980, c. M-1.

[29] *MOA*, R.S.A. 1980, c. M-1, ss 2, 3.

[30] *Ibid.*, s. 4(1).

[31] *Ibid.*, s. 4(2).

b. *DRA*

Spousal support rights and obligations in Alberta are governed by Parts 3 and 4 of the *DRA*.[32] Part 3, entitled "Alimony and Maintenance," consists of sections 15 to 25. Part 4, entitled "Protection Orders," consists of sections 25.1 to 39.

Under the *DRA*, the spousal support obligation must be inferred from the power to award support that is conferred on the court by this statute. The obligation is owed to a spouse on marriage breakdown and is not restricted to a spouse who is disabled or destitute. The court power to award support is general in that once the strictures of the fault doctrine have been satisfied, a judge has power to award support if and as the judge sees fit.

i. Part 3

Part 3 of the *DRA* confers jurisdiction on the Court of Queen's Bench to grant alimony to either spouse.[33] Alimony may be granted in an action limited to that object, in a proceeding for judicial separation or on non-compliance with a decree for restitution of conjugal rights.[34] The jurisdiction to grant alimony in an action limited to that object is exercisable "only in a case where the plaintiff would be entitled to a judgment for judicial separation or a judgment for restitution of conjugal rights."[35] That is to say, the right to alimony is fault-based as both judicial separation and restitution of conjugal rights are fault-based. Support may also be granted when a decree of divorce or

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[32] On June 16, 1998, the Court of Appeal found that Parts 2 and 3 of the *DRA* contravene the *Charter*, s. 15, by failing to confer equal support rights on common law partners and declared them to be invalid; however, the Court suspended the operation of the declaration for twelve months to give the Alberta government a chance to amend the offending provisions: *Taylor* v. *Rossu, infra, note 277. See also Chapter 7, heading D.4.*

[33] "Alimony" means spousal support payments ordered by the Court of Queen's Bench during the subsistence of a marriage: see *supra*, Chapter 1, heading C. "Spouse" may now be interpreted to include cohabitants: *Taylor* v. *Rossu*, *infra* note 277.

[34] *DRA*, ss 15, 17. A judgment for judicial separation releases the applicant spouse from the duty of cohabiting with the other spouse while the marriage continues. This remedy is fault-based. A judgment for restitution of conjugal rights requires a spouse who has left the marriage to resume cohabiting with the other spouse. Its purpose is to enforce the rights "which both husband and wife have to each other's society and marital intercourse": *Fumerton* v. *Fumerton (1970), 12 D.L.R. (3d) 504 at 505 (B.C.S.C.).*

[35] *DRA*, s. 15. In ALRI Report No. 65, *supra*, note 23, we recommended the abolition of these matrimonial actions and their replacement by a stand alone spousal support proceeding. Report No. 65, published as Phase 1 of the ALRI Family Law Project, was directed specifically at reform of the *DRA*.

declaration of nullity has been obtained.[36] In these instances, the right to support is not necessarily fault-based. Interim alimony may be granted immediately.[37]

The provisions in Part 3 represent the traditional approach to provincial spousal support law. No legislated objectives or other aids are provided to guide the court in determining the amount of support. For example, where alimony follows judicial separation or the refusal to resume conjugal living, the court is simply empowered to "order that the defendant pay to the plaintiff until further order, or during their joint lives or during a shorter period, a periodical sum as alimony."[38]

ii. Part 4

Part 4 of the *DRA* confers jurisdiction on the Provincial Court to grant maintenance to a deserted spouse.[39] An order made under Part 4 may require the payment of "a weekly, semi-monthly or monthly sum for the maintenance of the applicant ... that the judge considers reasonable having regard to the means of both the spouses."[40] Here again, the offence concept is dominant and there is a conspicuous absence of any statutorily-declared objectives. Interim support may be granted pursuant to the *Provincial Court Act* (*PCA*) on adjournment of a hearing.[41]

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[36] *Ibid.*, s. 22.

[37] *Ibid.*, s. 16.

[38] *Ibid.*, s. 17(1).

[39] *Ibid.* ss 26, 27. In this context, "maintenance" means orders for spousal support granted during the subsistence of a marriage by the Provincial Court of Alberta. As stated in Chapter 1, heading C, maintenance can also mean support payments ordered after divorce or annulment of marriage. A deserted spouse is a person who has been deserted by or is living apart from the other spouse on account of cruelty or the failure of the spouse, without sufficient cause, to provide food and other necessaries: *DRA* s. 27(1).

[40] *Ibid.*, s. 27(4).

[41] *PCA*, s. 30(1).

2. Federal *Divorce Act*

As an alternative to seeking support under the *DRA*, separated spouses may file immediately for divorce.[42] Under the *Divorce Act*, the Court of Queen's Bench of Alberta may grant interim or permanent support to a spouse.[43] Interim support is available at once. In granting support, the court may make an order to secure or pay, or to secure and pay, such lump sum or periodic sums as the court thinks reasonable. The order may be for a definite or indefinite period or until the happening of a specified event and the court may impose other terms, conditions or restrictions as it thinks fit.[44]

3. Other provinces and territories

As stated in ALRI RFD No. 18.1, since the late 1970s, other Canadian provinces and territories have modified their spousal support laws in response to the changes in federal divorce legislation.[45]

B. Modern Characteristics

The recognized nature and purpose of spousal support rights and obligations is changing. The modern spousal support obligation that has emerged in Canada has seven common characteristics. It is: (i) based in marriage; (ii) mutual as between spouses; and (iii) unrelated to the commission of a matrimonial offence (does not act as a reward or punishment for past or present behaviour). The obligation (iv) exists throughout marriage (unless and until terminated by court order) and (v) survives marriage breakdown or marriage dissolution (depending on the circumstances of the spouses). It (vi) is quantified according to the modern cornerstones of need and ability to pay. It also (vii) recognizes a spousal duty of self-sufficiency.

We will examine each of these characteristics separately in order to develop our specific recommendations.

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[42] *Divorce Act*, s. 8(2)(a).

[43] *Ibid.*, ss 15.2(1), (2).

[44] *Ibid.*, s. 15.2(3).

[45] RFD No. 18.1 at 21.

C. Legislating the Obligation

1. Legislative statement

There is a broad societal consensus today, as in former times, that the law should recognize and enforce spousal support rights and obligations. Under the existing Alberta law, the only direct statement of the spousal support obligation is in the *MOA*, rarely-used legislation of primarily historical interest. The obligation arises only with respect to a spouse who is old, blind, lame, mentally deficient or impotent or otherwise destitute and not able to work.[46] The obligation is to provide "maintenance" which includes "adequate food, clothing, medical aid and lodging."[47] Under the *DRA*, which is Alberta's main family law statute, the obligation must be inferred from the power conferred on the court to award support.

Modern family law statutes in several Canadian jurisdictions state the spousal support obligation in express terms.[48] For example, the *Family Law Act* in Ontario imposes an obligation on every spouse "to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so."[49]

This is consistent with our recommendation in ALRI Report No. 27 on *Matrimonial Support*. There, we recommended that "family legislation in Alberta should express the spousal support obligation as a positive statement that the parties to a marriage are mutually liable to support each other."[50] We concluded that a general statement of the basic obligation may be an aid to interpretation.

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[46] *MOA*, *supra*, note 29, s. 2(1).

[47] *Ibid.*

[48] *See Family Relations Act*, R.S.B.C. 1996, c. 128, s. 89; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 4; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112; *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 36; *Family Law Act*, R.S.O. 1990, c. F.3, s. 30.

[49] R.S.O. 1990, c. F.3, s. 30. Similarly, s. 31 imposes an obligation on parents to provide support for their children and s. 32 imposes an obligation on adult children to provide support for their parents.

[50] ALRI Report No. 27, *supra*, note 26 at 19; *see also* Rec. 2.

RECOMMENDATION No. 1.2

Alberta legislation should contain a general statement of the basic spousal support obligation.

2. Basic characteristics

a. Flows from marriage

Until recently, under the existing law, the spousal support obligation was associated with marriage. This was so whether the relationship was regarded as one of contract, status or partnership and whether marriage was regarded as a legal matter or a religious sacrament.[51] Now, the spousal support obligation is associated with both marriage and marriage-like relationships.[52]

We believe that the spousal support obligation should continue to flow from the existence of a marriage or marriage-like relationship, with marriage being broadly interpreted. The scope of the relationship encompassed by the concept of marriage for the purpose of this report is discussed in this Chapter under heading D. Meaning of "Marriage Relationship." "Marriage-like" relationships are discussed in Chapter 7 on Unmarried Cohabitants.

b. Mutual

Historically, the support obligation was unilateral—the husband had an obligation to maintain his wife. In Alberta, the 1973 amendments to the *DRA* transformed the spousal support obligation from a unilateral obligation owed by the husband to his wife into a mutual obligation.[53] Today, in Alberta as elsewhere, husbands and wives are equally obligated to each other to provide support and are equally entitled to receive support.

We agree that the spousal support obligation should be mutual. We endorsed the mutuality of the spousal support obligation owed by husbands and wives in ALRI Report No. 27. Mutual obligations are consistent with the

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

[52] *Taylor* v. *Rossu*, *infra* note 277.

[53] S.A. 1973, c. 61. s. 5. And see RFD No. 18.1, Chapter 2 at 16.

equality rights guaranteed to Canadians by section 15 of the *Canadian Charter of Rights and Freedoms*.[54]

c. Unconnected to matrimonial fault

In the past, the right to spousal support was tied to the absence of matrimonial fault. Other Canadian jurisdictions—federal, provincial and territorial—have generally rejected the fault doctrine as irrelevant to spousal support rights and obligations.

We believe that any concept of matrimonial fault should be irrelevant to the determination of spousal support rights and obligations. This position is subject to the discussion of the effect of spousal misconduct in Chapter 5 of this report.[55] This recommendation is consistent with the recommendation in ALRI Report No. 65 on *Family Relationships: Obsolete Actions*, issued in Phase 1 of this project, to abolish the matrimonial actions based on fault and in ALRI Report No. 27 on *Matrimonial Support* to abolish the offence grounds and bars to relief. Our recommendation dissociates the determination of spousal support rights and obligations from responsibility for the marriage failure.

d. Exists during marriage

The MOA imposes a limited support obligation on spouses during marriage. Under the existing *DRA*, the spousal support obligation becomes legally enforceable only on the breakdown or dissolution of marriage. As has been seen, legislation in some jurisdictions provides that the spousal support obligation commences and is enforceable throughout marriage.[56]

In ALRI Report No. 27, we recommended that the spousal support obligation should exist throughout marriage.[57] We reaffirm this position in principle, but qualify it with respect to the conferral of court jurisdiction to make a support order prior to separation by reason of marriage breakdown. That is because, even if mutual support obligations are implicit in marriage

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[54] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[55] See Chapter 5, heading A.

[56] See *supra*, heading C.1 and note 48.

[57] ALRI Report No. 27, *supra*, note 26 at 33.

as a going concern, their enforcement by legal action is not necessarily appropriate in a case where the marriage has not irretrievably broken down.

e. Survives marriage breakdown

As in the past, the modern spousal support obligation survives marriage breakdown. The extent of the obligation beyond marriage depends on the roles that the spouses undertook during marriage and their circumstances on marriage breakdown or marriage dissolution.

In ALRI Report No. 27, we recommended that the spousal support obligation should continue to exist regardless of separation, unless and until terminated by court order. We reaffirm this limb of our previous recommendation.

f. Quantified by need and ability to pay

The cornerstones of the modern spousal support obligation are the need of the spouse seeking support and the ability to pay of the spouse from whom support is sought.

We discuss the purpose of spousal support, including the criteria underlying the right to and quantification of the amount of support, in Chapter 3.

g. Recognizes duty of self-sufficiency

Today, the spousal support obligation is commonly combined with an obligation, where reasonable, on each spouse to support themself to the extent of their ability. The *Divorce Act*[58] and most provincial statutes regulating spousal support on marriage breakdown impose a legal obligation on each spouse to strive for financial independence.[59] Such an obligation has

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[58] *Divorce Act*, s. 15.2(6)(d), reproduced in Chapter 3, under heading A.

[59] See e.g., *Family Relations Act*, R.S.B.C. 1996, c. 128, ss 89(2) and 96(4); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 6; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112(1); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 36; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 5; *Family Law Act*, R.S.O. 1990, c. F.3, s. 30; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 30; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 5(1)(b)(ii); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 31. The Saskatchewan *Family Maintenance Act* will be replaced by the *Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, which received Royal Assent on May 21, 1997; however, this report cites the current Act because the new Act had not yet been proclaimed as of December 1, 1997 (the time of writing).

been endorsed by law reform commissions in England,[60] Scotland[61] and Canada.[62] The imposition of this duty has worked to the disadvantage of dependent spouses, usually wives, and children, so much so that recent jurisprudence under the *Divorce Act* has worked to soften the expectation that a spouse achieve self-sufficiency.[63] Account must be taken of the economic realities in the workplace, as well as the cost of marriage in terms of training and lost years in the workplace.

The suitability of this characteristic is discussed further in Chapter 3.

RECOMMENDATION No. 2.2

The legislated obligation should:

(1) flow from marriage or a marriage-like relationship;

(2) be mutual as between the spouses;

(3) not be tied to matrimonial fault; [64]

(4) exist during marriage (unless and until terminated by court order); and

(5) survive marriage breakdown (in appropriate circumstances).

D. Meaning of "Marriage Relationship"

We have said that the spousal support obligation flows from marriage or a marriage-like relationship. It is necessary to define the marital relationships to which the obligation applies. The choices include the parties to a monogamous marriage, a polygamous marriage or a marriage-like cohabitational relationship.

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[60] Law Commission (England), Law Com. 103, *Family Law — The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper* (October, 1980) and Law Com. No. 112, *Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law* (December 14, 1981).

[61] Scottish Law Commission, Scot. Law Com. No. 67, *Family Law — Report on Aliment and Financial Provision* (November 4, 1981).

[62] See especially, Law Reform Commission of Canada, *Report on Family Law*, 1976.

[63] *Moge* v. *Moge (1992), 43 R.F.L. (3d) 345 (S.C.C.).*

[64] But see Chapter 5, heading A, on the relevance of spousal misconduct.

Because cohabitational relationships raise constitutionally-based policy issues of particular complexity, we consider the support rights and obligations of unmarried cohabitants separately, in Chapter 7.

1. Parties to a monogamous marriage

a. Valid

The classic common law definition of marriage is "the voluntary union for life of one man and one woman to the exclusion of all others."[65] To be valid, the man and woman entering into the marriage must not be related within the prohibited degrees of marriage[66] and the marriage must have been solemnized in accordance with the required formalities.[67] Having accepted that spouses should have an obligation to support each other, there can be little question that the rights and obligations of spousal support should apply to a man and woman whose lives are bound together by a valid marriage.

b. Annulled

An action for a declaration of nullity may involve either a voidable or a void marriage.

i. Voidable

A marriage is voidable where the parties have gone through a form of marriage which they believed to be valid, but in fact the requirements for a valid marriage were not fully satisfied. A voidable marriage is valid in law unless and until it is annulled by a court of competent jurisdiction, whereupon the marriage, for most purposes, is treated as if it had never existed.[68] Sections 16, 22, 23 and 25 of the *DRA* create exceptions to this general rule. They empower the Court of Queen's Bench of Alberta to make orders for interim alimony prior to annulment and orders for other payments

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[65] *Hyde* v. *Hyde and Woodmansee (1866), L.R. 1 P. & D. 130 (Eng.).*

[66] *The Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46 ss 2(2) and 3(2), prohibits and renders void the marriage of persons who are related:

(a) lineally by consanguinity or adoption;
(b) as brother and sister by consanguinity, whether by the whole blood or by the half-blood; or
(c) as brother and sister by adoption.

[67] *Marriage Act*, R.S.A. 1980, C. M-6.

[68] *De Reneville* v. *De Reneville,* [1948] P. 100 at 110, [1948] L.J.R. 1761, 64 T.L.R. 82 (Eng. C.A.) (per Lord Greene, M.R.).

or benefits on or after a declaration of nullity. The rationale for the exception is that the parties have relied on the validity of the marriage.

We recommend that spousal support rights and obligations continue to be available on or after marriage annulment.

ii. Void

A void marriage, in law, is not a marriage at all. Different considerations could therefore apply. In ALRI Report No. 27, we concluded that a spouse who is mistaken as to the legal validity of the marriage should not be deprived of financial support. We observed that support does not become less necessary because an apparent marriage suffers from a legal defect.

We also concluded that a person who knew or had reason to believe the marriage was void should not be able to assert marriage rights.[69]

We now think that the support obligation should apply regardless of the state of knowledge of the parties as to the validity of the marriage. We have removed fault as a consideration in awarding spousal support. Parties who purport to enter into a marriage relationship should bear the effects of the status they intend.

2. Parties to a polygamous marriage

A polygamous marriage is one that is celebrated under a law that permits a spouse (usually the husband) to take more than one spouse of the opposite sex (usually wives).[70] A marriage is actually polygamous if a second spouse is actually taken.[71] It is potentially polygamous if, under the law of the place where the marriage was celebrated, a second spouse could be taken.[72] Canadian courts have offered qualified recognition to polygamous marriages

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[69] ALRI Report No. 27, *supra*, note 26 at 17, Rec. 1. The approach we recommended is taken in the *Matrimonial Property Act*, R.S.A. 1980, c. M-9, ss 1(e) and 2. Compare definition of "spouse" in *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(1).

[70] The practice or custom according to which one man has several wives is called polygyny and the practice or custom according to which one woman has several husbands is called polyandry.

[71] Christine Davies, *Family Law in Canada*, (Toronto: Carswell, 1984), at 5, note 11.

[72] *Ibid.* In some circumstances, a polygamous marriage may be transmuted into a monogamous one.

but, in the absence of express statutory authority, a party to a polygamous marriage cannot obtain relief, such as spousal support, in respect of that marriage.[73]

In ALRI Report No. 27, we recommended that the duty of support should apply to a marriage which was solemnized under a law which permitted polygamy, "whether or not either party to it has, or at the time of the marriage or thereafter had, a spouse other than the other party."[74] We endorse that recommendation. The aim of societal ordering through structuring private relationships and imposing support obligations on those relationships applies equally to polygamous as to monogamous marriages.

3. Cohabitational relationships

By "cohabitational relationship" we mean a relationship between a man and a woman who are not formally married to each other but are living together in a marriage-like state. As stated previously, we consider their position in Chapter 7.

RECOMMENDATION No. 3.2

(1) The legislated spousal support obligation should extend to the parties to

(a) a void marriage,

(b) a voidable marriage,

(c) a polygamous marriage that is valid according to the law of the place where the marriage was celebrated, or

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[73] See generally, Christine Davies, *supra*, note 71, c. 1, Marriage, at 1-9.

[74] ALRI Report No. 27, *supra*, note 26, Rec. 1(c). *See also Family Law Act*, R.S.O. 1990, c. F.3, s. 1(2). In ALRI Report No. 18, on *Matrimonial Property*, we recommended that, for purposes of matrimonial property division, recognition should be afforded to a potentially polygamous marriage—that is, one that would permit a husband to have more than one wife or *vice versa* — but not to an actually polygamous marriage. That recommendation was not adopted in the *Matrimonial Property Act, 1978*. We concluded that the law should go farther in the case of matrimonial support. That is because two or more personal claims for support do not appear to involve the same theoretical and practical difficulties as two or more claims for the sharing of property.

(d) a cohabitational relationship [*i.e.* a relationship between "cohabitants" as defined in Recommendation No. 13.2].

(2) "Spouse" should be defined to include a party to such a marriage or marriage-like relationship.

CHAPTER 3 SPOUSAL SUPPORT THEORIES

A. Terminology

Considerable variation exists in the terminology used to conceptualize what spousal support is all about and how to achieve the ends involved.

The use of the words "objective" and "factor" are one example. The *Divorce Act* sets out a list of objectives for spousal support which are to be considered in light of specified factors. One of these factors is "need." In other spousal support conceptualizations the "relief of need" may be characterized as a primary purpose or objective.

In another example, in its leading judgment interpreting the spousal support objectives specified in the *Divorce Act*, justices in the Supreme Court of Canada refer at times to "spousal support theories" and at times to "spousal support models."[75] They do not explain the separate meanings of these terms. The intention seems to be to identify a composite understanding.

We have not attempted to resolve these linguistic and conceptual dilemmas. What we have done is divide our discussion into two chapters. Chapter 3 contains a discussion of various ideas about what spousal support is intended to achieve: we have called these ideas "theories." Chapter 4 contains a discussion of alternative ways to implement those intentions once they have been decided upon: we have called these alternatives "implementation models."

We conclude the discussion in Chapters 3 and 4 by recommending that Alberta accept the "theory" behind the *Divorce Act* provisions and implement that theory using the Divorce Act "model."

B. Existing Law

The *DRA* provides little direction to assist the court in deciding whether to award spousal support, in what amount and over what time period. By

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[75] *Moge* v. *Moge*, *supra*, note 63; see also discussion under headings B.2 and E.1 of this Chapter.

extension, the legislation does little to assist spouses to resolve support issues by agreement. The *Divorce Act* provides more guidance, but it, too, is of limited effect in that the legislated provisions do not provide a blueprint for judicial consistency. In practice, the interpretation that the courts give to the legislation and the awards that the courts make help counsel to forecast what the courts will do.

1. Alberta *DRA*

Under the *DRA*, spouses must establish their eligibility for support in accordance with the strictures of the fault doctrine. Where eligibility is established, the court exercises a broad, essentially unfettered discretion in quantifying the support owing.

2. Federal *Divorce Act*

The *Divorce Act*, in section 15.2(6), furnishes four objectives for an order for spousal support. The objectives are that the order should:[76]

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In working to achieve these four objectives, the court is required to consider certain factors. Section 15.2(4) requires the court making a support order to consider:[77]

> ... the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

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[76] As to variation proceedings, see *Divorce Act*, s. 17(7).

[77] For similar factors in variation proceedings, see *ibid.*, s. 17(4).

The judicial discretion to determine support remains broad, even with the addition of these factors.

The leading discussion of the interpretation to be given to the spousal support provisions in the *Divorce Act* is found in the Supreme Court of Canada judgment in the case of *Moge* v. *Moge*.[78] This judgment establishes that the four objectives in the *Divorce Act* have to do with "fair distribution": they "can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown."[79] This involves "the development of parameters with which to assess the respective advantages and disadvantages of the spouses as a result of their roles in the marriage, as the starting point in determining the degree of support to be awarded."[80]

No single objective can be presumed to take priority over any other. The court must assess the relevance of the objectives and factors in light of the circumstances of the parties as presented in the evidence before the court:[81]

> At the end of the day ... courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

As the Alberta Court of Appeal has observed, the determination of spousal support awards remains essentially a function of the evidence.[82]

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[78] While the *Moge* case had to do with the variation of support, the discussion is equally relevant to the determination of support on the initial application. Under the *Divorce Act*, the objectives and factors that govern variation are the same as those that govern the initial application.

[79] *Moge* v. *Moge, supra,* note 63 at 387; see also discussion of *Moge* in *Lauderdale* v. *Lauderdale* (1997), 202 A.R. 198 (Alta. C.A.).

[80] *Ibid.* at 374.

[81] *Ibid.* at 387.

[82] *Lasalle* v. *Lasalle* (1994), 7 R.F.L. (4th) 100 (Alta. C.A.)

3. Other provinces and territories

The existing legislation in several provinces resembles the itemized list of designated factors in section 15.2(4) of the *Divorce Act*.[83] Some provinces have legislated objectives similar to those defined in section 15.2(6) of the *Divorce Act*. Ontario,[84] Newfoundland[85] and Prince Edward Island[86] are examples. Legislation in Saskatchewan incorporates a shorter combination of objectives and factors.[87] The legislation in these provinces promotes consistency with the federal provisions. However, despite these efforts, the statutory language is so general that, like that in the *DRA* and the *Divorce Act*, it confers a broad discretion on the trial judge. Not surprisingly, there have been significant differences of judicial opinion in the application of the statutory provisions over the years.[88]

C. Relationship to Public Law

The private law system is founded on the premise that the primary support obligation falls on individual citizens rather than the state. It is only when this private law obligation is not, or cannot be, discharged that the state intervenes to provide a subsistence level of financial support for the economic victims of marriage breakdown and divorce.

D. Is a Single Objective Feasible?

As the *Moge* judgment emphasizes, economic circumstances differ considerably from case to case and the differences do not readily lend themselves to the formulation of any single objective. For example, the legitimate objectives of spousal support in long-term marriages will rarely coincide with the objectives that should be pursued with respect to short-term

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[83] *See e.g.*, *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 114(6); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(9); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 4; *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(9); and *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(9).

[84] *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(9).

[85] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(8).

[86] *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(7).

[87] *Family Maintenance Act*, S.S. 1990, c. F-6.1, ss 4, 5.

[88] See generally, Carol J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985" (Part I) (1990), 7 C.F.L.Q. 155.

marriages. Long-term marriages that break down often leave in their wake a condition of financial dependence, because the woman's role was that of a full-time homemaker, a condition that may be of lesser consequence for short-term marriages. Childless marriages cannot be treated in the same way as marriages with dependent children. Two-income families cannot be equated with the one-income family. Any attempt to provide a single objective for spousal support laws thus defies the diverse characteristics of families in contemporary society.

Because circumstances differ so much, it would be difficult, if not impossible, to come up with a single spousal support objective that would lead to a fair result in every case.

The Scottish Law Commission considered the possibility of defining a single all-encompassing objective and accompanying this with a list of specific factors to be taken into consideration. It observed:[89]

> [To] say that the objective of financial provision should be an equitable adjustment of the spouses' economic position on divorce, without any limitation ... would come as close to an acceptable single objective as it is possible to get.

The Scottish Commission concluded, and we agree, that this objective would be "far too vague and general to provide sufficient guidance to the courts, the legal profession and the public."[90]

The *Divorce Act* copes with the difficulty by providing four objectives which must be read in conjunction with each other and weighed according to the circumstances of the individual case.

E. The "Theories"

Various spousal support theories applicable to marriage breakdown have been articulated by legislators, courts and academics. This section outlines a number of them.

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[89] Scot. Law Com. No. 67, *supra*, note 61, para. 3.57.

[90] *Ibid.*

1. Equitable sharing of the economic consequences of marriage or marriage breakdown

As already stated, the Supreme Court of Canada, in *Moge*, identifies the equitable sharing of the economic consequences of marriage or marriage breakdown as the overall objective intended by the provisions in the *Divorce Act*. The issue before the court in *Moge* was whether the wife was entitled to ongoing support from the husband for an indefinite period of time or whether spousal support should be terminated. The facts, briefly, were these:

Both Mr. and Mrs. Moge were persons of modest education and modest means. They had been divorced for 16 years when Mr. Moge applied to terminate spousal support (19 years by the time the Supreme Court of Canada heard argument and rendered its decision in 1992). Subsequent to the divorce, Mr. Moge had remarried; Mrs. Moge had not. During their marriage (of nearly 20 years), Mrs. Moge had worked briefly as a sales clerk, maintained the home as wife and mother, cleaned offices from 5-11 p.m. and worked briefly as a seamstress. After the divorce, she continued to work in cleaning jobs outside the home while raising the couple's three children who were in her custody. Mr. Moge paid $150 a month for spousal and child support (later increased to $200). There were no longer any "children of the marriage" at the time of this application.

The Court stated that in applying the objectives set out in the *Divorce Act*, courts must make a far-reaching inquiry into the circumstances of the parties. That inquiry must take into account matters such as the earning capacity of the spouses, including the loss of future earning power due to the role played in the marriage and the care of children. Such losses "will often encompass loss of seniority, missed promotions, and lack of access to fringe benefits, such as pension plans, life, disability, dental, and health insurance" as well as decreases in "the value of education and job training" over the years.[91] As the judgment states, "All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years."[92]

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[91] *Moge* v. *Moge, supra,* note 63 at 388, citing H. Joshi and H. Davies, "Pensions, Divorce and Wives' Double Burden" (1992) 6 Int'l. J.L. & Fam. 289.

[92] *Ibid.*

The Supreme Court of Canada gives examples of other factors that may affect the equitable sharing of the economic consequences of marriage or marriage breakdown which the court should look at. The examples include: the impact of child care on the custodial spouse (discussed below, under heading E.5, Fair Sharing of the Economic Burden of Child Care), career sacrifice to benefit family or advance the other spouse's career, contribution to the other spouse's business, disparity in the standard of living enjoyed by the spouses after marriage breakdown and the evidence in the particular case.

In the result, the Supreme Court agreed that Mr. Moge should pay Mrs. Moge continuing support in the amount of $150 a month.

This is a far-reaching theory. According to the *Moge* judgment, it requires courts to be "alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefiting the other upon its dissolution." We think it superior to the narrower application of the theories discussed in the following paragraphs.

2. Equitable adjustment of economic advantages and disadvantages arising from marriage or marriage breakdown

The equitable adjustment of "any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown" is the first objective expressly recognized in the *Divorce Act*, s. 15.2(6). *Moge* states that this objective provides the starting point for the development of "parameters with which to assess the respective advantages and disadvantages of the spouses as a result of their roles in the marriage."[93] This objective is also recognized in section 5 of the Saskatchewan *Family Maintenance Act*.[94] Similar, though not literally identical provisions, are found in section 39(7)(a) of the Newfoundland *Family Law Act*[95] and in section 33(8)(a) of the Ontario *Family Law Act*.[96]

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[93] *Moge* v. *Moge*, *supra,* note 63.

[94] S.S. 1990, c. F-6.1, s. 4(2)(a).

[95] R.S. Nfld. 1990, c. F-2, s. 39(7)(a).

[96] R.S.O. 1990, c. F.3, s. 33(8)(a).

Although the *Moge* judgment makes it clear that a broad view should be taken of the factors that affect the economic advantages and disadvantages arising from the marriage and marriage breakdown, this purpose does not cover all circumstances where spousal support may be required. That is because the assessment is restricted to the advantages and disadvantages arising from the marriage or marriage breakdown. It does not take into account factors that are independent of the marriage, for example, an unrelated health problem.

The idea of "compensatory support" is implicit in this provision. To the extent that this is so, its purpose is different from the purposes that are based on the obligation of one spouse to support the other in order meet ongoing needs. That is to say, this is not a "relief of need" provision.

We agree that this objective should be incorporated into the spousal support theory that we adopt.

3. "Means and needs"

This theory places an obligation on the spouse with greater means to contribute to the support of the spouse with lesser means where that spouse is unable to meet his or her own needs.

Under the 1985 *Divorce Act*, the court must take "means" and "needs" into consideration in weighing the legislated factors that must be considered in applying the four objectives. In contrast to the *1968 Divorce Act*, the *1985 Divorce Act* involves a shift away from means and needs "as the exclusive criterion for support to a more encompassing set of factors and objectives which require courts to accommodate a much wider spectrum of considerations."[97]

The Ontario *Family Law Act* identifies the "relief of need" weighed against "capacity to pay" spousal support as an essential component of the spousal support obligation.[98] Several provinces have followed the lead. Courts in Canada, England and Australia have recognized this objective in the exercise of the broad judicial discretion conferred on them by current

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[97] *Moge* v. *Moge, supra, note 63 at 374.*

[98] *Family Law Act*, R.S.O. 1990, c. F.3, s. 30.

legislation. In our 1978 report on spousal support law, we identified the relief of need as "the principal objective of the system of support obligations."[99]

Recognition of the relief of need as a purpose of a spousal support order has the attraction of simplicity and fairness. However, beyond repeated judicial approval of the principle of economic self-sufficiency (the priority of which has been modified by *Moge*), the unfettered discretion generated by the needs-based approach to spousal support, taken on its own, has resulted in a lack of consensus or predictability. The statutory endorsement of the relief of need raises fundamental questions, such as those that could be asked of the *Divorce Act 1968*, before it was rewritten in 1985:[100]

- How is need to be quantified? Should it reflect the standard of living enjoyed before marriage breakdown, does it signify a subsistence level, or does some other criterion of self-sufficiency apply?

- If a needs approach is linked to the obligation of each spouse to strive for self-sufficiency, what reasons will justify a failure to find employment? (The Supreme Court of Canada has given some answers to this question in *Moge*.)

- Is the spousal support obligation triggered by need, irrespective of how it arises, or must the applicant's need be causally connected to the marriage or its breakdown?

Questions such as these have occupied Canadian courts exercising judicial discretion or interpreting statutory provisions calling for a needs-based approach. The inconsistencies in judicial decision-making based on this theory has motivated legislators in other jurisdictions to adopt new models based on other theories. We think that reform is needed in Alberta as well.

4. Protection from economic hardship

Another theory would protect the economically disadvantaged spouse from economic hardship. This theory modifies the "means and needs" theory by

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[99] ALRI Report No. 27, *supra*, note 26 at 40.

[100] See Law Commission (England), *supra*, note 60, para. 72. For further criticism of relief of need as a primary objective of spousal support, see Scottish Law Commission, Scot. Law Com. No. 67, *supra*, note 61, para. 3.49.

narrowing the circumstances in which needs-based spousal support may be obtained and the amount of support.

In some formulations, the protection is limited to "grave" economic hardship. This restricts the application of this theory even further.

Under the third *Divorce Act* objective, the "economic hardship" must be arise from "the breakdown of the marriage." This requirement also restricts the scope of this theory. Without this restriction, the protection could encompass the need of a spouse that arises not because of the marriage or marriage breakdown, but for reasons independent of the marriage.

A further variation would restrict the spousal support obligation to cases where divorce would impose economic hardship on a spouse because of circumstances that arose prior to marriage dissolution but not to include the relief of hardship arising after the divorce. One concern about imposing such a limitation is that some cases would fall "narrowly on the 'wrong' side of the line."[101] This is not the direction being take by the current law.

Restrictions that require a causal connection with the marriage breakdown proceed from the perspective that a spouse whose economic difficulties have arisen for some reason unconnected with the marriage are the responsibility of society as a whole and not of a former spouse alone.

The *Divorce Act* requires courts to take "a commonplace, non-technical view of causation," starting with a comparison of "the spouse's actual situation before and after the breakdown."[102]

> ... the whole context of her conduct must be considered. It is not enough to say in the abstract that the ex-spouse should have done more or be doing more, and argue from this that it is her inaction rather than the breakup of the marriage which is the cause of her economic hardship. One must look at the actual society and personal reality in the situation in which she finds herself and judge the matter fairly from that perspective.

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[101] *Ibid.*, para. 3.110.

[102] *Moge* v. *Moge, supra, note 63 at 400.*

We think it appropriate for spousal support to protect a spouse from economic hardship where that spouse's need arises from the marriage breakdown, as under the *Divorce Act*.

5. Economic self-sufficiency

This theory requires each spouse to attain economic self-sufficiency on marriage breakdown. Spousal support is awarded to facilitate the smooth transition from an economically dependent marital status to a self-sufficient single status. Depending on the circumstances, the purpose of the award might be to finance the economically dependent spouse to undertake a course of training or retraining, or give that spouse time to find suitable employment or to adjust gradually to a lower standard of living.

Section 15.2(6)(d) of the *Divorce Act* and section 5(c) of the Saskatchewan *Family Maintenance Act*[103] expressly stipulate that an order for spousal support "should, insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time." Similarly, section 39(8)(c) of the Newfoundland *Family Law Act*[104] and section 33(8) of the *Family Law Act*[105] acknowledge that one of the objectives of spousal support orders is to "make fair provision to assist the spouse to become able to contribute to his or her own support." Under the *Divorce Act*, the order that enables the spouse's "financial rehabilitation" may be an order for lump sum support but is more commonly associated with periodic support payments for a fixed period of time or until the occurrence of a future event.

Before the Supreme Court of Canada rendered judgment in the *Moge* case, this model held sway in many cases. Many courts accepted the argument that the so-called "trilogy" of cases — *Pelech* v. *Pelech*,[106]

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[103] S.S. 1990, c. F-6.1.

[104] R.S. Nfld. 1990, c. F-2.

[105] R.S.O. 1990, c. F.3.

[106] [1987], 1 S.C.R. 801; [1987], 4 W.W.R. 481, 76 N.R. 81, 14 B.C.L.R. (2d) 145, 7 R.F.L. (3d) 225, 38 D.L.R. (4th) 641.

Richardson v. *Richardson*[107] and *Caron* v. *Caron*[108] — which had been decided by the Supreme Court of Canada under the 1970 *Divorce Act*, advocated a self-sufficiency model of spousal support as the only basis of spousal support under the Act.[109] In rejecting this argument, the *Moge* judgment distinguishes these cases, saying that they concerned "situations in which the parties had set out their respective rights and obligations following the dissolution of the marriage by agreement."[110] In refusing to order the continuation of support in those cases, the court "is paying deference to the freedom of individuals to contract."[111]

The *Moge* judgment emphasizes that the economic self-sufficiency judgment is just one of four specific objectives specified in the *Divorce Act*. To elevate the self-sufficiency model "to the pre-eminent objective in determining the right to, quantum, and duration of spousal support" under the *Divorce Act* "is not consonant with proper principles of statutory interpretation."[112] Moreover, the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only "in so far as is practicable":[113]

> Several things about this subhead should be noted. First, unlike the first three factors, this one is stated in qualified language, beginning with the conditional phrase "in so far as practicable." Second, economic self-sufficiency is not to be required or assumed; the verb used is "promote." By this language Parliament recognizes that actual self-sufficiency, while desirable, may not be possible or "practicable."

Indeed, the theory behind the self-sufficiency model of spousal support , "at a minimum, is contributing to the problem" of the prevalence of poverty among

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[107] [1987], 1 S.C.R. 857, 7 R.F.L. (3d) 304, 38 D.L.R. (4th) 699.

[108] [1987], 1 S.C.R. 892; [1987], 4 W.W.R. 522, 75 N.R. 36, 14 B.C.L.R. (2d) 186, 7 R.F.L. (3d) 274, 38 D.L.R. (4th) 735.

[109] The *1985 Divorce Act* substituted four objectives in the place of the presumption of economic self-sufficiency found in the 1970 Act: *G.(L.)* v. *B.(G.)*, [1995] 3 S.C.R. 370, 15 R.F.L. (4th) 201, *per* L'Heureux-Dubé.

[110] *Moge* v. *Moge, supra*, note 63 at 360.

[111] *Ibid.* at 362.

[112] *Ibid.* at 377.

[113] *Ibid.* at 397.

divorced women.[114] That is because it fails adequately to recognize the value of work in the home, the losses in earning power brought about by the marriage role and the limitations that child care demands place on the income earning power of the custodial parent after marriage breakdown.

If the economic self-sufficiency theory were to be adopted, rehabilitative support could be tied to a maximum time period.[115] This would ensure that any such rehabilitative provision would not be converted into lifelong support. The *Divorce Act* does not go this far, but it does provide for time-limited support orders and impose limitations on the court powers to amend such orders.[116]

Economic self-sufficiency will not be achievable in all cases. For example, an older spouse who has committed many years of their lives to homemaking responsibilities will often lack the opportunity to find gainful employment on marriage breakdown and can rarely, if ever, recapture the lost employment potential.[117] Similar liabilities may be incurred by a parent with custody of a child or children of the marriage and who may face years of parenting responsibilities before the children attain maturity. Moreover, in times of high unemployment, a short-term award may enable retraining but it does not guarantee employment. That is to say, the award may fall short of its objective.

In ALRI Report No. 27 on *Matrimonial Support*, we recommended that, where the spouses are living separate and apart, provincial legislation should recognize the obligation of each spouse "to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation" in circumstances where it is not "unreasonable or impractical" to impose this

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[114] *Ibid.* at 380.

[115] *Family Law (Scotland) Act, 1985*, s. 9(1)(d), imposes a maximum duration of three years on rehabilitative support orders. The provision enacts a recommendation of the Scottish Law Commission, Scot. Law Com. No. 67, *supra,* note 61.

[116] *Divorce Act*, s. 15.2(3) (finite orders) and s. 17(10) (limit on power to vary a finite order).

[117] Statistical data compiled by the Canadian Institute for Research indicate that 23.6 per cent of the dissolved marriages in the Province of Alberta had lasted for sixteen years or more: *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, a report prepared by the Canadian Institute for Research for the Alberta Law Reform Institute, March 1981: Vol. 1, Summary Report, Vol. 2, Technical Reports, at 38, Table 6.3.

expectation.[118] Our current view is that the economic rehabilitation of a dependent spouse should be identified as one of the objectives of spousal support. However, we do not think that such a provision should stand by itself. It would be unfair and impractical to assert rehabilitation as the sole objective of spousal support laws.[119]

6. Compensatory spousal support

This theory involves the conferral of a fair reward for past contributions made by either spouse to the marriage.

According to the *Moge* judgment, the first three *Divorce Act* objectives — economic advantages and disadvantages, child care demands, and economic hardship — provide legislative support for the principles of compensation.[120] The Supreme Court gives an example of the appropriate application of this theory under the *Divorce Act* provisions:[121]

> [In a case where a former spouse continues to] suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages, compensatory spousal support would require long-term support or an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives of the Act.

In earlier cases, Canadian courts (with rare exception), had hesitated to embrace the concept of compensatory support implicit in these statutory provisions.[122]

Explicit acknowledgment of spousal contributions to the marriage as one of several objectives of spousal support law is found in the Newfoundland

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[118] *Supra*, note 26 at 23, Rec. 3.

[119] See Scot. Law Com. No. 67, *supra*, note 61, paras. 3.44 and 3.50; see also Law Commission (England), Law Com. No. 103, *supra*, note 60, paras. 73-76.

[120] *Divorce Act*, ss 15.2(6)(a)-(c) and 17(7)(a)-(c).

[121] *Moge* v. *Moge, supra, note 63 at 383.*

[122] See *Payne on Divorce*, 2nd ed. (Butterworths, 1988) para. 16.15. See also Carol J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)" (1990), 7 C.F.L.Q. 155, at 214-17; Nicholas Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Career Assets: Towards Compensatory Support" (1989), 8 Can. J. Fam. L. 23.

and statutory provisions.[123] Implicit acknowledgement of spousal contributions as an appropriate objective of spousal support law is also found in the Saskatchewan *Family Maintenance Act*, 1997.[124]

A strength of this theory is that is recognizes the value of the roles played by both spouses in the marriage, including domestic duties, child care responsibilities, and contribution to the other spouse's business or advancement of that spouse's career. For reasons such as these, the Supreme Court of Canada views this theory is superior to a strict economic self-sufficiency model:[125]

> As a matter of statutory interpretation, it is precisely the manner in which compensatory spousal support is able to respond to the diversity of objectives the Act contains that makes it superior to the strict self-sufficiency model.

However, as an exclusive spousal support theory, fair reward for past contributions would be "too narrow" and "too exclusively retrospective" to accommodate future contingencies, such as a continuing need for child-care.[126]

We think that compensatory support should be recognized as one purpose of spousal support in Alberta's legislation.

7. Fair sharing of the economic burden of child care

The fair sharing of the economic burden of child care is encompassed in the second *Divorce Act* objective.[127] This theory recognizes that continuing parental responsibilities after marriage breakdown or divorce often reduce or

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[123] Newfoundland *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(8)(a) and *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(8)(a) expressly provide as follows:

> An order for the support of a spouse shall
> (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse; ...

[124] S.S. 1990, c. F-6.1, s. 5(1)(a).

[125] *Moge* v. *Moge, supra, note 63 at 383.*

[126] Scot. Law Com. No. 67, *supra*, note 61, para. 356.

[127] *Divorce Act*, s. 15.2(6)(b).

eliminate the custodial parent's ability to pursue gainful employment and establish economic self-sufficiency.

These economic consequences for the custodial parent of the limitations and demands arising from the custody of the child are not reflected in child support awards. For example:[128]

> A custodial parent ... seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the daycare arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child himself for the parent's attention. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement or even a modest social life.

There will, of course, be circumstances where the custodial parent delegates child care responsibilities to another person or agency, such as a babysitter or daycare centre. In these cases, the expenses incurred can properly be included in the assessment of child support. Where, however, a parent who justifiably assumes the personal responsibility for child care, is "prevented from realising his or her full earning potential" or "put to the expense of providing a home for the children," the proper disposition would appear to be an order for spousal support in addition to the appropriate order for child support.[129]

It would not be satisfactory for spousal support theory to focus exclusively on the existence of continuing parental responsibilities. Four out of five marriages that have subsisted for 25 years or more before judicial dissolution no longer involve dependent children.[130] Legislatively to exclude spousal support in all such cases would be both irrational and unfair. For many wives or former wives, it would guarantee a life of economic hardship,

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[128] *Brockie* v. *Brockie, supra, note ? cited with approval and adopted in Moge at 389.*

[129] Scot. Law Com. No. 67, *supra*, note 61, para. 3.55.

[130] Julien D. Payne, *A Review of Spousal and Child Support Under the Domestic Relations Act of Alberta*, a research paper prepared for the ALRI (October 1991), at 154.

if not destitution. An objective that denied any opportunity for a fair and reasonable adjustment between the spouses of the economic consequences of marriage breakdown or divorce would undermine the very nature of marriage, regardless of whether marriage is perceived as a partnership or as a permanent relationship based upon the joint contributions of the spouses, albeit of differing kinds.

We think that spousal support law should foster the objective of compensating parents having the care of dependent children for the economic disadvantages that may result from their continuing parental obligations.

8. Preservation of economic standard spouses enjoyed during marriage

The idea behind this theory is that the economically dependent spouse should enjoy that same economic standard after marriage breakdown that the spouses enjoyed prior to marriage breakdown.

This theory was once legislated in England. Prior to its amendment in 1984, section 25 of the *Matrimonial Causes Act* (England), 1973 required the court to exercise its jurisdiction over financial provision and property division so as to preserve the financial positions the spouses would have enjoyed if the marriage had continued to be satisfactory. In applying this standard, the court could look at what is practical and have regard to the conduct of the spouses. According to the Law Commission of England, "the primary objective of this provision is that the financial position of the parties should so far as possible be unaffected by their divorce."[131] As the Commission observed, "although divorce terminates that legal status of marriage it will usually not terminate the financial ties of marriage which may remain life-long.

The practical impossibility of preserving the economic status quo, when a marriage breaks down or is dissolved, is amply demonstrated by empirical

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[131] Law Commission (England), Law Com. No. 103, *supra*, note 60, para. 22.

research in Canada,[132] the United States[133] and England.[134] Moreover, an exclusive statutory objective of spousal support laws that seeks to preserve a life-long standard of living commensurate with that enjoyed during cohabitation is inconsistent with contemporary family roles and structures.

We now live in an era of two-income families, when one-third of Canada's married population will divorce at least once in their lifetime, when the average duration of dissolved marriages is less than eleven years, and when the majority of divorced Canadians will remarry and form new families within a few years of their divorce.[135] A comparison of the average duration of dissolved marriages (10.5 years) with the average post-dissolution lifespan of the former spouses (38-43 years) demonstrates that an exclusive norm of life-long spousal support obligations may no longer be tenable. Nevertheless, former spouses — particularly older spouses who have little realistic employment opportunity and younger spouses who are carrying parenting responsibilities — should not be automatically relegated to a significantly lower standard of living than that which their former spouse enjoys.

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[132] Margrit Eichler, "The Limits of Family Law Reform on the Privatization of Female and Child Poverty" (1990), 7 Can. J. Fam. L. 59, at 78-81.

[133] David L. Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago: University of Chicago Press, 1979) at 48.

[134] W. Barrington Baker, John Eekelaar, Colin Gibson and Susan Raikes, *The Matrimonial Jurisdiction of Registrars* (Centre for Socio-Legal Studies: Wolfson College, Oxford, 1977) para. 2.26. And see Law Commission (England), Law Com. No. 112, *Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law* (December 14, 1981), paras. 5 and 6.

[135] The Canadian Institute for Research found that at the time of divorce in Alberta, in 1978, the average age of men was 36, and of women, 32 (SC: 2.3.5, p. 41). The average duration of marriage was 10.5 years (SC: 2.2.3, p. 38). Fewer than a third of wives (Calgary: 31% and Edmonton: 26%) had formed a permanent relationship subsequent to their divorce whereas seventy percent of husbands had formed a new relationship. Two-thirds of these husbands had re-married and the remainder were living common-law. Forty-three percent of those who had formed a new relationship had children from this relationship. *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, *supra*, note 117: vol. 1, Summary Report, at 12-13; vol. 2, Technical Reports, at 180, para. 11.1, and at 372, paras. 4.2.1.8 and 4.2.1.9.

In the words of Sir Jocelyn Simon, P. in *Attwood* v. *Attwood*, an English judgment that has been cited with approval from time to time by Canadian courts:[136]

> (i) In cohabitation a wife and the children share with the husband a standard of living appropriate to his income, or, if the wife is also working, their joint incomes.
>
> (ii) Where cohabitation has been disrupted ... the wife's and children's maintenance should be so assessed that their standard of living does not suffer more than is inherent in the circumstances of separation, though the standard may be lower than theretofore (since the income or incomes may now have to support two households in place of the former one where household expenses were shared).
>
> (iii) Therefore, although the standard of living of all parties may have to be lower than before there was a breach of cohabitation, in general the wife and children should not be relegated to a significantly lower standard of living than that which the husband enjoys.

Disparities in the economic standard of living enjoyed by the spouses after marriage breakdown are relevant to the assessment of the economic advantages and disadvantages arising from the marriage or marriage breakdown under the first *Divorce Act* objective:[137]

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin* v. *Mullin* (1991), supra, and *Linton* v. *Linton*, supra). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)," at pp. 174-175).

We agree with the *Moge* judgment that courts should consider the extent to which disparities in the standard of living experienced by the spouses after marriage breakdown point to inequities in the balance of advantages and disadvantages arising from marriage or marriage breakdown.

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[136] *Attwood* v. *Attwood*, [1968] P. 591, [1968] 3 W.L.R. 330, [1968] 3 All E.R. 385, at 388 (per Jocelyn Simon, P.), cited with approval in several Canadian cases, including Alberta decisions in *Hunter* v. *Hunter* (1974), 15 R.F.L. 336 (Alta. S.C.); and *Krause* v. *Krause*, [1975] 4 W.W.R. 738, 19 R.F.L. 230, reversed in part [1976] 2 W.W.R. 622, 23 R.F.L. 219, 64 D.L.R. (3d) 352 (Alta. C.A.).

[137] *Moge* v. *Moge, supra, note 63 at 390.*

9. Restoration to pre-marriage position

Another theory would define the objective of spousal support law in terms of restoring the spouses to the position in which they would have been had their marriage not taken place. Both the English and Scottish Law Commissions considered this theory and concluded that it would be impractical to implement, especially in long-term marriages where any attempt to put the clock back could be highly speculative and artificial.[138] It is worth noting that this theory is limited to restoring a spouse who is worse off after the marriage than before. It does not include as an objective the demotion to their lower pre-marital condition of a spouse who is better off (though that consequence could flow from payment of support).

This theory is accommodated to some extent by the first *Divorce Act* objective, under which changes in the economic condition of the spouses before and after marriage or marriage breakdown would be considered in the assessment of advantages and disadvantages experienced by the spouses.

We agree that implementing this theory in and of itself would be impractical but think that the court should consider these changes in assessing the advantages and disadvantages brought about by the marriage or marriage breakdown.

10. Desirability of a "clean break"

Under the "clean break" concept, the economic rights and obligations of the spouses are determined once and for all. There is a severance of all future financial ties and the parties are free to plan their separate lives with a higher degree of certainty than would otherwise be feasible.[139] In its purest form, the "clean break" principle presupposes that the courts should make no order for continuing periodic spousal support.[140]

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[138] Law Commission (England), Law Com. No. 103, Cmnd. 8041, *supra*, note 60, para. 85; Scot. Law Com. No. 67, *supra*, note 61, para. 3.53.

[139] See *Minton* v. *Minton, [1989] A.C. 593 at 608 (Eng. H.L.) (per Lord Scarman).*

[140] In furtherance of the "clean break" principle, the Scottish Law Commission recommended that the divorce court should not make an order for periodic payments, unless it is satisfied that an order for the payment of a capital sum by instalments or otherwise or for the transfer of property would not provide an appropriate and sufficient remedy: Scot. Law Com. No. 67, *supra*, note 61, para. 3.121 and Draft Bill, clause 13(1) at 206-07; see now *Family Law (Scotland) Act*, 1985, s. 13(2)(b).

A "clean break" (often linked to the economic self-sufficiency theory)[141] is achieved on the dissolution of marriage in the following examples:

(1) Spouses with an adequate independent income or earning capacity are usually denied spousal support in divorce proceedings.

(2) If a substantial property division is ordered pursuant to provincial statute, a complementary claim for spousal support may be denied.

(3) Wives whose marriages are childless and of limited duration have sometimes received a modest lump sum in full satisfaction of their rights to spousal support.

(4) Lump sum awards may also be granted to reduce or eliminate acrimony between spouses or to guarantee financial security where the spouse having the support obligation is unlikely to discharge a continuing obligation to pay periodic support.

A danger of the "clean break" is that its effect in many cases "would simply be to drive divorced wives onto supplementary benefit."[142] The empirical studies conducted in Alberta by the Canadian Institute for Research and throughout Canada by the Department of Justice appear to confirm that the "clean break" concept is applied much too frequently by Canadian courts to the economic prejudice of dependent wives and children.[143]

Section 15.2(3) of the *Divorce Act* facilitates a clean break by permitting the court to place a time limit on a support order.

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[141] According to the judgment of L'Heureux-Dubé in the case of *L.G.* v. *G.B.*, *supra*, note 109, at392 (S.C.R.), the *Moge* judgment "clearly rejected the concept of formal equality which has previously prevailed and, with it, the main assumption at the heart of the economic self-sufficiency model." In adopting as its underlying philosophy an equitable division of the economic consequences of marriage between the spouses at the time of divorce, the 1985 *Divorce Act* moved away from the formal equality of the "clean break" to emphasize the substantive equality of the spouses.

[142] Law Commission of England, Law Com. No. 112, *supra*, note 60, para. 28.

[143] In the fact finding study of the Canadian Institute for Research, it was observed that "wives were rarely granted periodic awards when no dependent children were involved" and "[even] when there were dependent children, only 18% of the wives received period awards": *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, *supra*, note 117, Vol. 1, at 2, and Vol. 2, paras. 2.4.1, 2.4.3 and 2.4.4.

We have reservations about the fairness and practicality of implementing the "clean break" theory in most cases. In most cases, the spouse required to pay support will have insufficient means with which to meet the obligation except by paying periodic support, often for an extended period of time. On the other hand, because there may be cases where it is desirable for the court to facilitate a clean break, we hesitate to reject this theory out of hand. For further discussion, see the discussion in Chapter 10 on the variation of spousal support and Chapter 12 on the duration of a spousal support order.

11. Recommendation for consistency with *Divorce Act*

We recommend that Alberta spousal support law foster the equitable sharing of the economic consequences of marriage or marriage breakdown. In our view, neither a 'compensation model' nor a 'self-sufficiency model' — the two models most discussed in recent years — is adequate because neither model "captures the full content of the [the equitable sharing theory], though both may be relevant to the judge's decision."[144] As under the *Divorce Act*, we think it desirable that the judge "base her decision on a number of factors: compensation, child care, post-separation need, and the goal, insofar as practicable, of promoting self-sufficiency."[145]

Our recommendation is in accord with the general premise espousing consistency with the *Divorce Act*, which we have adopted.

In Chapter 4, we discuss a choice of models by which to implement this recommendation.

RECOMMENDATION No. 4.2

Alberta spousal support law should foster the equitable sharing of the economic consequences of marriage or marriage breakdown.

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[144] *Moge* v. *Moge, supra, note 63 at 398.*

[145] *Ibid.* at 398.

F. When Do the Theories Apply?

The issue of spousal support could arise on marriage dissolution (by divorce or annulment), on marriage breakdown after the couple has separated or while the couple are living together. Conceivably, these different circumstances could require the application of a different spousal support theory.[146]

1. Couples who are separated but still married

We have changed out minds about the law that should apply to couples who are separated but still married. Previously, in ALRI Report No. 27 on *Matrimonial Support*, we expressed reservations about equating the criteria that apply on dissolution to spousal support obligations that exist while spouses are married:[147]

> [While] the provincial legislation should be framed with the consequences of possible divorce proceedings in mind, it should have regard to other things as well. For one thing, except in the case of nullity it will deal with people who are still married and whose problems will not necessarily best be solved by conforming to a statute which assumes that they are not.

Reservations have been expressed in other jurisdictions as well. For example, the English and Scottish Law Commissions both concluded that the objectives of spousal support laws in the context of divorce, judicial separation and nullity should not extend to proceedings for spousal support instituted before the marriage has irretrievably broken down.[148] These Commissions held the view that "the powers of the court in an action for spousal support prior to marriage breakdown should be directed to the provision of periodic support."[149]

Aversion to applying the same objectives to spousal support laws while the couple are still married and on marriage dissolution appears to be grounded on the assumption that the finality implicit in some spousal

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[146] As has been seen, unless and until divorce proceedings are brought, provincial governments have legislative competence in all of these circumstances.

[147] ALRI Report No. 27, *supra*, note 26 at 13.

[148] Law Commission (England), Law Com. No. 77, *Family Law — Report on Matrimonial Proceedings in Magistrates' Courts* (October 20, 1976).

[149] *Ibid.*, paras. 2.83 and 2.84.

support objectives is inconsistent with the legal subsistence of a marriage and may preclude spousal reconciliation. When an application is brought during marriage, "the marriage may not yet have irretrievably broken down and may never do so; and even if it has, this is usually incapable of proof at such an early stage."[150] The "court is merely quantifying and regulating a subsisting legal obligation between the parties to a continuing relationship" whereas on divorce the "court is winding up a terminated legal relationship."[151]

The adoption of a distinction between spousal support objectives while the spouses are still married and on marriage dissolution would necessarily reopen the issue of spousal support in the event that an order made under provincial legislation is followed some time later by divorce proceedings.

The reality is that support applications are not instituted by spouses who are living together in a viable relationship. They are triggered by marital difficulties that lead to spousal separation. Where marriage reconciliation is a possibility, the court could consider the objectives that apply where the marriage has irretrievably broken down, and design its award to fit the circumstances where hope remains that the marriage can be repaired. In cases of doubt whether the marriage has irretrievably broken down, it would be appropriate for the court to limits its order to periodic (rather than lump sum) support payments and refer the spouses to a counselling service to explore the possibility of reconciliation (which possibility, although slim, may exist even in cases where divorce proceedings have been commenced).

We now believe that consistency between the spousal support theory that operates on marriage breakdown and dissolution should be promoted in order to reduce confusion and eliminate multiplicity of proceedings. A separated spouse, who is so inclined, can always invoke the *Divorce Act* objectives simply by presenting a statement of claim of divorce immediately after the separation and bringing an application for spousal support pursuant to section 15.2 of the *Divorce Act*.

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[150] *Ibid.*, para. 2.2.

[151] Scot Law. Com. No. 67, *supra*, note 61 at paras. 2.83 and 2.84.

We think the law that applies on marriage breakdown, as evidenced by the fact that the parties are living separate and apart, should be consistent with the law that applies on marriage dissolution.

2. Non-separated couples

a. Constructive separation

Restricting court jurisdiction to couples who are living separate and apart may be excessive. Current legislation in most Canadian provinces does not preclude applications for support being brought while the applicant and respondent are residing together. Such applications, although rare, are brought, occasionally, in cases where the parties are living independent lives, albeit under the same roof.

Should the court have power to grant an order for support while the parties are still living together? We addressed this question in ALRI Report No. 27 on *Matrimonial Support*. There, we observed that, on one view, "a wife who is not receiving enough money for the proper support of herself and, more particularly, the children should be able to apply to the court for support whether or not she or her husband are living together."[152] We observed that, on another view, "recourse to law is foreign to a continuing marriage, and is likely to bring about the breakdown of a marriage which might otherwise survive."[153]

Ultimately, we rejected the idea, but with one exception. The exception recognized that a dependent spouse might not have the financial means to withdraw from an intolerable situation. We recommended that the court should have power to award support where the parties are living separate and apart, or where the court is of the opinion that they are "experiencing marital discord of such a degree that they cannot reasonably be expected to live together as spouses."[154]

We endorse our previous recommendation.

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[152] ALRI Report No. 27, *supra*, note 26 at 32.

[153] *Ibid.*

[154] *Ibid.*, at 33.

3. Recommendation

We recommend that the spousal support law apply where the parties are living separate and apart or where the marital discord is of such a degree that they cannot reasonably be expected to live together.

RECOMMENDATION No. 5.2

The court should have the power to make an order of spousal support where

(a) the spouses are living separate and apart, or

(b) although the parties are not living separate and apart, they are, in the opinion of the court, experiencing marital discord of such a degree that they cannot reasonably be expected to live together as spouses.

a. Marriage not broken down

It could be argued that where the spouse is otherwise able to demonstrate a need for support, the court should be empowered to make a spousal support order in a case that does not satisfy the requirements of Recommendation 5.2 We have reservations about extending the court power to make a spousal support order to an ongoing marriage in circumstances that do not satisfy the criteria set out in Recommendation 5.2 and do not recommend this extension.

CHAPTER 4 IMPLEMENTATION MODELS

A. Two Approaches

In Chapter 3, we recommended that Alberta spousal support law should foster the equitable sharing of the economic consequences of marriage or marriage breakdown. In this Chapter, we will look at two contrasting approaches that may be taken to spousal support legislation and at various models that could be adopted in order to implement the spousal support theory we have recommended.

1. Judicial discretion

One approach would be to continue the present approach which relies heavily on the exercise of judicial discretion.

2. Fixed formula

The other approach would be to legislate a fixed formula as the basis for decision making.

3. Modifications in approach

At the extreme ends, the two approaches stand in sharp contrast to each other. However, with tempering, the results under each of the two approaches converge.

Legislation founded in judicial discretion typically contains fetters on the exercise of this jurisdiction.

In order to ensure individual fairness, legislation that recognizes the usefulness of fixed formulae typically empowers judges to make exceptions.

B. Judicial Discretion

Several approaches may be taken to legislation built on judicial discretion to decide spousal support rights and obligations. They are: (1) preserve unfettered judicial discretion; (2) specify objectives; (3) identify factors to consider; (4) legislate principles; (5) rely on development of judicial guidelines; or (6) adopt a combination of approaches.

1. Continue broad judicial discretion

As has been seen, current legislation in Canada confers a very broad discretion on the courts in the adjudication of spousal support claims. The flexibility of an unfettered judicial discretion is purchased at a high price in terms of its uncertainty, inconsistency and unpredictability.

Cogent arguments militate against an unfettered judicial discretion. As the Scottish Law Commission has stated:[155]

> The result of a system based on unfettered discretion is that lawyers cannot easily give reliable advice to their clients. Clients in turn feel dissatisfied with the law and lawyers. The system encourages a process of haggling in which one side makes an inflated claim and the other tries to beat it down. A battle of nerves ensues, sometimes right up to the morning of the proof. By that time it is known which judge will be dealing with the case, and this may become a factor affecting last minute and hurried negotiations. Such a system does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness.

More than fifty years ago, an American commentator observed that the trial judge's personal beliefs and biases towards marriage, divorce and support constitute an "inarticulate major premise" of support dispositions.[156] More recently, a Canadian commentator asserted that federal and provincial statutes regulating spousal support rights and obligations on marriage breakdown or divorce represent a "Rubik's Cube for which no one yet has written the Solution Book."[157] The Scottish Law Commission concluded that such an approach is not only "an abdication of responsibility by Parliament in favour of the judiciary but also an abdication of all collective responsibility in favour of the conscience of a single judge."[158]

2. Specify objectives

As seen in Chapter 3, the *Divorce Act* and statutes in some provinces specify objectives. Specifying objectives to be achieved gives some guidance to the

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[155] Scot. Law Com. No. 67, *supra*, note 61 at para. 3.37.

[156] Edward W. Cooey, "The Exercise of Judicial Discretion in the Award of Alimony" (1939) 6 Law and Contemporary Problems 213.

[157] Rosalie Silberman Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981) 4 Fam. Law Rev. 1, reprinted in *Payne's Divorce and Family Law Digest*, 1983 tab at 83-875.

[158] Scot. Law Com. No. 67, *supra*, note 61, para. 3.37.

courts, but the effect on decision-making is not much different from the conferral of a broad judicial discretion.

3. Identify factors to consider

Legislation may give the judge some direction for the use of the power to award spousal support by listing factors to be considered. This course has been taken in the Divorce Act, section 15.2(4), and in provincial or territorial family law statutes across Canada.

Our recommendations in ALRI Report No. 27 illustrate this approach. In that report, we recommended that "in deciding whether to make an order granting or denying support, and the amount and conditions of the order where support is granted" the court should have the duty:[159]

> "to have regard to all of the circumstances of the case relating to the financial positions of the parties including:
>
> (a) the care and custody of a child or children of the parties;
>
> (b) the duration of the marriage and the effect of the way of life of the parties on the earning capacity of each;
>
> (c) the income, property and other financial resources or benefits which each of the parties has or is reasonably likely to have in the foreseeable future, and any entitlement under the *Matrimonial Property Act* or the *Matrimonial Home Possession Act*;
>
> (d) the extent to which the payment of support to the applicant would increase his earning capacity by enabling him to undertake a course of education, training or retraining or to establish himself in a business or occupation or otherwise to achieve financial self-sufficiency;
>
> (e) the earning capacity, including the potential earning capacity, of each party;
>
> (f) the financial needs of each party, having regard to the past and present standard of living of the family;
>
> (g) the age and health of each party;
>
> (h) a legal or moral obligation of either party for the support of any other person;
>
> (i) the provisions of any order of support between the parties made by another court;
>
> (j) an agreement, oral, written or implied by conduct, including an arrangement under which one party manages the home or cares for the children or both.

Typically, such lists of factors provide no indication of the objectives to be sought in the resolution of spousal support claims, and make no attempt to

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[159] ALRI Report No. 27, *supra*, note 26, Rec. 5 at 30-31.

weigh the relative significance of the specified factors or place them in any order of priority.

Lists of factors are useful to help judges focus on the evidence with which they are now dealing. They provide a framework that helps prevent cases going off on unreal tangents. However, we no longer think that, standing alone, our recommendation in ALRI Report No. 27 goes far enough toward alleviating the uncertainties of an unstructured and unfettered judicial discretion.

4. Legislate principles

The *Family Law (Scotland) Act*, 1985, came into force on September 1, 1986. This Act legislates the recommendations of the Scottish Law Commission made four years earlier.

The Scottish Law Commission formulated five basic principles as the exclusive criteria to govern spousal support rights and obligations. These principles represent an attempt to structure the exercise of judicial discretion in a manner that would balance the need for flexibility, consistency and justice. Under them, a support order can be made only if

(a) the order is justified by an applicable principle, and

(b) the order is reasonable having regard to the resources of the parties.

These requirements introduce at the outset a certain balance between principles and discretion which, in the opinion of the Scottish Law Commission, can and should be maintained by the way in which the applicable principles are framed.[160] In the legislation, each principle is carefully defined and combined with specific direction about the factors the court is to take into account in applying it.

The five principles, as legislated, are:[161]

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[160] Scot Law Com. No. 67, *supra*, note 61, para. 3.62; see also Draft Bill, clause 8(2), *ibid.* at 190; see now *Family Law (Scotland) Act, 1985*, s. 8(2).

[161] *Ibid.*, para. 3.64. See also Draft Bill, clauses 8(2) and 9(1) and (2), *ibid.* at 190-195; see now *Family Law (Scotland) Act, 1985*, ss 8(2), 9(1) & 9(2). The Commission did not think that the principles would necessarily be more complex in practice than the pre-existing system":

(continued...)

(i) fair sharing of matrimonial property;

(ii) fair recognition of contributions and disadvantages;

(iii) fair sharing of the economic burden of child-care;

(iv) fair provision for adjustment to independence; and

(v) relief of grave financial hardship.

The Scottish legislation has been viewed as a "qualified success," but with room for improvement. Scottish solicitors welcomed the framework of rules and principles but there was "a widespread view that greater clarification would be desirable on how to apply the principles of the Act to particular circumstances."[162]

The last four of the five principles defined in the Scottish legislation compare closely to the four objectives set out in the *Divorce Act*, section 15.2(6). The comparison is shown in the Table below.

Table 1. Comparison of Scottish Principles with Objectives in Canada's *Divorce Act*.

Scottish Principles *Family Law Act (Scotland), 1985*	**Canadian Objectives** *Divorce Act, 1985*
9(1)(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family	15.2(6)(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown
9((1)(c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties	15.2(6)(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.

[161] (...continued)
ibid. para. 3.61. The Commission reasoned that in many cases only one or two principles would apply, and that the provision of a framework of principles would make it easier, rather than more difficult, for the parties to reach settlements: *ibid.*

[162] Scottish Office, Central Research Unit, *The Impact of the Family Law (Scotland) Act 1985 on Solicitors' Divorce Practice* (November, 1990) at 2, para. 13.

Table 1. Comparison of Scottish Principles with Objectives in Canada's *Divorce Act*.

Scottish Principles *Family Law Act (Scotland), 1985*	**Canadian Objectives** *Divorce Act, 1985*
9(1)(d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce	15.2(6)(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time *See also 15.2(6)(c) below.*
9(1)(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period	15.2(6)(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage

The fifth Scottish principle, "fair sharing of matrimonial property," is dealt with in Alberta by the *Matrimonial Property Act*. We think that this should continue to be the case for two reasons. First, we think it appropriate to consider spousal support and matrimonial property separately: the amount of spousal support payable should be determined in the light of the effect of the division of matrimonial property on the means and needs of the two spouses. Second, the *Divorce Act* does not deal with the division of matrimonial property, and, in the absence of strong reason to the contrary, we think that the legislative pattern for dealing with the rights of spouses to a marriage which has broken down but still subsists legally should be the same as the legislative pattern for dealing with the rights of spouses to a marriage which is being terminated.

The main difference between the two approaches—Scottish principles or Canadian objectives—appears to be that, in Scotland, the principles are more fully developed in the legislation and the order must identify the principle that justifies it. As well, particular factors for the court to consider are associated with each principle.

5. Rely on judicial guidelines

The courts could be left to provide their own guidelines, as the Alberta Court of Appeal did in the area of child support.[163] This approach has the advantage of maintaining the flexibility within the courts to respond to particular fact situations as well as to changing societal expectations.

6. Combine approaches

Different approaches to legislating the criteria by which spousal support rights and obligations are to be determined may be combined. For example the legislative articulation of objectives to be achieved by spousal support could be combined with the formulation of factors for the judge to consider in determining whether a spouse should receive support and in what amount. As already stated, the *Divorce Act* takes this two-pronged approach to the award of support.[164] It combines the objectives set out in section 15.2(6) with factors which are listed in section 15.2(4). As commented earlier, the effect is much the same as the legislative conferral of an unfettered judicial discretion. In Alberta, one advantage of choosing this option is that it would afford both theoretical and practical consistency with the *Divorce Act*.

Alternatively, principles could be combined with factors, as in the Scottish legislation. As has been seen, that legislation carefully defines the principles which govern the award of spousal support and combine them with specific direction to the court about the factors it is to take into account in applying the principles.

Having conceded that a single all-encompassing objective would be "far too vague and general to provide sufficient guidance to the courts, the legal profession and the public,"[165] the Scottish Law Commission considered whether the vacuum could be filled by the designation of an extensive list of specific factors to be taken into account. Testing this approach by reference to the factors enumerated in section 25 of the *Matrimonial Causes Act (England), 1973*, the Scottish Law Commission concluded that coupling the objective of an equitable adjustment of the spouses' economic position on

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[163] *Levesque* v. *Levesque* (1994), 20 Alta. L.R. (3d) 429 (Alta. C.A.).

[164] See Chapter 3, heading B.2.

[165] *Ibid.*

divorce with an extensive list of specific factors would not provide a satisfactory solution:[166]

> It seems to us that such a system does not go far enough in the direction of principles and predictability. There is no acceptable way of specifying how much weight should be given to the various factors, some of which pull in opposite directions. The factors are so numerous and so various that the discretion is likely in the end to be as wide as it would be without the list.

While a combined approach may shore up the shortcomings of any single approach, no combined approach is perfect. For example, evaluations by the Department of Justice, Canada demonstrate that the *Divorce Act* has failed to alleviate the economic hardship sustained by dependent wives and children on marriage breakdown or divorce.[167] In the words of a Justice Communique:[168]

> The 1985 *Divorce Act* attempted to achieve a balance between having spouses achieve economic independence from one another and protecting older homemakers and women who are the primary caretakers of young children. The Department of Justice's evaluations show that this balance has not been reached. Few women are receiving support and awards are generally insufficient in both amount and duration.

The Supreme Court of Canada judgment in the *Moge* case shows that since 1991 the courts have taken steps to correct the disparity with respect to spouses. With respect to children, the federal Parliament has moved to improve the balance by introducing presumptive Child Support Guidelines that set the level of child support payments. (See RFD No. 18.3 for a discussion of this development.)

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[166] Scot. Law Com. No. 67, *supra*, note 61, para. 3.58.

[167] *Supra*, note 19.

[168] Minister of Justice and Attorney General of Canada, *Justice Communique: Family Law Reform Initiative* (Ottawa, June 17, 1991).

C. Fixed Formula[169]

1. Meaning of "spousal support guidelines"

Empirical data in Alberta, and in Canada generally, support the conclusion that the absence of more precise criteria for spousal support contributes to the economic hardship experienced by many separated and divorced women.[170] One way to ensure that spousal support is awarded in an appropriate amount would be to provide comprehensive guidelines for the assessment and periodical review of spousal support. Taking this approach:[171]

> ... the spouses' financial rights and duties *inter se* on divorce would be resolved by reference to fixed mathematical formulae which might then be adjusted to take into account particular factors such as the care of children or the length of the marriage.

Quantitative support guidelines can operate either as presumptive guidelines or as advisory guidelines. Advisory guidelines permit a wider ambit for the exercise of an overriding judicial discretion.

Quantitative spousal support guidelines may be established judicially or by legislation.

2. Establishment

a. Judicial guidelines

Prior to the *Divorce Act*, 1968, Canadian courts followed English judicial precedents by applying the so-called "one-third rule" as a "rule of thumb" for calculating spousal support.[172] The one-third approach was usually applied when the husband was the sole income earner and presumptively entitled the wife to spousal support fixed at one-third of the husband's income. Different formulae were applied when both the husband and wife earned incomes. In some cases, courts applied a two-fifths of joint income rule, subject to a

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[169] The analysis that follows draws heavily on the Department of Justice (Canada) study, *Spousal and Child Support Guidelines* (October 1988) prepared by Danreb Inc. (Principal Researcher: Julien D. Payne).

[170] Zweibel, *supra*, note 5. Some possible reasons: *e.g.*, market factors, division of spousal and child support, equal opportunity that is assumed does not exist in workplace; inadequate account taken of what a wife has given up: Zweibel, *ibid.*

[171] Law Commission (England), Law Com. No. 103, *supra*, note 60, para. 80.

[172] *Ibid.*, para. 81; see also Report of the Centre for Socio-Legal Studies, *supra*, note 134 at 89-90.

deduction of the wife applicant's own income. Other courts would equalize the income of the spouses by way of a spousal support order.[173]

All of these formulae were associated with an era when the right to spousal support was available only to a wife, who was required to prove that her husband had committed a matrimonial offence. Even then, the application of formulae was considered inappropriate when the husband's income was very high or very low.[174] With the enactment of the *Divorce Act*, 1968 and provincial statutes, which have endorsed no-fault criteria, reciprocal spousal support obligations, notions of rehabilitative support premised on obligations to strive for economic self-sufficiency, and equitable property sharing, the use of presumptive formulae to assess spousal support no longer meets with judicial approval and has fallen into disuse.[175]

b. Legislated guidelines

i. Precedents

Legislated quantitative spousal support guidelines exist in a handful of counties in the United States where they provide a mathematical formula only for the purpose of assessing interim or temporary support.[176]

In contrast, child support guidelines based on numeric criteria that result in the computation of a specific quantum of child support have been implemented in Australia, the United States and England.[177] The reason for the difference is that quantitative spousal support guidelines are more difficult to design and administer than needs-based child support guidelines.

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[173] *Power on Divorce*, 2nd ed. (Burroughs & Co., 1964) at 280 and 539.

[174] Julien D. Payne, "Corollary Financial Relief in Nullity and Divorce Proceedings" (1969) 3 Ottawa L. Rev. 373 at 400-01.

[175] *Ibid.* at 401. See also *MacIsaac* v. *MacIsaac* (1974), 10 N.S.R. (2d) 221, 2 A.P.R. 221, 17 R.F.L. 328 at 330-31, 52 D.L.R. (3d) 740 (N.S.C.A.).

[176] George H. Norton, "Support Schedules in California: Selected Custody and Spousal Support Issues" (1987) 4 Calif. Fam. Law Mthly 57 at 68; *see also* George H. Norton, "Explaining and Comparing the California Child and Spousal Support Guidelines" (1987) 4 Calif. Fam. Law Mthly 1.

[177] Department of Justice, Canada, *Spousal and Child Support Guidelines*, October 1988, prepared by Danreb Inc. (Principal Researcher: Julien D. Payne) for the Department of Justice, Canada, at VIII — 1, Child Support Guidelines in the United States, and IX — 1, Child Support Guidelines in Australia.

ii. an American proposal

Despite the difficulties, proposals exist for legislation that will provide quantitative formulae to regulate spousal support on marriage breakdown or divorce. A detailed scheme proposed by G.H. Norton, a practising attorney in Palo Alto, California, is described in Appendix A. Under this scheme, the guidelines would be combined with a "reasonable discretion" to deviate from the guidelines in individual cases.

Mr. Norton prefaces his proposal by observing that:[178]

> ... a problem exists for many women because there are no clear-cut criteria for setting spousal support in the law ... statistics, which show that the standard of living for women decreases after divorce and often continues to decrease, while it increases for men soon after the divorce, are troubling.

He states that spousal support "remains an area of unpredictability because of the wide divergence of awards" and this "undoubtedly works to the detriment of women in many cases" whereas "[i]n contrast, there are very few examples in which an objective commentator can say that spousal support awards result in substantial injustice to men paying support."[179]

3. Arguments for a fixed formula

Several arguments can be made in favour of the implementation of presumptive spousal support formulae, such as those proposed by Mr. Norton.

a. Simplicity, consistency and predictability

One argument for a fixed formula is this: quantitative spousal support guidelines have the attraction of simplicity, consistency and predictability. Because of this, their existence facilitates the negotiation of settlements and the avoidance of litigation. In the words of the Law Commission of England:[180]

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[178] George H. Norton, "Support Schedules in California ...," *supra*, note 176 at 69.

[179] *Ibid.*

[180] Law Commission (England), Law Com. No. 103, *supra*, note 60, para. 80.

> The result [of quantitative support guidelines], it is said, would be two-fold. First, the parties and their legal advisers would in most cases be able to save time and money by negotiating a settlement in the knowledge that it accurately reflected current practice. Secondly, adjudicators would be able to decide cases in an entirely consistent fashion.

b. A complement to child support guidelines

According to a second argument for a fixed formula, the implementation of mathematically based spousal support guidelines is a necessary corollary to the introduction of quantitative child support guidelines.

It is noteworthy that the development of quantitative child support guidelines in the United States deliberately avoided analysis of the potential, if any, for complementary spousal support guidelines.[181] This analysis was also absent from the process leading to the adoption of the Federal Child Support Guidelines in Canada. Many people agree, at least in principle, with the notion that the economic needs of children—the innocent victims of marriage breakdown—should, if possible, be met by their separated or divorced parents. The quantitative child support guidelines that have been statutorily implemented in the United States and Australia do not adequately address the indirect but very substantial financial losses incurred by a sole custodial parent, usually the wife, whose homemaking role must continue to be discharged at great personal sacrifice to her economic advancement.[182]

The formulaic calculations that underlie the Canadian guidelines make some attempt to address this criticism. So does the case law: as emphasized in *Moge*, custodial wives and displaced homemakers should not be reduced to a poverty level standard of living while the absent spouse or parent continues to enjoy a comparatively high standard of living.

Nevertheless, according to this argument, the implementation of mathematically-based spousal support guidelines to complement child support guidelines could do a great deal to promote new attitudes towards spousal and child support that would equitably apportion the economic consequences or marriage breakdown and divorce between the spouses.

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[181] Diane Dodson, "A Guide to the Guidelines", Family Advocate, Spring, 1988, Vol. 10, No. 4 at 6.

[182] See Zweibel, *supra*, note 5, for criticisms of the approach taken in these statutory models.

c. Equitable apportionment of the economic consequences of marriage breakdown

A third argument for a fixed formula stresses that diverse policy objectives, though theoretically more equitable than quantitative guidelines, do little, if anything, to assist the typical Canadian family with an average income. Although diverse objectives could benefit more affluent families, the judicial practice, established prior to the Supreme Court of Canada decision in *Moge*, of asserting the predominance of the objective of achieving economic self-sufficiency tended to reduce the potential significance of the other objectives and generates relatively low levels of spousal support.[183] Quantitative spousal support guidelines, even if needs-based, do not necessarily presuppose a subsistence standard of living. Such guidelines could seek to equitably reduce the substantial disparity of income in the two households after separation or divorce. If they were presumptive and not conclusive, quantitative guidelines would not preclude supplementary payments being ordered to achieve any stipulated objective under the governing legislation.

d. Administrative variation

A fourth argument for a fixed formula is that quantitative spousal support guidelines could facilitate the administrative variation of subsisting orders without recourse to costly litigation. They may also reduce the large number of cases wherein no spousal support is claimed or ordered and may alleviate the problem of women being coerced into unreasonable settlements.[184]

4. Arguments against a fixed formula

Several arguments can also be made against the implementation of presumptive spousal support forumulae, such as those proposed by Mr. Norton.

a. Underlying assumptions

One argument against a fixed formula has to do with the complexities involved in defining the objectives of spousal support. Before they can be quantified mathematically, it is necessary to define the objectives of spousal support. Indeed, any attempt to formulate mathematical formulae

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[183] See Carol J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part 1)" (1990), 7 C.F.L.Q. 155, at 162-64.

[184] Department of Justice, Canada, *Evaluation of the Divorce Act - Phase II*, *supra*, note 19 para. 4.2.2.

presupposes a prior definition of the objectives sought to be achieved.[185] However, no consensus exists about the appropriate parameters of spousal support rights and obligations on marriage breakdown or divorce. As has been seen, opinions differ widely on the objectives of spousal support and the means of implementing these objectives and on the balancing of competing interests of members of sequential and reconstituted families. This makes it difficult to reduce the spousal support obligation to quantitative formulae that will take account of particular circumstances such as the duration of the marriage and the care of children. What is more, the objectives that are employed tend to be hidden within the formula, making any unfairness inherent in the formula difficult to challenge.

b. Fairness over time

A second argument against a fixed formula has to do with the difficulties involved in anticipating future events. It is necessary to provide for the fair operation of quantitative guidelines in response to the complexities of changing future circumstances. Viewing the apportionment of means by way of mathematical formulae as an aspect of continuing and prospectively lifelong support, the Scottish Law Commission concluded:[186]

> A solution which involves income transfers between the parties for their joint lives on the basis of a formula would be open to even more objections than the continuing maintenance model. We can see no more reason for tying divorced parties together for life with a formula than for doing so without a formula. Predictability of results ceases to be a virtue if the results are predictably unsatisfactory and unjustifiable.

c. Injustice from inflexibility

A third argument against a fixed formula questions the assumption that quantitative spousal support guidelines promote fairness through simplicity and certainty. The Law Commission of England has cautioned that "the desirability of certainty, which is clearly one of the chief merits of a mathematical approach, must ... be balanced carefully against the need for flexibility which the courts have often emphasized ...."[187] In its view, "the possibility that most individual variations of circumstance could be provided

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[185] Law Com. (England), Law Com. No. 103, *supra*, note 60, para. 83.

[186] Scot. Law Com. No. 67, *supra*, note 61, para. 3.52.

[187] Law Commission (England), Law Com. No. 103, *supra*, note 60, para. 82.

for within the framework of a mathematical formula must be weighed against the possibility that such formulae would thereby become so unwieldy and complicated that they could only be interpreted by specialists and the initial attractions of simplicity and certainty would be lost."[188]

d. Complexity caused by multiplicity of circumstances

A fourth argument against a fixed formula rests on the observation that the diversity of circumstances existing in individual cases makes a fair formula extremely difficult to fashion. Spousal support guidelines based on prescribed formulae cannot properly take account of the multiplicity of economic variables that may be present on marriage breakdown. Unlike quantitative child support guidelines, where fewer variables are present and expenses are calculable in relation to a child's age, quantitative spousal support guidelines cannot be reduced to a simple needs-based criterion.

Many considerations must be taken into account in determining what is fair and reasonable in granting or denying spousal support and in determining whether an appropriate entitlement should be by way of a lump sum payment, periodic payments, whether for a fixed term or an indefinite period, or a combination of lump sum and periodic payments.

Relevant considerations include: (i) the duration of the marriage; (ii) the functions performed by each spouse during the marriage; (iii) the age of the spouses; (iv) the health of the spouses; (v) the occupational status of each spouse; (vi) the education, skills and earning capacity of each spouse; (vii) the assets or debts of each spouse and how they were accumulated or incurred; (viii) the spousal advantages and disadvantages arising from the marriage or its breakdown; and (ix) the income of each spouse and the necessary retention of some incentive for each spouse to realize his or her earning potential.[189] These considerations do not constitute a comprehensive list but they demonstrate the difficulty of implementing quantitative spousal support guidelines.

Visualize a situation where rehabilitative support would be appropriate. In such circumstances, a court might conclude that the ideal solution is to

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[188] *Ibid.*

[189] See *e.g.*, *Brocklebank* v. *Brocklebank* (1977), 25 R.F.L. 53 (B.C.S.C.).

allocate a lump sum to enable the disadvantaged spouse to pursue an educational or professional training program for the purpose of securing or enhancing employment opportunities that will foster economic self-sufficiency in the future. Given that assumption, the court might be expected to address the following concerns: (i) the suitability of the particular program envisaged by the claimant spouse; (ii) the costs of undertaking a suitable program and how they are to be met, e.g. by spousal contributions, student loans or grants; and (iii) the ability of the paying spouse to furnish a lump sum in light of his or her capital and income. If no capital were available out of which a lump sum could be paid, periodic support might be ordered to accommodate the venture. It is extremely doubtful whether fixed formulae can be devised to include the variety of circumstances that a court might face.

Similarly, to the extent that spousal support orders are premised on compensating a spouse for disadvantages sustained or contributions made to the financial and emotional welfare of the family, it is difficult to see how these considerations can be reduced to fixed formulae.

It is also difficult to see how such formulae can take account of circumstances where a spouse has remarried or entered into a "common law relationship" with consequential financial liabilities or benefits.

e. Artificial divisions

A fifth argument against a fixed formula emphasizes the extent to which spousal support, child support and property division are inextricably intertwined from an economic standpoint on marriage breakdown or divorce. Quantitative spousal support guidelines would introduce artificial divisions and would prevent legitimate trade-offs that facilitate the consensual resolution of the economic consequences of marriage breakdown.

f. Threat to economic security of subsequent families

A sixth argument against a fixed formula claims that quantitative spousal support guidelines wrongly disregard the high incidence of common law relationships and remarriage after marriage breakdown and divorce. Formulaic guidelines quantifying the obligation to the former spouse might threaten the economic security of subsequent families by reason of the inability of most individuals to support two households. We have endorsed the specific premise that "no preference should be expressed with respect to

the relative support rights and obligations of past and present partners." The issue of fairness as between a former spouse and a new partner is a discussion in itself and we say more about it in Chapter 5, heading B where we discuss the impact on spousal support of new families.

g. Foster economic dependence

A seventh argument against a fixed formula makes this objection: unless the concept of rehabilitative support were incorporated into the formula, the application of formulaic guidelines might foster a state of continued economic dependence that would undermine the initiative and obligation of each spouse to become financially self-sufficient to the extent that this is practicable after marriage breakdown or divorce.[190]

D. Issues and Recommendations

No single approach or combination of approaches provides a perfect solution. Each has strengths and shortcomings. We set out our conclusions here.

1. Introduce spousal support guidelines

In our view, spousal support rights and obligations cannot readily be reduced to arithmetic formulae. The economic variables are too complex to lend themselves to quantitative spousal support guidelines, even with respect to interim support which often becomes the norm.

2. Retain judicial discretion

On balance, we think that judicial discretion is the best option. In making this recommendation, we note that, in the absence of fixed arithmetical formulae, there will always be considerable freedom of choice in the application of statutory provisions, however specific or detailed they may be.

3. Legislate objectives and factors

We have considered the advantages and disadvantages of various approaches to legislation incorporating judicial discretion. In Chapter 3, we recommended that Alberta adopt a spousal support theory that is consistent with the *Divorce Act*. In the further pursuit of such consistency, we recommend that the Alberta legislation adopt the approach of legislating specific objectives and identifying factors for the court to consider in

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[190] Scot. Law Com. No. 67, *supra*, note 61, para. 3.52.

determining the right to and amount of support. To this end, we think that the *Divorce Act* provisions are good or, at least, that there is no improvement that would justify departing from the *Divorce Act*. We recommend that Alberta legislate the objectives set out in section 15.2(6) of the *Divorce Act* and the factors set out in section 15.2(4).[191]

In making this recommendation, we note that, in the absence of fixed arithmetical formulae, there will always be considerable freedom of judicial discretion in the application of statutory provisions, however specific or detailed they may be.

RECOMMENDATION No. 6.2

(1) Alberta should retain the approach of judicial discretion to spousal support but enact objectives for spousal support combined with factors for the court to consider in making a spousal support order.

(2) Spousal support orders made under Alberta legislation should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown,

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to an order for child support,

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage, and

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[191] Other factors could be added to the list, in subsection (3) of the recommendation. Examples of factors that a court could be required to consider in calculating the quantum of spousal support include:

d) the resources that each spouse brought into the marriage;
e) the current earning capacity of each spouse;
f) the probable effect of any order on an existing subsequent family.

We have declined to add these or any other factors, but are open to comment on our decision to omit them.

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

(3) Alberta legislation should direct the court, in an application for spousal support, to take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited,

(b) the functions performed by the spouse during cohabitation, and

(c) any order, agreement or arrangement relating to support of the spouse.

CHAPTER 5 OTHER SUBSTANTIVE ISSUES

A. Relevance of Spousal Misconduct

In Phase 1 of this project, we recommended abolition of the matrimonial actions for judicial separation and restitution of conjugal rights in favour of an independent action for support.[192] In doing so, we rejected matrimonial fault as the relevant basis for deciding the right to and amount of support.

This change is consistent with the trend in other Canadian jurisdictions. However, some of those jurisdictions have retained reference to conduct in modified form. Debate continues about the role that spousal misconduct should play in relation to support.

There is no cohesive body of reported judicial decisions respecting the appropriate response of the law to the competing demands of past and present families.

1. Existing law

a. Alberta *DRA*

Misconduct, as manifested by the commission of a matrimonial offence, is still the basis of a claim for spousal support under the *DRA*. Applicants seeking spousal support must prove that their spouse has committed a matrimonial offence, such as adultery, cruelty or desertion, and the applicant's own misconduct may constitute a bar to relief.[193]

b. Federal *Divorce Act*

In contrast, the *Divorce Act* specifically directs the court to disregard any misconduct of a spouse in relation to the marriage. Section 15.2(5) provides:[194]

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[192] ALRI Report No. 65, *supra*, note 23 at 16 and 27; see also *ibid.*, at 27, referring to the existing availability of spousal support as an independent remedy under Part 4 of the *DRA*.

[193] See *DRA*, s. 22, which requires the court to have regard to "the conduct of both parties" when support is sought in nullity proceedings. See also Christine Davies, *supra*, note 71, c. 9 at 170-73, and c. 12 at 245-48.

[194] For a summary of differing opinions as to whether s. 15.2(5) ought to be interpreted to
(continued...)

> In making [a spousal support order or an interim order], the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

The effect is that the conduct of divorced spouses is irrelevant except insofar as it impacts on the economic circumstances of the parties.[195]

Previously, the *Divorce Act, 1968* had expressly declared the conduct of the parties to be a relevant consideration. Section 11 of that Act directed the court to determine the right to and quantum of spousal support "having regard to the conduct of the parties and the condition, means and other circumstances of each of them." However, many reported decisions shifted from moral judgments reflecting judicial perceptions of guilt and innocence to evaluations assessing the economic implications of conduct.[196]

c. Other provinces

At the present time, in addition to Alberta, only the Northwest Territories still bases the right to support on the fault doctrine.[197] Other provinces and territories in Canada have moved to the approach introduced federally in the *Divorce Act, 1968*. British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island, Quebec, Saskatchewan and the Yukon have all replaced the fault doctrine with a "needs" and "ability to pay" criterion,[198] although in the Yukon "conduct" has been retained as a factor relevant to determination of the amount.[199] The exception of certain

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[194] (...continued)
preclude a court from having regard to the economic implications, either positive or negative, of spousal conduct, such as the acquisition or dissipation of assets or the formation of a new cohabitational relationship, see CRILF, *supra*, note 117, at 12-13, para. 2.1.5.

[195] *Cohen* v. *Leboff* (1987), 11 R.F.L. (3d) 379 (Que. C.A.). See *Payne on Divorce*, 4th ed. (Butterworths, 1996) at 347-48.

[196] See *Connelly* v. *Connelly* (1974), 9 N.S.R. (2d) 48, 16 R.F.L. 171 at 176-78, 47 D.L.R. (3d) 535 (N.S.S.C.) (App. Div.).

[197] *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8, Parts I and II.

[198] *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*, R.S. Nfld. 1990, c. F-2, Part III; *Family Law Act*, R.S.O. 1990, c. F.3, Part III; *Family Law Act*, S.P.E.I. 1995, c. 12, Part III; *Civil Code of Québec*, ss 633, 635; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 4; and *Family Property and Support Act*, R.S.Y. 1986, c. 63, Part 3.

[199] Yukon *Family Property and Support Act*, *ibid.*, s. 34(5)(j). And see *ibid.*, s. 34(6), which (continued...)

"misconduct" from some of these statutes is discussed below under headings 3 and 4.

2. Categories of misconduct

Two categories of misconduct are identifiable among the many attempts that have been made to frame the exception. They are:

(1) conduct repudiating the marriage relationship, or

(2) conduct having economic implications.

The misconduct may affect the right to support or the amount of support or both. That is, the legislation may provide for the amount of support to be reduced or eliminated altogether, effectively removing the right.

3. Conduct repudiating the marriage relationship

a. Obvious and gross repudiation of the relationship

Statutes in Newfoundland[200] and Ontario[201] provide that conduct is irrelevant to the obligation to provide support, but may affect the amount where "a course of conduct ... is so unconscionable as to constitute an obvious and gross repudiation of the relationship." The interpretation and application of these statutory provisions has resulted in some inconsistencies but there has been strong judicial resistance to spouses engaging in mutual recriminations.[202] Manitoba originally applied this criterion but abandoned it by amending legislation in 1983 to prohibit a court from considering "the conduct of the spouses in respect of the marriage relationship."[203] Prince Edward Island made a similar change in 1995.[204]

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[199] (...continued)
permits the court to refuse to make a support order "where, at the time of the bringing of the application, the dependant has remarried or is cohabiting or has cohabited in a relationship of some permanence with a person other than the respondent."

[200] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(10).

[201] *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(10).

[202] See Julien D. Payne, "The Relevance of Conduct to the Assessment of Spousal Maintenance under the [Ontario] Family Law Reform Act" (1980), 3 Fam. Law Rev. 103.

[203] S. Man. 1983, c. 54, s. 4, now R.S.M. 1987, c. F20, s. 4(2).

[204] *Family Law Reform Act*, S.P.E.I. 1995, c. 12, s. 33(6).

In Nova Scotia, conduct repudiating the relationship is involved in two prongs of a three-pronged approach.[205] Under one prong, maintenance may be reduced or eliminated where the spouse who otherwise would be entitled:

> (a) persistently engages in a course of conduct that constitutes a repudiation of that spouse's marriage relationship; or
>
> (b) persistently engages in a course of conduct which, if the spouses were married and living together, would constitute a repudiation of their marriage relationship.[206]

Under another prong, a right to maintenance is forfeited by marriage to or cohabitation with another as husband and wife.[207]

As already stated, in England the courts have decided that matrimonial misconduct should be ignored in proceedings for spousal financial support unless it is "obvious and gross."

b. Misconduct in relation to marriage or the family

In Report No. 27 on *Matrimonial Support*, the ALRI concluded that, in general, conduct should not be a factor in the determination of spousal support because "there should be no element of reward or punishment in the award or its denial."[208] However, we thought it would be wrong to require the other spouse to provide financial support where "the conduct of a spouse has amounted to a refusal to undertake the obligations of marriage, or has amounted to a repudiation of the relationship." We felt that to disregard conduct of this kind would be "to disregard the ordinary person's sense of values." We concluded:[209]

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[205] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 6. The third prong relates to conduct having economic implications.

[206] *Ibid.*, s. 6(2).

[207] *Ibid.*, s. 6(3).

[208] ALRI Report No. 27, *supra*, note 26 at 26, and see Rec. 4 at 27.

[209] *Ibid.* Similar opinions have been expressed by other law reform agencies in Canada and abroad: see, e.g., Manitoba Law Reform Commission, *Report on Family Law, Part I, The Support Obligation*, February 27, 1976 at 21; Ontario Law Reform Commission, *Report on Family Law, Part VI, Support Obligations*, 1975 at 9; Law Commission of England, Law Com. No. 77, *supra*, note 57, paras. 2.15-2.25; Law Commission of England, Law Com. No. 112, *supra*, note 60, paras. 36-39; Scottish Law Commission, Scot. Law Com. No. 67, *supra*,

(continued...)

> ... that the best way to balance these conflicting considerations is, firstly, to provide that the conduct of the parties is in general not relevant, and, secondly, to add a qualification to the effect that if the party seeking support has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, the court may reduce the amount of support granted or deny it altogether.

4. Conduct having economic implications

a. Conduct affecting need for support or ability to pay

In New Brunswick, conduct is relevant only insofar as it affects the applicant's need for support or the respondent's ability to pay. In determining the amount of support, the court must consider the conduct of the parties "where such conduct unreasonably precipitates, prolongs or aggravates the need for support or unreasonably affects the ability to pay support."[210]

b. Conduct prolonging need

Under the third prong of the Nova Scotia provision, support may be reduced where the spouse entitled to support "engages in conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance is based or that arbitrarily or unreasonably prolongs the period of time required by the person maintained to prepare himself to assume responsibility for his own maintenance."[211]

5. Pros and cons

a. Inclusion of misconduct

There is no doubt that individuals who are ordered to pay spousal support often feel a sense of injustice if no account is taken of the other spouse's

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[209] (...continued)
note 61, paras. 2.40-2.45, 2.104-2.108, 3.42 and 3.172-3.187. Compare the opinions of the Royal Commission on Family and Children's Law for the province of British Columbia, *Seventh Report, Family Maintenance*, 1975 at 23-24 and the Law Commission of Canada, *Report on Family Law*, 1976 at 43, which favour the elimination of fault as a factor in spousal support claims. And see generally, Julien D. Payne, "Maintenance Rights and Obligations: A Search for Uniformity" (1978) 2 Fam. Law Rev. 1 at 10-12.

[210] *Family Services Act*, S.N.B. 1980, c. F-2.2, s 115(6)(t). To like effect, see s. 118(c) governing applications to vary or discharge orders for support.

[211] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 6(1). See also *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 42 (variation may be ordered by reason that "the dependant has not taken reasonable steps to improve self-sufficiency").

misbehaviour.[212] This is confirmed by the findings of the CIR in its study of spousal support in Alberta.[213] In a fault-based system, where blame for the marriage breakdown must be assigned, it is not surprising that a spouse who has been legally branded as the "wrongdoer" is resentful when called upon to support the legally "innocent" spouse.

However, there is another side to this coin: in a system where fault is eliminated from consideration, it is not surprising that an "innocent" spouse may be angry when no award is made to punish the "wrong-doer." Moreover, where fault is not attributed, how much greater must be the resentment felt by an "innocent" spouse who is required to pay support to the "wrongdoer."

The argument for including misconduct as part of the consideration is that misconduct is likely to be considered whether it is specified in legislation or not. The argument presupposes that allegations of spousal misconduct can easily become an integral part of written pleadings and oral submissions during any contested hearing on spousal support, and, therefore, the complete exclusion of misconduct will cause the law to depart from reality.

b. Exclusion of misconduct

It is generally conceded that "[it] would impose an impossible burden on the courts to require them to apportion blame for the breakdown of the marriage in each individual case."[214] The judicial process provides little or no opportunity for the courts to assess the degrees of responsibility to be attributed to the spouses on their marriage breakdown. As observed in the English case of *Wachtel* v. *Wachtel*:[215]

> Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality.

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[212] Law Commission (England), Law Com. No. 112, *supra*, note 60, para. 36.

[213] Canadian Institute for Research, *supra*, note 117, Vol. 1 at 21, and Vol. 2 at 291, Table 11.4(j) & 293-94, para. 12.4.

[214] Law Commission of England, Law Com. No. 103, *supra*, note 60, para. 89.

[215] *Wachtel* v. *Wachtel*, [1973] 1 All E.R. 829, *per* Ormrod, J.

Similar skepticism attaches to the idea that it is possible to quantify spousal support by reference to the conduct of the parties.

If misconduct is included, a trial may become a potential battleground for mutual recriminations by way of charges and countercharges of spousal misconduct at enormous expense to the individuals involved and taxpayers, and little or no gain in fairness.[216]

Many spouses on their marriage breakdown must "come to terms with their, often deep-seated, feelings of resentment and anger."[217] To expose them to "this kind of remorseless investigation into the, sometimes distant, past [would not help] in encouraging them to come to terms with the new situation." The parties should be neither compelled nor permitted to "seek an unattainable catharsis in a judicial forum."

The elimination of spousal misconduct as a factor in the adjudication of spousal support claims has already been achieved either legislatively or judicially in several Canadian provinces without any public outcry and without any apparent condemnation.

6. Recommendation

We are of the view that spousal misconduct affecting the marital relationship should be eliminated from consideration in the determination of spousal support rights and obligations in all cases. In Phase 1, we recommended abolition of the fault doctrine in matrimonial actions. It follows from that recommendation that spousal misconduct should be irrelevant to any determination of the right to, quantum or duration of spousal support. We think, nevertheless, that it should be possible to consider economic consequences of spousal misconduct in the circumstances identified in New Brunswick and Nova Scotia. Although this recommendation departs from the wording of the *Divorce Act*, we think our recommendation is consistent with its spirit.

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[216] Law Commission (England), Law Com. No. 112, *supra*, note 60, para. 37.

[217] *Ibid.*

RECOMMENDATION No. 7.2

Alberta legislation should provide that, in determining the amount of spousal support, the court

(1) shall consider only conduct that

(a) arbitrarily or unreasonably precipitates, prolongs or aggravates the need for support,

(b) arbitrarily or unreasonably prolongs the period of time required by the person being supported to prepare themself to assume responsibility for their own support, or

(c) unreasonably affects the ability to pay support, and

(2) shall not consider any other conduct.

B. Impact of New Families[218]

1. Introduction

In Chapter 1, we observed that the formation of new relationships and the creation of reconstituted or blended families strains limited financial resources and introduces fundamental policy issues for spousal and child support. The issues differ depending on which spouse has formed a new relationship — the spouse having the support obligation or the spouse claiming support. In this Chapter, we examine these issues at the time the initial support order is made. They also arise at a later date in the context of an application for a variation order (Chapter 10) and the duration of a support order (Chapter 12).

2. New relationship of spouse having support obligation

The impact of remarriage or the formation of a new cohabitational relationship by the spouse having the support obligation is discussed in relation to two questions. The first question is: to what extent, if at all, should the spouse paying support be relieved of obligations owed to his or her first family by reason of subsequently assumed new family responsibilities? The second question is: to what extent, if at all, should the resources of the

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[218] See *supra*, note 20.

new spouse (or cohabitant) be taken into account in assessing the capacity of the spouse paying support to support the former spouse?

In imposing and enforcing support obligations, Canadian courts have consistently stated that they must seek to ensure the payment of money that can reasonably be paid while leaving some inducement to the spouse paying support to keep up his other responsibilities.[219] Difficult though it may be to divide an insufficient pie among too many consumers, the courts seek to balance the respective needs of both past and present families.

In England, the Law Commission found widespread resentment among ex-husbands and their second wives towards the law. Husbands complained that their continuing financial responsibilities to a former wife rendered it impossible for them to have children in their second marriage. Many second wives were resentful of the reduced standard of living that resulted from the diversion of part of their husband's income to support his first wife. It was also claimed that many second wives were forced to work, regardless of family commitments, whereas the husband's first wife commonly chose not to work. Some second wives considered that they were personally responsible for supporting the husband's first wife because the courts took into account the second wife's resources in assessing the husband's financial circumstances.[220]

The Law Commission attributed these attitudes, in part, to a misunderstanding of the law:

> The court has no power to make orders against the second wife; and it is never appropriate to make orders against the husband which effectively have to be paid out of his new partner's income (or capital).

It asserted, nevertheless, that:

> ... the fact that the partner has income or capital of her own *may* sometimes be relevant in assessing the amount of the order against the husband, because (it has been said) the availability of those means releases resources for the upkeep of his family: In effect, the

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[219] See *e.g.*, *Patry* v. *Patry* (1975), 16 R.F.L. 332 (Ont. Prov. Ct); *Harris* v. *Harris* (1980), 110 D.L.R. (3d) 483, 21 B.C.L.R. 145.

[220] Law Commission (England), Law Com. No. 112, *supra*, note 60, para. 40.

> husband is *not* allowed in such a case to say that he needs to retain all or most of his income in order to provide for the needs of his new family.

The Commission acknowledged that "the practical effect will sometimes be that a husband is ordered to pay more by way of periodical payments for his first wife if his second wife has financial resources of her own than he would if she did not." It concluded that it would be illogical and unjust to allow a spouse to escape from an obligation to a first family by pleading that all the income is needed to support a second family, when this is not in fact the case:[221]

> What would be involved in abandoning the present practice would often be a transfer of the husband's proper obligation in respect of his first wife to the state. We do not think that would be acceptable.

The Scottish Law Commission recommended the enactment of legislation that would permit the court to take into account legally unenforceable, as well as legally enforceable, obligations to support members of the new household.[222] In addressing the question whether the needs and resources of new spouses should constitute a relevant consideration in determining the right to or quantum of spousal support, the Scottish Law Commission concluded:

> While the resources of third parties ... are irrelevant as such, any economic advantages derived by either party to the divorce action from third parties should, in our view, be regarded as part of the circumstances of the case or, where appropriate, as affecting that party's resources, even if they are unenforceable. Any other solution would be liable to lead to unrealistic results.

In our view, it would be unwise to fetter the exercise of judicial discretion in this context by establishing a statutory priority for either family.[223] The resentment of ex-husbands and their second wives towards the husband's continuing financial obligations to his former wife is to some extent inevitable. In practical terms, giving exclusive preference to the first

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[221] *Ibid.*, paras. 41 & 42.

[222] Scottish Law Commission, Scot. Law Com. No. 67, *supra*, note 61, para. 3.189; and Draft Bill, clause 11(6) at 202. And see *Family Law (Scotland) Act, 1985*, s. 11(6).

[223] Compare *Family Services Act*, S.N.B. 1980, F-2.2, s. 115(7), which gives support right "primacy" to a spouse or any child of a lawful marriage over those of a "common law spouse."

family could seriously undermine the economic viability of the second family. In such a case, the prospect of the spouse having the support obligation actually discharging financial obligations to the first family would be remote. On the other hand, a former spouse who is receiving support should not be put at disadvantage just because the spouse paying support has entered into a new relationship. Legislation should not give exclusive preference to the second family as this would enable a spouse to avoid their obligations by entering into a subsequent relationship.

Nevertheless, where the second spouse or a "common law spouse" can, or does, contribute to the expenses of running the home, the approach described by the Law Commission of England provides a proper means of balancing the interests of the past and present families of the spouse having the support obligation.

We think it would be desirable to define the applicable principles in legislation. Such legislation should specifically recognize the needs of the second family as a factor to be taken into account in the adjudication of claims for spousal support. Several Canadian provinces have included express provision in their support legislation whereby the amount of support, if any, payable to a family dependant shall be determined having regard, among other matters, to the legal obligation of the respondent to provide support for another person.[224] We prefer the recommendation of the Scottish Law Commission which is somewhat broader in scope.

Statutory implementation of the policies endorsed by the Scottish and English Law Commissions would provide an appropriate foundation on which Alberta courts could seek to balance the legitimate economic claims of all family members.[225]

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[224] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(2)(d); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(6)(i); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 38(9)(h); *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(9)(h); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(9)(h); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 34(5)(h); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 5(1)(c).

[225] Interestingly, in its study of *Matrimonial Support Failures* in Alberta, the CIR reported the following findings:

> In the Survey of Women there appeared to be a positive correlation between the ex-husband's involvement in a new relationship and [the] payment status [of court-
>
> (continued...)

3. New relationship of spouse claiming support

The impact on support rights and obligations of the formation of a new relationship by the spouse claiming support cannot logically be divorced from a consideration of the objectives that are sought to be achieved by an order for spousal support.[226]

Under the *Divorce Act*, remarriage does not automatically terminate support rights, although the court may relieve the former spouse against whom support is claimed of the spousal support obligation.[227] Where the new relationship is cohabitational, the answer to the question whether it should affect pre-existing spousal rights and obligations might depend on whether cohabitation, like marriage, gives rise to legally enforceable support rights and obligations during cohabitation and on the breakdown of that relationship. (We deal more fully with the support rights and obligations of unmarried cohabitants in Chapter 7.)

Reciprocal support rights and obligations between unmarried cohabitants have been legislatively established under certain circumstances in most Canadian provinces.[228] Generally speaking, these provincial statutes do not include any explicit corollary provision whereby subsisting spousal support rights and obligations will be terminated where the spouse receiving support enters into a new cohabitational relationship. Several provincial

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[225] (...continued)
ordered support] . . . Ex-husbands who had remarried or who had formed a common law relationship tended to be better payers. The same pattern held true in the Survey of Men.

These findings must be viewed in the context of the additional findings of the CIR that the most common reasons given by men for default in paying court-ordered support were that the ex-wife could support herself (63%) and that they could not afford the payments (46%). The fact that husbands who remarry or cohabit with another woman were found to be "better payers" may be explicable on the basis that such husbands wish to avoid future confrontations with their former wives that might constitute a source of pressure in their present relationships.

[226] See *e.g.*, *Keast* v. *Keast* (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.).

[227] See e.g. *Rosario* v. *Rosario* (1991), 37 R.F.L. (3d) 24 (Alta. C.A.); see also *Payne on Divorce, supra,* note 82 at 34 and Marie Gordon, *The Effect of Remarriage and Cohabitation on Spousal Support*, LESA Family Law Refresher Course, 1993.

[228] For a summary of relevant provincial statutory provisions, see ALRI Issues Paper No. 2, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (October, 1987), at 59-62. See also *Family Proceeding Act 1980* (N.Z.), ss 79-81.

statutes direct the court, in assessing the amount of support, if any, to be ordered, to have regard to "any other legal right of the dependant to support other than out of public money."[229] We agree that the court should consider the obligation of a new partner to support the spouse claiming support. We think that this should be a consideration whether or not that obligation is a legal one. If the relationship changes, the spouse claiming support could apply for a variation order.

Legislation in the Yukon permits the court to refuse to make an order for support "where, at the time of the bringing of the application, the dependant has remarried or is cohabiting or has cohabited in a relationship of some permanence with a person other than the respondent."[230] Even under this provision, the jurisdiction of the court to refuse an order is discretionary. We consider what the effect of remarriage or entering into a cohabitational relationship should be on the duration of a support order in Chapter 12.

Our recommendations relating to the impact of new families depart from the specific provisions of the *Divorce Act*. We think they improve upon them by clarifying the matters that the court can consider in determining spousal support.

RECOMMENDATION No. 8.2

Alberta legislation should direct the court to have regard to

(a) the legal obligation of the spouse having the support obligation to provide support for any other person,

(b) the responsibilities of the spouse having the support obligation towards any dependent member of their household, whether or not the responsibility is a legal obligation,

(c) the extent to which a second spouse contributes towards household expenses and thereby increases the ability of the

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[229] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(6)(s); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(8)(p); *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(9)(m); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(9)(m). See also *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(2)(b).

[230] *Family Property and Support Act*, S.Y. 1986, c. 63, s. 34(6).

spouse having the support obligation to support prior family dependants, and

(d) the responsibility of a new partner to support the spouse claiming support, whether or not the responsibility is a legal one.

C. Priority of Child Support

The *Divorce Act* was amended in 1997 to provide for the introduction of child support guidelines. Pursuant to those amendments, section 15.3(1) now requires the court to give priority to child support over spousal support when considering applications for both. This amendment follows the recommendation of the Federal/Provincial/Territorial Family Law Committee in its 1995 "Report and Recommendations on Child Support." The Committee explains:[231]

> The Family Law Committee recognizes that in some cases (for example, where there are many children) the granting of a child support award as determined by the formula may impact on the non-custodial parent's resources to the point that it would be difficult to establish an adequate spousal support award.
>
> In these cases, it is recommended that child support be awarded according to the formula. Spousal support awards may have to be established at a lower level than they otherwise would have been because the remainder of the income would be limited.

The Committee proceeds to recommend that "in cases where it is difficult to pay both child and spousal support, priority should be given to child support."[232] It recommends, further, that "the courts should consider alternative methods of awarding spousal support such as lump sums and postponing commencement of the spousal support award."[233]

In keeping with our general premise promoting consistency with the *Divorce Act*, we accept this position and adopt it as a recommendation. The issues relating to child support are discussed at length in our RFD No. 18.3 on *Child Support*.

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[231] *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support*, Minister of Public Works and Government Services, Canada (1995) at 47.

[232] *Ibid.*, Rec. 10.3.1.

[233] *Ibid.*

RECOMMENDATION No. 9.2

Child support should take priority over spousal support.

D. Recovery of Birth Expenses

Most provincial statutes expressly empower the court to include in a support order the payment of expenses incidental to the prenatal care of a mother and child or the birth of a child.[234] Most of these jurisdictions treat all children equally regardless of their birth within or outside marriage. In Alberta, the *P&MA* provides for the payment of such expenses where the child is born of parents who are not married to each other.[235]

In addition to prenatal and birth expenses, the Saskatchewan *Family Maintenance Act*[236] provides for the payment of support to the mother for a period not exceeding three months immediately preceding the child's birth and for a period not exceeding six months after the child's birth. In Alberta, the expenses listed in the *P&MA* include:[237]

> (a) reasonable expenses for the maintenance of the mother
>
> (i) during a period not exceeding 3 months preceding the birth of the child,
> (ii) at the birth of the child, and
> (iii) during a period after the birth of the child that, in the opinion of the Court,
> is necessary as a consequence of the birth of the child;

The Saskatchewan Act provides that an order for prenatal and birth expenses, including an order for the support of the mother *before* the child's birth, may be made "before or after the birth of the child and whether or not

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[234] See e.g.: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(k); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1)(h); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 11(1) (confined to child of unmarried parents; funeral expenses included); *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1)(h); *Family Law Reform Act*, S.P.E.I. 1995, c. 12, s. 39(1)(h); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 7(1)(f); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1)(g). Compare *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5, s. 1(d)(iii).

[235] *P&MA*, S.A. 1990, c. P-0.7, s. 16(2).

[236] S.S. 1990, c. F-6.1, ss 7(1)(f)(ii) & 7(1)(f)(iii).

[237] *P&MA*, ss 16(2)(a), 16(2)(d).

the child survives the birth."[238] In Alberta, application for an order directing the payment of these expenses must be made "within two years after the expense was incurred."[239]

It is our intention that the recommendations we make in RFD No. 18.3 on *Child Support* will lead to legislation that replaces the *P&MA*. With this in mind, we recommend that Alberta courts should be able to include prenatal, birth and postnatal support for the mother in a spousal support order. The court should have this power whether or not the child survives the birth. (In RFD No. 18.3, we make a parallel recommendation with respect to prenatal, birth and postnatal support for mothers who are not spouses within the meaning of this report.)

RECOMMENDATION No. 10.2

Alberta legislation should empower the court to include prenatal, birth and postnatal support for the mother in a spousal support order, whether or not the child survives the birth.

E. Spouses as Principal and Agent

1. General law of agency

In general, a wife or husband may act as their spouse's agent and the principles of the law of agency apply just as they would apply to any other principal and agent.

2. Wife's right at common law

Outside of the operation of the general law of principal and agent, the common law recognized the wife's right to pledge her husband's credit in three situations: implied agency; agency by estoppel; and agency by necessity.

a. Implied agency

At common law, a husband is liable for debts incurred by his wife during cohabitation when those debts are incurred to obtain household necessaries.

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[238] S.S. 1990, c. F-6.1, ss 7(1)(f)(ii) & 7(1)(f)(iii).

[239] *P&MA*, s. 16(3)(b).

The necessaries envisaged are those required by their style of life. This implied agency extends beyond husbands and wives to other cohabitants or relationships under which a woman attends to the domestic management of a household.

There are various circumstances under which the supplier cannot rely on the presumption. For example, the husband may be able to show that the supplier relied on the wife's credit; that the husband had warned the supplier not to grant credit to the wife; or that the wife had had a sufficient supply of money to pay for the goods. The husband may be able to deny liability on the grounds that without the supplier's knowledge he forbade the wife to pledge his credit.

b. Agency by estoppel

A husband can also be estopped from denying liability as a principal where he has held out his wife as having authority to pledge his credit.

c. Agency of necessity

At common law, a wife who is living apart from her husband by reason of his misconduct is entitled to pledge her husband's credit for necessaries for herself and the children which she had no other way to obtain. She could pledge his credit directly or borrow for the purpose. The husband may escape liability if the supplier relied on the wife's credit, or if the husband has allowed her adequate maintenance, or if she has other means, or if she has forfeited her right to support.

3. Statutory modification

a. Alberta

Section 12[240] of the *DRA* provided until 1973 that a husband was not liable for his wife's contracts after judicial separation unless he defaulted in payment of alimony, in which case he was liable for necessaries supplied for her use. Section 18[241] provided that where there was a subsisting alimony order and the husband was not in arrears he was not liable for necessaries supplied to his wife; the agency of necessity presumably applied if he was in

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[240] Formerly s. 13. S. 13(2) has not been retained in s. 12.

[241] Formerly s. 19.

arrears. In 1973 these two sections were amended to apply equally to a wife's support of her husband.

b. Other jurisdictions

The wife's agency of necessity arising on spousal separation has been abolished in several jurisdictions.[242] Legislation in Ontario, Prince Edward Island, New Brunswick and the Yukon Territory replaces the common law rules.[243] These legislative provisions alter the common law in four ways:[244]

> (1) they apply only to "transactions occurring while the parties are cohabiting; thus ... the wife's agency of necessity is supplanted;"
>
> (2) "the authority is not revoked by a private prohibition made by the one spouse to the other in contrast to the common law implied authority arising from cohabitation;"
>
> (3) the spouses are made jointly and severally liable—at common law "the presumption was that the wife contracted as agent for her husband and was not herself jointly liable;" and
>
> (4) both spouses are treated alike, that is, the section is gender neutral in its operation.

The Ontario provision is a good example. It provides:[245]

> (1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third party for necessities of life, unless the spouse has notified the third party that he or she has withdrawn the authority.
>
> ...
>
> (3) If persons are jointly and severally liable under this section, their liability to each other shall be determined in accordance with their obligation to provide support.
>
> (4) This section applies in place of the rules of common law by which a wife may pledge her husband's credit.

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[242] *Matrimonial Proceedings and Property Act (England), 1970*, s. 41; *Family Law Act*, R.S.O. 1990, c. F.3, s. 45; *Family Law Reform Act*, S.P.E.I. 1995, c. 12, s. 44; *Family Services Act*, S.N.B. 1990, c. F-2.2, s. 127; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 48.

[243] Christine Davies, *supra*, note 71 at 22.

[244] *Ibid.*

[245] *Family Law Act*, R.S.O. 1990, c. F.3, s. 45(1), (3) and (4). (S. 45(2) deals with the liability of a parent for necessaries of a minor.)

4. Recommendation

In ALRI Report No. 27, we recommended that the law should be changed to eliminate the wife's right to pledge the husband's credit for necessaries after separation. We observed that suppliers of necessaries no longer rely on this imperfect remedy and that spouses now can obtain support orders from the courts on short notice. We did not see a useful function for the right.[246]

How far the doctrine of implied agency is useful in assisting a cohabiting wife to obtain credit for household necessaries is questionable.[247] Changed social and economic conditions may well justify statutory abolition of this presumption as well. On the other hand, it is possible that the ability to obtain necessaries may be useful to cover the gap until an interim support order is in place.

In ALRI Report No. 27, we concluded that, while the spouses are cohabiting, the presumption of implied agency is not harmful and should continue. We are less convinced now than we were in 1978 about the utility of retaining the doctrine of implied agency. We also have reservations about the merits of allowing a spouse to notify suppliers of the withdrawal of the authority of the other spouse's authority, as an agent, to pledge credit. On occasion, such notices are given out of spite after marriage breakdown and this hampers the spousal support settlement process.

Agency by estoppel operates as a limb of the general law of agency under which liability can be established against a principal who holds a person out as agent. It should be governed by the general law.

RECOMMENDATION No. 11.2

Alberta should abolish

(a) the wife's common law right to pledge her husband's credit for necessaries after separation, and

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[246] ALRI Report No. 27, *supra*, note 26 at 172-74.

[247] See Ontario Law Reform Commission, *Report on Family Law, Part VI, Support Obligations* (1975) at 134-35.

(b) the common law presumption of the implied agency of a wife to render her husband liable for necessaries supplied by a third party.

CHAPTER 6 EFFECT OF DOMESTIC CONTRACT

A. Meaning of "Domestic Contract"

For present purposes, a "domestic contract" may be defined as meaning "a marriage contract, separation agreement or cohabitation agreement."[248] This definition is borrowed from the draft legislation proposed in ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage.* According to those definitions, a "marriage contract" is an agreement that two persons enter into "before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage." A "cohabitation agreement" is defined similarly but tied to cohabitation rather than marriage. A "separation agreement" is an agreement in which a couple, who are or have cohabited, either as married persons or as cohabitants living outside marriage, agree on their respective rights and obligations after separation.

B. Existing Law

1. Alberta DRA

Existing Alberta law does not regulate domestic contracts specifically. Courts generally agree that a spousal support order made pursuant to jurisdiction conferred by statute supersedes the spousal support provisions in a domestic contract. However, the other provisions in the domestic contract continue to be "operative and enforceable."[249] Even though courts may indirectly vary the terms of a spousal agreement by granting an order for spousal support that is inconsistent with it, there is no general power vested in the courts to vary or discharge a spousal agreement.

2. Federal *Divorce Act*

Section 15.2(4)(c) of the *Divorce Act* expressly requires the court to have regard to "any ... agreement or arrangement relating to the support of either spouse" in making an order for spousal support.

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[248] See draft legislation proposed in ALRI Report No. 53, *supra*, note 51 at 61: Part IV, ss 12(b), 13, 14 & 15. See also discussion under heading C. below.

[249] *Payne on Divorce, supra*, note 195, at 306.

The issue of contracting out of spousal and child support received considerable judicial attention under the *Divorce Act*, 1968, section 11. Until 1995, courts deciding cases under the 1985 Act appeared to accept the principles established under the former Act.[250] However, the 1995 judgment of the Supreme Court of Canada in the case of *G.(L.)* v. *B.(G.)*[251] raises doubt about the continuing applicability of these principles.

The judicial attention under section 11 of the 1968 Act was focused in three Supreme Court of Canada judgments: *Pelech* v. *Pelech*,[252] *Richardson* v. *Richardson*[253] and *Caron* v. *Caron*.[254] This trilogy of judgments imposed severe limitations on the discretionary jurisdiction of a court to grant an order for spousal support in contravention of the terms of a valid separation agreement.[255] Those judgments establish the following principles with respect to the effect of a domestic contract on the jurisdiction of the court to order spousal support:

(1) A freely negotiated and informed waiver of spousal rights in a separation agreement or in minutes of settlement incorporated in a divorce judgment cannot oust the statutory jurisdiction of the court to order spousal support on or after divorce.

(2) A distinction is to be drawn between the existence of this discretionary jurisdiction and the circumstances where it is proper for it to be exercised.

> (a) Where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs will be settled, and the agreement is not unconscionable in the substantive law sense, it will be respected by reason of the importance of finality in the financial affairs of former spouses and judicial

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[250] See Julien D. Payne, "Further Reflections on Spousal and Child Support after *Pelech*, *Caron* and *Richardson*" (1990) 20 Revue Générale de Droit 477, reprinted in (1990) 11 Adv. Qtly. 137 and in *Payne's Divorce and Family Law Digest*, at E-163. See also Carol J. Rogerson, *supra*, note 88.

[251] *Supra*, note 109.

[252] *Supra*, note 106.

[253] *Supra*, note 107.

[254] *Supra*, note 108.

[255] Compare ALRI Report No. 53, *supra*, note 51, Rec. 22(2).

deference to the right of individuals to take responsibility for their own lives and their own decisions.

(b) Only when an applicant, who is seeking spousal support or an increase in the existing level of support, establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependence engendered by the marriage, will the court exercise its relieving power to order spousal support or increased spousal support. Particularly stringent criteria apply under the *Divorce Act* where the terms of a comprehensive separation agreement, which includes a third party non-cohabitation clause, are incorporated in a divorce judgment.[256]

(c) Otherwise, the obligation to support an indigent former spouse should be the communal responsibility of the State. The fact that the applicant is impoverished and in receipt of public assistance, with little or no prospect of improvement in his or her economic condition, is insufficient in itself to warrant judicial disturbance of a negotiated settlement by way of an order for spousal support, if there is no causal connection between the applicant's present economic status and the prior marital relationship.

The Supreme Court impliedly endorsed the restrictions on judicial interference with the provisions of a separation agreement in the case of *Willick* v. *Willick*, which concerned child support. In that case, the Court stated:[257]

> Clearly the court is not bound by the terms of a separation agreement in exercising its jurisdiction to award support under the Act. ... the true question is the effect of the agreement in restricting the court's discretionary jurisdiction. See Wilson J. in *Pelech* v. *Pelech* [1987] 1 S.C.R. 801, at p 849... The reasoning which supports the restrictions with respect to interspousal support does not apply to child support.

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[256] *Payne on Divorce*, *supra*, note 122 , citing *Caron* v. *Caron*, *supra*, note 108. For a current statement, see *Payne on Divorce*, 4th ed., *supra*, note 195 at 301-3.

[257] *Willick* v. *Willick*, [1994] 3 S.C.R. 670.

For a time, lower courts accepted the judgment in the *Willick* case as standing for a continuation of the notion that "maintenance agreements may restrict the Court's discretion to vary spousal maintenance."[258]

Doubt that this is the correct position has been cast by the Supreme Court of Canada in the case of *G.(L.)* v. *B.(G.)*.[259] In that case, the four judges who formed the majority "concluded that this was not an appropriate case to determine whether the *Pelech*, *Richardson* and *Caron* trilogy applies to the support provision of the current *Divorce Act*."[260] However, the three judges who formed the minority concluded that "the criteria set out in the trilogy should not continue to be applied" under the current *Divorce Act* and that, consequently, "the Court must assess the effect of the agreement in light of the factors and objectives that govern spousal support under ss. 15(5), 15(7), 15(8), 17(4), 17(7) and 17(8) of the Act."[261] In short, although important, an agreement is only one factor that the court should consider in exercising its judicial discretion to award spousal support.

Where a spousal support order has been made, even if it incorporates the terms of the agreement, the order governs. If application is made to vary support, the support order rather than the agreement will be considered and section 17(4) of the *Divorce Act* applies.[262]

3. Other provinces or territories

With the exception of Alberta, the Northwest Territories and Quebec, provincial statutes regulating spousal support obligations specifically refer either to agreements or to domestic contracts. There is diversity, however, in the particular statutory provisions that have been enacted.[263] For example,

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[258] See *e.g.*, *Ginn* v. *Ginn* (1995), 11 R.F.L. (4th) 377 (Alta. Q.B.).

[259] *Supra*, note 109.

[260] *Payne on Divorce*, *supra*, note 195, at 302.

[261] *G.(L.)* v. *B.(G.)*, *supra*, note 109 at 264-65, cited in *Payne on Divorce*, *supra*, note 195, at 302.

[262] *Ibid.*; see also *MacDonald* v. *Macdonald* (1997), 30 R.F.L. (4th) 1.

[263] See *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 89 (obligation to support spouse) and s. 74 (enforcement of agreement as court order); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 4(4) (agreement will bar unmarried cohabitant) and ss 9(2) & 9(3) ("separation agreement"

(continued...)

the provision in the British Columbia *Family Relations Act*, like that in the *Divorce Act*, is couched in very general terms. It simply provides that:[264]

> [a] spouse is responsible and liable for the support and maintenance of the other spouse having regard to ...
>
> (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other ...

Most provincial statutes are far more specific. They empower a court to set aside an agreement in proceedings for a spousal support order:

(1) if the agreement provides inadequate support or results in unconscionability,

(2) if the applicant is receiving or would qualify for public assistance, or

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[263] (...continued)
precludes spousal support except where in default, or support inadequate as of date of agreement, or spouse in need of public assistance); *Family Services Act*, S.N.B. 1990, c. F-2.2, s. 115(5) (court may set aside "any agreement" where circumstances are unconscionable, applicant qualifies for public assistance, or default in payment under agreement), s. 134 (agreement may be filed with court and thereafter enforced or varied like an order of the court); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(5) (court may set aside "domestic contract" where circumstances are unconscionable, applicant qualifies for public assistance, or default in payment under agreement), s. 40(4) (incorporation of "domestic contract" in court order), s. 42 ("domestic contract" may be filed in "Trial Division or Unified Family Court" and thereafter enforced or varied as if it were an order of the court); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 4(b) ("express or tacit agreement" is a relevant factor in support proceedings), s. 13 ("paternity agreement" binding where adequate child support provided), s. 31 (court not bound by "any agreement" if terms of agreement "are not in the best interests of a party or the child"), s. 52 (agreement may be registered in Family Court after judicial approval or variation and thereafter has same effect as an order of the court); *Family Law Act*, R.S.O. 1986, c. 4, s. 2(9) (incorporation of "domestic contract" or "paternity agreement" in court order); s. 33(4) (court may set aside "domestic contract" or "paternity agreement" where circumstances are unconscionable, applicant qualifies for public assistance, or default in payment thereunder), s. 35 (domestic contract may be filed with Ontario Court (Provincial Division) and thereafter enforced or varied as if it were an order of the court); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 2(5) (incorporation of "domestic contract" in court order), s. 33(4) (court may set aside "domestic contract" or "paternity agreement" where circumstances are unconscionable, applicant qualifies for public assistance, or default in payment thereunder); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 7(2) (incorporation of "agreement" in court order), s. 9 (agreement may be filed in "Court of Queen's Bench or Unified Family Court" and thereafter enforced as if it were an order of the court); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 34(4) (court may set aside "domestic contract" where circumstances are unconscionable, applicant qualifies for public assistance, or default in payment thereunder), s. 41 (any person "obligated to provide support under a domestic contract" may apply to set support provision aside when payment would be unconscionable or obligee qualifies for public assistance), s. 58(4) (binding effect of cohabitation agreement).

[264] R.S.B.C. 1996, c. 128, s. 89(b).

(3) if there is default in the payment of support under the agreement.

The statutory provisions in sections 34(4) and 41 of the Yukon *Family Property and Support Act* are a good example. Section 34(4) deals with an application for support. It states:

> 34(4) A court may set aside a provision for support in a domestic contract and may determine and order support in an application under subsection (1) notwithstanding that the contract contains an express provision excluding the application of this section,
>
> (a) where the provision for support or the waiver of the right to support results in circumstances that are unconscionable,
>
> (b) where the provision for support or the waiver of the right to support is in respect of a person who qualifies for an allowance for support out of public money, or
>
> (c) where there has been default in the payment of support under the contract or agreement,
>
> and where an order is made under this subsection, the order terminates the support provisions in a domestic contract.

Section 41 permits the person obligated to provide support to apply to set aside the support provisions in a contract. It states:

> 41. Any person who is obligated to provide support under a domestic contract may apply to the court to set aside the provision for support in the contract, and where the court is satisfied that
>
> (a) requiring the person to continue to pay support under the terms of the contract would be unconscionable, or
>
> (b) the person obligated under the contract qualifies for support out of public money,
>
> the court may set aside the provision for support and determine and order support in accordance with this Act in the same manner and subject to the same considerations as apply in the case of an application made under section 34, and where an order is made under this section the order terminates the support provisions in the contract.

Several provincial statutes give an agreement or domestic contract the effect of a court order. Under these provisions, an agreement or domestic contract that has been filed in a designated court may be enforced in the same way as an order of the court.[265]

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[265] These provincial statutes likewise provide that, once filed in a designated court, an agreement or domestic contract may be varied in the same way as an order of the court. Compare the Alberta *MEA*, S.A. 1985, c. M-0.5, ss 1(2) & 1(3), whereby a support agreement under s. 6 of the *P&MA*, S.A. 1990, c. P-0.7 or s. 51 of the *Income Support Recovery Act*, R.S.A. 1980, c. I-I.7, or the *CWA*, S.A. 1984, c. C-8.1, "is deemed to be a maintenance order under this Act". Also compare Alberta *MEA* s. 24(2) which permits the court to relieve

(continued...)

As with section 15.2(4)(c) of the *Divorce Act*, the applicability to provincial statutory support regimes of the Supreme Court of Canada trilogy of judgments on section 11 of the *Divorce Act, 1968* is uncertain.[266]

C. Previous ALRI recommendations

The ALRI has made recommendations on domestic contracts in two previous reports: ALRI Report No. 27 on *Matrimonial Support* and ALRI Report No. 53 on *Reform of the Law Relating to Cohabitation Outside Marriage*. Under this heading, we will review those recommendations. Report No. 53 is more recent. The recommendations in that report reflect our current thinking on most issues. However, the report is silent with respect to some of the issues covered in Report No. 27. We think it is important to raise them again. We do so under heading D.

1. ALRI Report No. 53

In ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, we recommended that the *DRA* should be amended to include new provisions to regulate domestic contracts.[267] Statutory provisions are proposed in Part II of the draft legislation. The proposed provisions are similar to those that exist in several common law provinces. Ordinarily, the domestic contract would prevail. However where, because of a change in circumstances, the enforcement of a marriage contract or cohabitation agreement (but not a separation agreement), would lead to serious injustice, the court would be empowered to disregard it. The draft provisions are as follows:[268]

> **17(2) [Dum casta clauses]** A provision in a separation agreement or a provision in a marriage contract to take effect on separation whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.

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[265] (...continued)
against the payment of arrears of support in certain circumstances: see *infra* Chapter 10 on variation orders.

[266] Payne's *Divorce and Family Law Digest*, *supra*, note 20 at E-170.

[267] ALRI Report No. 53, *supra*, note 51 at 27, Recs. V and VI ; and see draft legislation, at 61-65.

[268] *Ibid.* at 63-65.

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

21 [Terms of domestic contract prevail.] Subject to section 17 and section 22 where there is a conflict between a provision of this Act and a domestic contract the domestic contract prevails.

22(1) **[Discretionary powers of court.]** A court may disregard any provision of a domestic contract,

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

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

(c) if the court is satisfied that the removal by one party of barriers that would prevent the other party's remarriage within that party's faith was a consideration in the making of all or part of the agreement or settlement; or

(d) if cohabitants who have entered into a cohabitation agreement subsequently intermarry;

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

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

2. ALRI Report No. 27

We examined the issue of contracting out of spousal support in 1978 in ALRI Report No. 27 on *Matrimonial Support*. There, we recommended that the Supreme Court (now Court of Queen's Bench) should be legislatively empowered to order support notwithstanding that the spouses have sought to contractually define or exclude spousal support rights and obligations. Our recommendation was:[269]

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

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

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[269] *Ibid.* at 98 (Rec. 22).

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

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

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

(3) An order under the section shall

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

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

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

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

D. Discussion

For the most part, we prefer the recommendations we made in Report No. 53 over those we made in the earlier Report No. 27. However, some of the issues warrant review and possible reconsideration. We will therefore comment on a number of points.

1. Contractual autonomy v. judicial power to override

In ALRI Report No. 27, we did not state what criteria would guide the court in making a decision to override the terms of a spousal agreement. The court would make its decision in the exercise of its judicial discretion, having regard to "whatever order is fair under all the circumstances."[270] Our reason for favouring judicial discretion with respect to spousal support rights and obligations over strict contractual autonomy was premised on the conclusion that:[271]

> The public interest requires that the support obligation be fairly performed as between each husband and wife, and it also requires that an agreement between a husband and wife not be allowed to make one of them a public charge.

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[270] *Ibid.* at 95.

[271] *Ibid.*

In Report No. 53, we set out the circumstances that would permit a court to disregard the provisions of a domestic contract. Unlike legislation in most other provinces, Report No. 53 does not include as one of those circumstances the fact that the applicant "is or would qualify for public assistance."

2. Exercise of court discretion

There is probably widespread support for the proposition that spouses should not have the right to negotiate contracts that shift the burden of spousal support from the individual to the state. It does not follow, however, that the court's power to override the terms of a spousal agreement by making an order for support should fall within the exercise of an unfettered judicial discretion.

Different approaches may be taken to the exercise of court discretion. As has been seen, the *Divorce Act* requires the court making a support order to "take into consideration" any support order, agreement or arrangement. The Report No. 53 recommendations would empower the court to "disregard" any provision of a domestic contract, but only in specified circumstances. Statutes in several provinces empower the courts to "set aside" a provision for support in a spousal agreement, but only in specified circumstances:[272] sections 34(4) and 41 of the Yukon *Family Property and Support Act*, reproduced above, are a good example. Report No. 27 contains specific recommendations about the court's power to alter the terms of the contract itself. The recommendations would allow the court to:

(a) confirm the contractual undertakings of the spouses by refusing an order for spousal support

(b) make an order for spousal support, notwithstanding the contractual waiver or release

(c) increase the amount by an order for supplementary payments that presupposed the survival of the contractual liabilities

(d) vacate the relevant contractual provisions and substitute an order for spousal support in an amount lesser or greater than that stipulated in the agreement.

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[272] See *supra*, note 263.

This power would exist even where the domestic contract included a waiver or release of all future claims to spousal support.

We now prefer an approach that specifies the circumstances when the court can interfere, as recommended in Report No. 53 with or without modification.

We also think that the court should be able to set aside or otherwise vary the provisions of the contract itself, as recommended in Report No. 27. Domestic contracts usually "deal with a whole range of subjects including division of property, support of a dependent spouse, and support and custody of children."[273] That is to say, in practice, if not in theory, the support provisions of a domestic contract are inextricably woven into the total fabric of the agreement. Simply allowing the court to disregard the contract may cloud the status of the contract by leaving unanswered questions about the extent to which its provisions continue in effect.

3. Who can apply?

The power of the court to vacate or redefine the support provisions of a domestic contract should not be conditioned on the granting of "an order for support." Where the contract provisions are, or have become, unconscionable to the supporting spouse, the court should have the power to discharge or reduce the liabilities of that spouse. As in the Yukon example, we think that either spouse should be able to apply to the court to set aside or vary the support provisions in the contract where appropriate. The legislation should make this clear.

4. Chastity as a condition of support

Recommendation 22(2) in ALRI Report No. 27 confers a discretionary power on the court to "[delete] any requirement [of a spousal agreement] that a party remain chaste as a condition of receiving support." Leaving this decision to the exercise of an unfettered judicial discretion invites undue subjectivity and a lack of judicial consistency. We prefer our more recent recommendations concerning *dum casta* clauses, made in Report No. 53.

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[273] ALRI Report No. 27, *supra*, note 26 at 93.

5. Identification of support provisions

Recommendation 22(3) in ALRI Report No. 27 would have required the court to identify the support provisions of a spousal agreement and to incorporate those provisions in any order for support that is granted to either spouse. Our thought was that, for the sake of certainty, it would be important to identify the provisions that were superseded by the court order. On reflection we think that this requirement would be impractical and lead to unnecessary difficulties in identifying what are truly support provisions. It should be sufficient that the court state the respects in which an agreement is varied or vacated.

E. Recommendation

To sum up, we recommend that the power to set aside or vary the support provisions of a domestic contract should be exercisable on the application of either the spouse with the support obligation or the spouse entitled to receive support. The court should be entitled to set aside or substitute the provisions of a domestic contract in certain circumstances, but this power should not be exercisable by way of a totally unfettered judicial discretion. Settlements should be encouraged but not at the expense of injustice to either spouse.

We endorse the domestic contract recommendations and draft legislation we proposed in ALRI Report No. 53 with the modifications we have discussed. These modifications will bring our recommendations more closely into line with the *Divorce Act* and the jurisprudence interpreting it.

RECOMMENDATION No. 12.2

(1) Alberta should enact those provisions set out in Part II, sections 17(2) and (3), 21 and 22 (1) and (2) of the draft legislation proposed in Part IV of ALRI Report No. 53, but modified

(a) to specify that either spouse may apply for relief from the spousal support provisions in the domestic contract, and

(b) to empower the court to make an order to vary, discharge or temporarily suspend and again revive the spousal support provisions in the contract. [NOTE: THOSE PROVISIONS ARE REPRODUCED IN THIS REPORT, AT 107-108.]

CHAPTER 7 UNMARRIED COHABITANTS

We addressed the meaning of "marriage relationship" and the corresponding meaning of the word "spouse" in Chapter 2, heading D. There, we established that the spousal support obligation flows marriage, broadly interpreted. We deferred the discussion of "marriage-like relationships" to this Chapter for the reason that cohabitational relationships raise constitutionally-based policy issues of particular complexity.

By "unmarried cohabitants," we mean a man and woman who are not formally married to each other but are living together in a marriage-like relationship.[274]

The reform of the law relating to support rights and obligations that exist between unmarried cohabitants is affected by a number of factors. First, the popularity of cohabitation outside marriage is on the increase, especially among persons under 35 years of age.[275] The increase reflects changing social

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[274] Our examination is limited to heterosexual couples. Some persons ask whether legislation that differentiates between cohabitants of the opposite sex and same-sex cohabitants contravenes the Charter, s. 15, which protects equality rights. In the case of *Egan and Nesbitt* v. *Canada*, [1995] 2 S.C.R. 73, decided at the same time as the case of *Miron* v. *Trudel*, *infra*, note 276, the majority of members of the Supreme Court of Canada did not find discrimination in federal old age security and guaranteed income supplements under the *Old Age Security Act* which singled out legally married and common law couples as the recipients of benefits. The Court concluded that same sex couples were incapable of meeting the fundamental social objectives that Parliament sought to promote. More recently, in the case of *Vriend* v. *Alberta*, [1998] S.C.J. 29., the Supreme Court of Canada held that Alberta's human rights legislation (the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7) contravened the Charter, s. 15, because it failed to provide protection from discrimination on the basis of sexual orientation.

We do not propose to discuss the subject of same-sex cohabitants or to make recommendations on this subject because we do not think that social policy is sufficiently well established for us to do so. In our opinion, the subject should be left, at least for the time being, to the political process. We note that the British Columbia *Family Relations Act* now applies to spouses living in a marriage-like relationship where the spouses are persons of the same gender: *Family Relations Amendment Act, 1997*, S.B.C. 1997, c. 20, s. 1(c).

[275] Statistics Canada reports that the number of common-law families in Canada increased by 28% between 1991 and 1996. (The Census defines common-law partners as "two persons of opposite sex who are not legally married to each other, but live together as husband and wife in the same dwelling.") In 1996, 11.7% of couples in Canada (or one couple in seven) were living as common-law partners, compared with 9.8% in 1991 (or one couple in nine). Two-thirds of individuals living common law were single, while over a quarter were divorced.

(continued...)

attitudes toward marriage and family. Associated with this change are changing views about what should be the legal consequences of this form of relationship.

Second, recent jurisprudence, specifically the judgment of the Supreme Court of Canada in the case of *Miron* v. *Trudel*,[276] delivered May 30, 1995, suggests that legislation differentiating between unmarried and married cohabitants of the opposite sex contravenes section 15 of the Canadian Charter of Rights and Freedoms. That section protects equality rights.

Third, the ALRI has issued two reports containing recommendations on the law relating to unmarried cohabitants: ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, issued in June 1989; and ALRI RFD No. 16, *Report on the Intestate Succession Act*, issued in January 1996. The recommendations in the two reports proceed from different philosophical starting points. The intervening judgment in the case of *Miron* v. *Trudel* led us to revisit, in RFD No. 16, the position we had taken in Report No. 53 on the question whether cohabitants should have rights on intestacy similar to those of married couples.

In this chapter, we explore the implications of these developments with respect to the law governing spousal support rights and obligations.

We underscore the point that this Chapter is restricted to the specific question of spousal support. That is to say, we are not dealing with the legal consequences of a cohabitational relationship taken in its entirety. We recognize that if cohabitational relationships are equated to marriage for spousal support and for intestate succession (as recommended in ALRI RFD

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[275] (...continued)
Common-law families with children at home accounted for 5.5% of all families (compared with 4% in 1991); common-law families without children constituted 6.2% of all families (compared with 5.8% in 1991). See Statistics Canada, *The Daily*, Catalogue no. 11-001E, October 14, 1997.

The numbers of persons in Alberta living in common-law partnerships in 1996 is slightly below the national average, coming in at approx. 10% which compares closely with the 1991 figure of 10.2%, of which 64.6% had not reached their 35th birthday: ALRI RFD No. 16, *Report on the Intestate Succession Act* (January 1996), at 27, citing Statistics Canada, *Families: Number, Type and Structure* (Ottawa: Supply and Services Canada, 1992), 1991 Census of Canada, Catalogue No. 93-312, Table 2 at 9.

[276] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

No. 16, *Report on the Intestate Succession Act*), it may follow that the two conditions should be equated for all purposes of the law. However, we do not consider the wider possibility in this report.

A. Existing Law

Alberta's existing statute law does not impose a general duty of support on unmarried cohabitants. It will be seen later in this Chapter that the failure to confer on unmarried cohabitants support rights equal to those enjoyed by spouses may infringe the Canadian Charter of Rights and Freedoms, section 15.[277] Specific statutes create support rights and obligations for unmarried cohabitants in particular situations. Examples include: the *Fatal Accidents Act*,[278] the *Insurance Act*,[279] various *Pension Plan Acts*,[280] and the *Workers' Compensation Act*.[281]

Elsewhere in Canada, most provinces have enacted legislation imposing support obligations on unmarried cohabitants of the opposite sex.[282] The requirements differ from one province to another with respect to the nature of the relationship that must exist before support rights and obligations arise. The provisions in several provinces require cohabitation for a designated period. The period designated varies from one to five years.

In Ontario and New Brunswick, the birth or adoption of a child will also trigger a support obligation between unmarried cohabitants. Notably, in New Zealand, cohabitation is not a necessary prerequisite of support. There, the payment must be desirable in the interests of providing, or reimbursing the applicant for having provided, adequate care for the child.[283] The closest analogy in Alberta is the *Parentage and Maintenance Act* (*P&MA*) under

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[277] See *Miron* v. *Trudel*, *supra*, note 276 and *Taylor* v. *Rossu*, [1998] A.J. No. 648 (Alta. C.A.), discussed below under heading D.4.

[278] R.S.A. 1980, c. F-5, s. 1(a.1).

[279] R.S.A. 1980, c. I-59, ss 313(10) & 313(11).

[280] *E.g.*, *Employment Pensions Plan Act*, S.A. 1986, c. E-10.05, ss 1(hh) & 1(2).

[281] S.A. 1981, c. W-16, ss 1(3) & 1(1)(f).

[282] See ALRI Issues Paper, *supra*, note 228 at 59-62.

[283] *Family Proceedings Act*, 1980, (N.Z.) ss 79-81.

which support may be ordered for a child born out of wedlock. Under its provisions, support may be obtained for a parent (the mother) for the period leading up to and following the birth of the child.

B. ALRI Report No. 53 on Unmarried Cohabitants

In ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, we considered the question of the proper philosophy that should be adopted towards any reform of the law relating to cohabitants. We considered three alternatives:

> (a) Should there, for the purposes of the law, be an assimilation of marriage and cohabitation of a defined nature?
>
> (b) Should there be a partial assimilation of marriage and cohabitation for the purposes of the law?
>
> (c) Should there simply be an examination on a case-by-case basis of some of the incidents of cohabitation and reform be effected as and where needed?

After examining arguments for and against each alternative, we recommended that reform should proceed on a case-by-case basis.

For most purposes of the law, including spousal support, we defined a "cohabitational relationship" as "the relationship between a male and a female cohabitant, being the relationship of living or having lived together on a *bona fide* domestic basis although not married to each other."[284] "Cohabitant" was defined as follows:[285]

> 1(1) "cohabitant" means,
>
> (a) in relation to a man, a woman who is living or has lived with the man on a *bona fide* domestic basis although not married to him; and
>
> (ib) in relation to a woman, a man who is living or has lived with the woman on a *bona fide* domestic basis although not married to him.

With respect to spousal support, we considered three possibilities for unmarried cohabitants. They were that there should be: no support

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[284] ALRI Report No. 53, *supra*, note 51, Draft Legislation, s. 1(1), at 54; see also Rec. XXI at 50.

[285] *Ibid.*, Draft Legislation, s. 1(2).

obligation; an obligation only in cases of defined hardship; or a support obligation attached to the cohabitational relationship.

We considered the arguments for and against each of these alternatives and recommended the conferral of legal support rights and obligations "in cases of defined hardship."[286] More specifically, we recommended that an order should not be made unless it is reasonable to make an order and one of two situations exists. The first situation is that the applicant is unable to support himself or herself because of responsibilities for the care of a child of the cohabitational relationship who is under 12 years of age, or 16 if handicapped. The second situation is that transitional maintenance of the shorter of three years from order, or four years from termination of the cohabitational relationship, is required because the applicant's earning capacity has been adversely affected by the cohabitational relationship.[287] Under our recommendations, the application would be barred if the applicant has entered into a subsequent cohabitational relationship or remarried.

The recommendation was worded as follows:

> It is recommended that "spouse" be defined for purposes of support rights and obligations to exclude the parties to a cohabitational relationship, except as follows:
>
> (a) An order for the maintenance of one cohabitant by another should be made only where it is reasonable that such an order be made and
>
> (i) the applicant for maintenance has the care and control of a child of the cohabitational relationship and is unable to support himself or herself adequately by reason of the child care responsibilities; or
>
> (ii) the earning capacity of the applicant has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to re-adjust his or her life.
>
> (b) An order made in respect of a cohabitant falling into category (i) above will cease when the child reaches the age of 12 (or, if handicapped, 16). An order made in respect of a cohabitant falling into category (ii) above will cease three years from the date the maintenance order is made or four years from the termination of the cohabitational relationship, whichever period is shorter.

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[286] *Ibid.* at 16. Our opinion was divided, and a minority opinion stipulated that "no maintenance obligation [should] attach to cohabitants *inter se*": *ibid.* at 20.

[287] *Ibid.*, paraphrasing Rec. II at 19.

(c) In determining whether to make a maintenance order in favour of a cohabitant a court will take into account factors corresponding to those a court considers in making an order for spousal support under the *Divorce Act*. Further, the court will bear in mind objectives corresponding to those a court is directed to have in mind in making an order for spousal support under the *Divorce Act*. An application cannot be made by one who, at the time of the application, has entered into a subsequent cohabitational relationship or who has married.

(d) Variation or rescission of a support order in favour of a cohabitant may be granted on proof of a change of circumstances in a similar way and on a similar basis to an order for spousal support under the *Divorce Act*. However, an order for the support of a cohabitant will automatically terminate on that cohabitant marrying.

C. ALRI RFD No. 16 on Intestate Succession

In ALRI RFD No. 16, *Report on the Intestate Succession Act*, we revisited the approach we had adopted in ALRI Report No. 53. We did so in light of the lapse of time that had occurred since Report No. 53 was issued and the developments in Charter law that had taken place, particularly the Supreme Court of Canada decision in *Miron* v. *Trudel*.[288] We concluded from our analysis of the judgments in this case that section 15 of the Charter requires the assimilation of married persons and unmarried cohabitants in the absence of reason sufficient to justify discrimination under section 1.

We asked: "When is a cohabitational relationship sufficiently analogous to marriage to attract the same rights and obligations?" We conducted a careful analysis in which we identified the purpose of intestate succession legislation to be to create a "default will" for those people who die without making a will. We determined that because cohabitants live in relationships that have different degrees of commitment, the default will created by the legislation should reflect intention of the group of cohabitants in which the majority would want a generous portion of his or her estate to pass to the surviving cohabitant. We decided that the intention must be inferred from the degree of commitment to permanence in the relationship. We formed the opinion that "the only group which would have such an intention are those who are in a relationship that is like marriage." We characterized such a relationship as one "that has interdependence and a publicly acknowledged

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[288] See discussion under heading D. below.

commitment to permanence.[289] This characterization would exclude cohabitants in casual relationships or short-lived trial marriages.

Having determined the characteristics of that group of cohabitants whose position is analogous to that of married persons, we asked: "How should "cohabitant" be defined in order to comply with the requirements of section 15 of the Charter?" We then defined those cohabitants who would be treated as spouses of each other under our proposed intestate succession distribution scheme as follows:

> "cohabitant" means a person of the opposite sex who, while not married to the intestate, continuously cohabited in a conjugal relationship with the intestate
>
> (i) for at least three years immediately preceding the death of the intestate, or
>
> (ii) in a relationship of some permanence immediately preceding the death of the intestate if they are the natural or adoptive parents of a child.

This definition is designed to include cohabitants living in relationships of interdependence and publicly acknowledged commitment to permanence and exclude those cohabitants living in casual relationships and short-term trial marriages.

D. SCC Judgment in *Miron* v. *Trudel*

1. Equality rights under the Charter

In its judgment in the case of *Miron* v. *Trudel*,[290] the Supreme Court of Canada interprets the extent to which the equality rights requirements of section 15 the Canadian Charter of Rights and Freedoms apply to unmarried cohabitants. Section 15(1) of the Canadian Charter of Rights and Freedoms says:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[289] In *Miron* v. *Trudel*, *supra*, note 276, para. 88, L'Heureux-Dube. J. described cohabitation that is marriage-like as a relationship with "some degree of publicly acknowledged permanence and interdependence."

[290] *Supra*, note 276.

The guarantees of equality in section 15, like all other rights protected by the Charter, are limited by section 1. It says:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

At issue in the case of *Miron* v. *Trudel* was the right of an unmarried cohabitant to accidents benefits and uninsured motorist coverage available to a spouse under insurance legislation in Ontario. Three justices of the Supreme Court of Canada wrote judgments. We examined each of these judgments at length in ALRI RFD No. 16. Here, we will simply summarize the majority position and the conclusions we have drawn from it.

2. Section 15 analysis

To determine whether the Ontario legislation contravened section 15(1) of the Charter, eight of the nine justices on the Court followed the approach set out in the case of *Andrews* v. *Law Society of British Columbia*.[291] As we explained in ALRI RFD No. 16, under the *Andrews* test a claimant must establish three factors before a legislative distinction will be found to contravene section 15(1) of the *Charter*. They are that:

(1) the legislation draws a distinction between the claimant and others;

(2) the distinction results in disadvantage;
- does the impugned law impose a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others? or
- does it deny them a benefit which it grants others?

(3) the distinction is based on a personal characteristic listed in s. 15(1) or on an analogous characteristic.

The Court agreed on the first two factors, but not on the third factor. In the opinion of the four justices in the minority, the *Andrews* approach does not make every distinction made on the basis of enumerated or analogous grounds discriminatory: only distinctions based on an irrelevant personal characteristic listed in section 15(1) or one analogous thereto are

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[291] [1989] 1 S.C.R. 143.

discriminatory.[292] However, in the opinion of the other four justices, with whom the ninth justice agreed in the result to create a majority, the relevancy of the distinction to the purpose of the legislation should be examined under section 1 of the Charter when the court determines whether the distinction is justifiable.[293]

The ninth justice abandoned the enumerated or analogous grounds approach to discrimination established in step three of *Andrews*, and developed a new method of determining whether a legislative distinction is discriminatory.

In short, the majority found that legislation that gives benefits to married persons and not to unmarried persons in similar relationships is discriminatory. The legislation infringes section 15(1) of the Charter and will stand only if it is justifiable under section 1 of the Charter. The fact that couples choose or do not choose to marry does not justify the distinction.

3. Section 1 analysis

Once discrimination is found under section 1, the Court must determine whether the distinction can be justified under section 1 of the Charter. As we stated in ALRI RFD No. 16, the conclusion depends on the purpose attributed to the legislation. What functional value does the legislation serve?

Does the legislation create protection for economically interdependent family units or members of such a unit? If this is the purpose of the legislation, it is discriminatory to exclude cohabitants in marriage-like relationships because the choice not to marry does not justify this discrimination. A better marker is available. Those who do not see cohabitation as a threat to the institution of marriage will be more likely to view spousal support law as protecting the members of family units.

Alternatively, does the legislation define the rights and obligations associated with marriage? If the purpose of the legislation is to define the rights and obligations associated with marriage, the discrimination will

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[292] *Ibid.*, paras. 19 & 23. See also the judgment of La Forest J. in *Egan and Nesbit* v. *Canada*, *supra*, note 274, with which Gonthier J. concurs.

[293] *Ibid.*, paras. 137 to 138.

likely be "reasonably justifiable" because marriage is a fundamental value of our society which government can promote by legislation. Those who are concerned about freedom of choice and the possibility that assimilation of cohabitation and marriage may discourage people from marrying, will be more likely to see the legislation as defining rights and obligations of marriage.

As we observed in ALRI RFD No. 16, "Changing social norms within society will have the greatest effect on determination of functional value of legislation."[294] We went on to explain:[295]

> Historically, if sufficient numbers of people have lived outside marriage, society has redefined marriage to include them.[296] This tendency is understandable for several reasons. First, in our society, the family unit is expected to support its members and where it is unable to do this the task falls to the state. Where the number of family units who fall outside support obligations becomes large, this can create a burden that is too much for the state. Second, the state does not wish to encourage large numbers of its citizens to live outside the protection of the law. This breeds disrespect for the law. Third, if ideas of fairness as between family members underpin certain areas of the law, there seems no justification (except, possibly, freedom of choice and religious doctrine) to exclude certain families from these principles. The question is whether our society has reached this point.

The majority of the Court in *Miron* v. *Trudel* "proceeded on the basis that present day society has overrun policies that were designed to serve a time when family was synonymous with marriage." The "trend is towards increasing numbers of Canadians in all age groups cohabiting outside marriage." In the opinion of the majority, "too many family units live outside of the protection and benefit of the law."

4. Effect on spousal support law

We concluded, in ALRI RFD No. 16, that the Charter, as interpreted by *Miron* v. *Trudel*, will bring about significant change in the law relating to

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[294] *Supra*, note 275 at 113.

[295] *Ibid.*

[296] At one time, English law only recognized marriages performed by the Church of England. Since many English citizens rejected the authority of this church and continued to be married in other churches, the marriage legislation was eventually amended to include ceremonies performed in other churches. For an interesting history of marriage in England see Stephen Parker, *Informal Marriage, Cohabitation and the Law 1750-1989* (New York: St. Martin's Press, 1990).

cohabitants. As we stated in that report, "although the majority judgment did say that it was possible to make a distinction on the basis of marital status that would withstand a Charter challenge, the task will be very difficult."[297] "The reason for this is simple: ... spousal support law has been designed to protect the husband and wife from the financial hardships that flow from the breakdown of the relationship." "Once the element of choice is rejected as a permissible ground of distinction, there seems little justification for treating similar couples differently on the basis of marital status."

This change is already occurring. In June 1998, in the case of *Taylor* v. *Rossu*, the Alberta Court of Appeal held that "the support provisions of the *DRA* discriminate against partners living in a common law relationship by depriving them of the benefit of a legislated right to apply for spousal support based on a prohibited analogous ground of discrimination under s. 15 of the Charter, marital status," and, further, "that the limitation cannot be justified" under s. 1.[298] In so doing, the Court of Appeal upheld the decision of the trial judge who stated that in "[excluding] couples who are in an economic union without the benefit of the marriage ceremony" from their operation, sections 15 and 22 of the *DRA* "singularly and collectively offend s. 15(1) of the *Charter*."[299] The Court of Appeal concluded that "the correct remedy is to strike the offending legislation."[300] Because "it is not possible to extricate those sections of the legislation which specifically offend s. 15 of the Charter from the complex scheme of Parts 2 and 3 of the *DRA*," the Court found it necessary "to strike those Parts in their entirety."[301] However, it suspended the declaration of invalidity for a period of twelve months "to allow the government time to draft its own legislation in this complex area."[302] The

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[297] At para. 159, McLachlin J. stated:

> Marriage and citizenship may be used as the basis to exclude people from protections and benefits conferred by law, provided the state can demonstrate under s. 1 that they are truly relevant to the goal and values underlying the legislative provision in question.

[298] *Taylor* v. *Rossu*, *supra*, note 277, paras. 129 and 140.

[299] *Taylor* v. *Rossu* (1996), 140 D.L.R. (4th) 562 at 565; 44 Alta. L.R. (3d) 388 (Alta. Q.B.).

[300] *Taylor* v. *Rossu*, *supra*, note 277, para. 156.

[301] *Ibid.*

[302] *Ibid.*, para. 157. The trial judge would have remedied the breach by reading into the

(continued...)

judgment permits the government to apply for an extension "should it prove impossible to implement legislative changes within that time."[303]

E. Discussion

The issue to be resolved is: in what circumstances should spousal support rights and obligations be extended to unmarried cohabitants? A number of questions come to mind. First, does the Charter, as interpreted in *Miron* v. *Trudel* require us to revise our recommendation in ALRI Report No. 53? That is to say, would our Recommendations in ALRI Report No. 53 stand up under *Miron* v. *Trudel*? It is becoming increasingly clear that they would not. As stated previously, in ALRI Report No. 53 we had taken the position that marriage and cohabitation were different and should not be assimilated although we did propose reforms that would remedy inequities and situations of hardship. Our recommendation would make support of an unmarried cohabitant exceptional and time-limited.

Second, if we must revise our recommendation in ALRI Report No. 53, should we take the approach adopted in ALRI RFD No. 16? There we produced a definition based on factors that make cohabitation marriage-like: duration of the relationship, degree of financial or emotional interdependence or commitment, public acknowledgment of that commitment, birth of a child. This definition avoids the uncertainty associated with the phrase "bona fide domestic basis." It is close to the position taken by the trial judge in *Taylor* v. *Rossu*,[304] and reflects the approach taken in most Canadian provinces. Statutes in other provinces require a designated period of cohabitation or the birth or adoption of a child as a condition precedent to support rights and obligations arising between unmarried cohabitants of the opposite sex. The designated period of cohabitation signifies a degree of commitment to the relationship that is marriage-like. The arrival of a child also signifies a degree of commitment to the relationship that is marriage-like. It requires

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[302] (...continued)
DRA, s. 15, the definition of "spouse" in s. 29 of the Ontario *Family Law Act* which the Supreme Court of Canada adopted in *Miron* v. *Trudel*: *supra*, note 276. This definition "includes heterosexual couples who have cohabited for three years or more or who have lived in a permanent relationship with a child or children:" *Taylor* v. *Rossu*, *supra*, note 299 at 568.

[303] *Taylor* v. *Rossu*, *supra*, note 277, para. 157.

[304] *Supra*, note 299.

the couple to organize their affairs in a marriage-like way in order to meet the responsibility of caring for that child. It is possible that the income earning ability of one or the other of the partners will be affected by the arrangement made.

Third, could differences in the purposes of spousal support and intestate succession law justify the use of different definitions of unmarried cohabitant? Various comparisons can be made between the purposes of spousal support and intestate succession law. In both cases, the public purse is relieved where support obligations lie with private individuals. Where an obligation exists, its prompt satisfaction is desirable in order to avoid hardship in a case of need. Intestate succession law creates a default will and "it is important that the rules are certain so that distribution of the estate can proceed without delay."[305] Spousal support law, on the other hand, is based on the exercise of discretionary jurisdiction. Certainty is not a priority because many factors may affect the result. Moreover, both parties are alive and able to negotiate their own agreement. Where they cannot agree, the Court exercises a broad discretion in determining whether a spouse should receive support and what the amount should be. Moreover, a spouse may be entitled to receive support even though a marriage is short-lived. These differences do not stand out as providing justification for different definitions.

Fourth, is it defensible to have different definitions of unmarried cohabitant for different purposes? If yes, are differences in the purpose of spousal support and intestate succession law sufficient to justify different definitions or should the law be consistent? As just stated, we do not think that the differences in purpose justify differences in the definitions of unmarried cohabitant.

F. Recommendation

In our opinion, the Charter as interpreted in the case of *Miron* v. *Trudel* requires provincial legislation about support to treat unmarried cohabitants the same as married cohabitants. We will make a recommendation that Alberta legislation do so for that reason and without regard to what would be the merits of the proposal if the Charter did not apply.

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[305] ALRI RFD No. 16, *supra*, note 275 at 84.

We think that the components of the definition of "cohabitant" which we proposed in RFD 16 meet the requirements of the Charter, section 15, for spousal support law, and we will accordingly include them in our recommendation.

RECOMMENDATION No. 13.2

"Cohabitant" should be defined [for the purposes of Recommendation No. 3] to mean either of a man and woman who are not married to each other and who, immediately preceding the breakdown of the relationship, continuously cohabited

(a) in a conjugal relationship with each other for at least three years, or

(b) in a relationship of some permanence if there is a child of the relationship.

SECTION III — COURT PROCEEDINGS

In Section III, we consider the powers ideally required by a court exercising jurisdiction over spousal support.

For the purposes of this discussion, we assume that the Alberta legislature has the power to confer the necessary jurisdiction and powers on a tribunal of its choice.

In Section II (Chapters 2-7), we made recommendations relating to the spousal support obligation – the nature of the obligation, the objectives to be achieved, the basis for decisions about entitlement to support and the assessment of the appropriate amount. We now direct our attention to the orders that the court can make in proceedings brought to obtain spousal support.

In Chapter 8, we examine who may apply for a spousal support order. Chapters 9, 10 and 11 deal with the court powers to order how the support obligation shall be carried out – by periodic or lump sum payment, with or without security for payment, or through the adjustment of a property interest. Chapter 9 is specific to spousal support orders, Chapter 10 to variation orders and Chapter 11 to interim support orders. In Chapter 12, we consider questions relating to the duration of court orders for support. In Chapter 13, we make recommendations with respect to various associated powers that it would be useful for the court to have in spousal support proceedings.

CHAPTER 8 APPLICANTS

In this chapter, we consider who should be eligible to apply to court for a spousal support order.

A. Spousal Support Order

1. Marriage circumstances

a. Existing law

By inference from sections 15 and 17, Part 3 of the *DRA* permits application by either spouse for an order of spousal support where one spouse would be entitled to a judgment of judicial separation or a judgment for restitution of conjugal rights or where one of those judgments has been granted. Section 22 permits either spouse to apply for support in proceedings leading to a decree of divorce or declaration of nullity. Section 27, Part 4, permits an application by a deserted spouse. A deserted spouse is defined to include a married person who is living apart from the other spouse because of cruelty or failure to supply food and other necessaries.[306]

Federally, section 15.2(1) of the *Divorce Act* permits either or both spouses to apply for support in divorce proceedings. Spouse means "either of a man or woman who are married to each other" and includes a former spouse.[307]

Provincial statutes in several provinces expressly empower a spouse to apply for spousal support.[308] In Manitoba, "[a] spouse or any person on behalf of a spouse" may bring an application.[309]

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[306] *DRA*, s. 27(1). With respect to the interpretation of the meaning of "spouse", see *Taylor* v. *Rossu*, *supra* note 277.

[307] *Divorce Act*, ss 2, 15.

[308] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(2); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(2); *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(2); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(2); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 34(2). See also *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 23(1).

[309] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 9(1).

b. Discussion

In Chapter 2, we recommended that a court should be able to order spousal support where the marriage has broken down and the spouses are living separate and apart.[310]

We further recommended that this power should extend to a situation where the spouses, although not living separate and apart, "are experiencing marital discord of such a degree that they cannot reasonably be expected to live together."

Where either of these circumstances is present, a spouse should be eligible to apply for support.

2. Social allowance payments

a. Existing law

In Alberta, in addition to the spouse, section 4 of the *MOA* allows an application for spousal support to be brought by: the person entitled to maintenance; the chief elected official of the municipality, the Minister of Family and Social Services or the Minister of Municipal Affairs (depending on where in the province the needy spouse resides) or by the superintendent of a hospital in which the spouse is a patient.

The *Social Development Act*, section 14, subrogates the government to the support rights of a social allowance recipient, including the support rights of that person's dependent children. Section 14(4) enables the government to "start an action or make an application in its own name or the name of the person to whose rights it is subrogated, including an action to obtain or vary" a support order. It also enables the government to oppose an application to vary a support order.

After a support order has been granted, section 5(1) of the *Maintenance Enforcement Act* (*MEA*) allows the Director to "commence and conduct a

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[310] The reference to marriage includes valid, void, voidable and polygamous marriages. In Chapter 7, we left open the question of whether the same law should apply to unmarried cohabitants.

proceeding in the name of the Director as if he were a creditor under the maintenance order."[311]

Statutes in several other provinces include express provisions whereby an application for a spousal support order may be brought by or on behalf of a government department or agency that is paying or has paid social assistance benefits to a spouse or to whom an application for social assistance has been made.[312]

b. Recommendation

We agree with the approach taken in the existing legislation and recommend that Alberta legislation permit application for a spousal support order to be made by a person acting on behalf, or in the place, of the spouse. We intend our recommendation to include any governmental agency or department that is paying or has paid social assistance benefits for the spouse because legislation subrogates it to the position of the spouse.

RECOMMENDATION No. 14.2

The following persons should be eligible to apply for spousal support:

(a) the spouse, or

(b) any other person acting on behalf of, or in the place of, the spouse.

3. Minor spouse

In British Columbia, Newfoundland and Saskatchewan,[313] a minor who is a spouse is expressly empowered to commence, conduct or defend a support

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[311] "Creditor" is defined in section 1(a) to mean "a person entitled under a maintenance order to receive money for maintenance on his own behalf or on behalf of another person."

[312] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 59(5); *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 115(3), 115(3.1) & 115(4); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(4); *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(3); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 33(3); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 34(3).

[313] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 4(2); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(3); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 10(2).

claim without the intervention of a next friend or guardian *ad litem*. We recommend that Alberta include a similar provision in its legislation.

RECOMMENDATION No. 15.2

Alberta legislation should enable a minor who is a spouse to commence, conduct or defend a support claim without the intervention of a next friend or guardian *ad litem*.

4. Time within which application must be brought

In ALRI Report No. 27, we favoured the imposition of restrictions concerning the time within which applications for spousal support must be brought in nullity cases. We recommended that a spouse be required to institute support proceedings within two years after the dissolution of marriage, subject to an overriding discretion in the court to entertain a later application by reason of exceptional circumstances.[314] We reasoned that "[r]ights should not be slept upon, and unadvanced claims should not be kept hanging over the heads of ex-spouses for an indefinite period."[315] We expressed the opinion that "the law, while it should provide a strong inducement to bring actions promptly, should not close the door entirely on a meritorious claim by a spouse, or, for that matter, by the public authority which provides financial assistance to a spouse."[316]

Section 50 of the Ontario *Family Law Act* imposes a more restrictive limitation period on spousal support claims arising pursuant to provincial statute. It prohibits application for support beyond two years from the day the spouses separated or, where a domestic contract exists, two years after default.[317]

The *Divorce Act* does not impose any limitation period on spousal support sought by way of corollary relief in divorce proceedings. Given the liberality of the *Divorce Act*, we no longer see any justification for the

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[314] ALRI Report No. 27, *supra*, note 26, Rec. 7.

[315] *Ibid.* at 34-35.

[316] *Ibid.* at 35.

[317] See *Family Law Act*, R.S.O. 1990, c. F.3.

imposition of any limitation on the time after marriage breakdown or dissolution within which a support application must be made.

B. Variation Order

1. Applicant

The same persons or agencies eligible to institute an original application for support should be entitled to apply for an order to vary, suspend or rescind a support order.[318]

In addition to the spouses who are party to the support order and a government agency providing support, section 37(1) of the Ontario *Family Law Act* expressly permits the personal representative of the person against whom the support order was made to apply for variation.[319] We recommend that Alberta legislation do likewise in cases where the support order survives the death of a spouse.[320]

RECOMMENDATION No. 16.2

The following persons should be eligible to apply for a spousal support variation order:

(a) the spouse,

(b) any other person acting on behalf, or in the place of, the spouse, or

(c) where the spouse against whom the support order was made is deceased, that spouse's personal representative.

2. Time within which application must be brought

Section 37(3) of the Ontario *Family Law Reform Act* imposes a procedural limitation on applications for variation, suspension or rescission of support orders. Under this section, an application to vary cannot be brought within

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[318] *Supra*, note 312.

[319] See *Re Morris and Butler* (1982), 27 O.R. (2d) 765 (Ont. Prov. Ct.); *Lesser* v. *Lesser* (1985), 49 O.R. (2d) 794, 44 R.F.L. (2d) 255 (Ont. S.C.), aff'd. 51 O.R. (2d) 100 (Ont. C.A.).

[320] See Chapter 12, Duration of Support Order.

six months of the support order without leave of the court.[321] This section adds an extra procedural step. In our view, it is unnecessary. We think that application for a variation order should be able to be brought at any time during the currency of the support order.[322] We do not recommend the adoption of this provision.

C. Interim Support Order

The same persons or agencies eligible to institute an original application for support should be entitled to apply for an interim support order.

RECOMMENDATION No. 17.2

The same persons who are eligible to apply for a spousal support order should be eligible to apply for an interim support order.

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[321] R.S.O. 1990, c. F.3.

[322] See Chapter 12, Duration of Support Order.

CHAPTER 9 SPOUSAL SUPPORT ORDER

A. Court Powers in General

In Alberta, the power of the court to order spousal support is generally limited to the payment of periodic support.[323] Neither the *DRA* nor the *MOA* empower the court to order lump sum payments.[324] The court's power to secure payment or settle property under the *DRA* is restricted to one or two narrowly defined situations.[325]

Federally, section 15.2(1) of the *Divorce Act* empowers the court to order spousal support in a lump sum, periodic sums or both. It further empowers the court to order one spouse to secure or pay, or to secure and pay, the sums ordered. These powers are available for interim as well as permanent support orders.

Other Canadian provinces and territories have followed the federal example and statutorily conferred wide powers on the courts in proceedings for spousal support.[326]

We take the view that Alberta should follow the example of other Canadian jurisdictions and statutorily confer wide powers on the courts with respect to the disposition of spousal support claims. In the following pages,

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[323] The *MOA*, s. 6, provides that a support order may:

> (b) prescribe the period or periods during which the maintenance granted thereunder is to be paid,
> (c) fix the instalments in which the maintenance is to be paid and the amounts of the instalments.

Used in this context, the word "instalment" appears to connote a "periodic payment."

[324] See also *infra* note 350.

[325] *DRA*, ss 21 to 24, discussed below under headings D. Security for Payment and E. Interests in Property; see also *infra* note 355.

[326] *Family Relations Act*, R.S.B.C. 1996, c. 128, ss 6, 93(3); *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 1, 10(1); *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 1, 116; *Family Law Act*, R.S.Nfld. 1990, c. F-2, ss 2(b), 40; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 2(f), 7, 33, 36; *Family Law Act*, R.S.O. 1990, c. F.3, ss 1, 34; *Family Maintenance Act*, S.S. 1990, c. F-6.1, ss 2, 7; *Family Property and Support Act*, R.S.Y. 1986, c. 63, ss 30, 36. (The *Divorce Act*, confers narrower powers than most provincial statutes, insofar as property transfers or settlements fall outside the jurisdiction of the court in granting orders to pay and/or secure periodic or lump sum support on or after the dissolution of marriage.)

we discuss what those powers should be. Much of the discussion and several of the recommendations are carried forward from ALRI Report No. 27 on *Matrimonial Support* which we issued in 1978.

B. Periodic Payments

1. Existing law

As stated in Chapter 2, under Part 3 of the *DRA*, where a judgment for judicial separation or a decree for restitution of conjugal rights is granted, the power of the court to order spousal support falls within the ambit of a broad and essentially unfettered judicial discretion to order periodic payments during the joint lives of the parties or a shorter period.[327] In the case of a decree of divorce or a declaration of nullity of marriage, the court has power to order the payment of "a monthly or weekly sum" during the spouses' joint lives.[328]

Part 4 of the *DRA* empowers a provincial judge to order the payment of "a weekly, semi-monthly or monthly sum" for the support of a deserted spouse.[329] The "anachronistic wording" of the provision means that no interim order may be made if the spouse seeking support has sufficient means of support independent from the other spouse.[330]

2. Court order

Alberta legislation should empower the court to make an order for periodic support. The section should be simply worded as it is in the *Divorce Act*, and not limited to the joint lives of the spouses as it is under the *DRA* at present. (See Chapter 12 for a discussion of the duration of a spousal support order.)

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[327] *DRA*, s. 17(1).

[328] *DRA*, s. 22(2). Section 22(1) gives the court power to order a party to secure the payment of an annual sum: see below, Heading D. Security for Payment.

[329] *DRA*, s. 27.

[330] *Hennig* v. *Hennig* (1995) 178 A.R. 114 (Alta C.A.), at 115, applying *McKenzie* v. *McKenzie* (1965) 51 W.W.R. (N.S.) 182 (Alta. C.A.):

> In *McKenzie* v. *McKenzie* ..., this court held that the predecessor section to s. 16(2), which was substantially the same as the current section, meant that the wife was obliged to erode her liquid capital assets for her support before any obligation arose on her husband's part to pay interim alimony. While this interpretation is totally inconsistent with current theories of spousal support, and arguably Charter values, it is nonetheless one we must follow given the reasoning in *McKenzie*, and the fact that the provincial legislature has not seen fit to amend the *Domestic Relations Act* in recent years.

RECOMMENDATION No. 18.2

(1) Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse.

(2) The power should not be limited to the joint lives of the spouses.

3. Cost-of-living indexation

a. Court jurisdiction

The purchasing power of long-term periodic support payments is inevitably eroded by inflation. Ideally, a support order should be tailored to the present and anticipated future financial circumstances of the spouses.

When spouses negotiate agreements or settlements to regulate the financial consequences of marriage breakdown or divorce, they may include provisions whereby periodic support payments shall be subject to annual adjustment having regard to designated cost-of-living formulae that reflect the impact of inflation on the purchasing power of the originally agreed amounts.

Where a court determines support, it is somewhat uncertain whether it can order periodic support payments to provide for automatic annual adjustments based on future changes in the cost of living. In the absence of express statutory authority, Canadian judicial opinion is divided on this question, although the preponderance of judicial appellate opinion has recognized a discretionary jurisdiction in the courts to index periodic support orders in the context of divorce.[331]

Problems can arise where increases in the cost of living are not matched by increases in the income of the spouse having the support obligation.[332] A court may protect the spouse having the support obligation from unfairness by ordering that periodic support payments shall increase annually by "an

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[331] See *Payne on Divorce*, 4th ed., *supra*, note 195 at 246-47.

[332] See *e.g.*, *Posener* v. *Posener* (1981), 123 D.L.R. (3d) 493 (B.C.S.C.), aff'd. (1984), 4 D.L.R. (4th) 385 (B.C.C.A.).

amount representing the lesser of the percentage increase in the respondent's gross annual income ... and the percentage increase in the cost of living in accordance with the Consumer Price Index ... published by Statistics Canada."[333]

Problems can also be anticipated in deflationary times. It can be asked whether orders should provide for the automatic adjustment downward of the support awarded where the Consumer Price Index falls or the income of the spouse having the support obligation is reduced by an across-the-board cut such as the 5% salary cut imposed on Alberta government employees in 1995.

b. Provincial legislation

In Quebec, the Civil Code[334] expressly provides for the automatic cost-of-living indexation of spousal support orders on January 1 of each year in accordance with the standard set in the annual Pension Index established under the *Pension Plan Act*.[335] The court has discretion to fix another basis of indexation or order that the claim not be indexed where the application of the index brings about a serious imbalance between the needs of the spouse receiving support and the means of the spouse having the support obligation.[336]

In Ontario, judicial indexation of spousal support orders is regulated by section 34(5) and (6) and section 38 of the *Family Law Act*.[337] These provisions apply different criteria to original applications for support and to subsequent applications to vary a subsisting order. On an original application, section 34(5) confers a discretionary jurisdiction on the trial judge to index periodic spousal support, after being apprised of all relevant facts.[338]

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[333] *Moosa* v. *Moosa* (June 17, 1981), (Ont. Prov. Ct.) [unreported].

[334] S.Q. 1991, c. 64, s. 1, art. 638.

[335] R.S.Q., c. R-9, s. 119.

[336] R.S.Q. 1987, c. 105, s. 1, art. 638.

[337] R.S.O. 1990, c. F.3.

[338] *Davidson* v. *Davidson* (1987), 62 O.R. (2d) 145 (Ont. Div. Ct.). As to mandatory cost-of-living indexation of periodic support orders granted in Nova Scotia to persons in receipt of social assistance, see *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 38.

In Newfoundland, the statutory power of a court to index periodic spousal support payments is purely discretionary.[339]

In both Ontario[340] and Newfoundland,[341] court-ordered indexation provides for annual increases to become operative on the anniversary date of the order and "[the] indexing factor for a given month is the percentage change in the Consumer Price Index for Canada for prices of all items since the last month of the previous year, as published by Statistics Canada."

c. Advantages of court-ordered indexation

Court-ordered indexation of periodic support payments has three primary advantages. First, it insulates the spouse receiving support from the erosion of the support entitlement by inflation. It protects a spouse who, for whatever reason, fails to apply to vary the order from "unintended injustice." The reason could be "ignorance of the option, the cost of petitioning or their unwillingness to face the often emotional experience of further court appearances."[342] Second, a clear-cut acceptance of the principle of indexing "[minimizes] variability in how inflation is recognized."[343] The inflation adjustment "can be objectively and readily calculated." Third, it reduces the need for repeated variation applications being made to the courts and the cost, inconvenience and uncertainty associated with such proceedings.[344] Both court and litigant "time is used inefficiently when the change in circumstance results from a change in the general economic environment applicable to all recipients of payments as distinct from changes that are peculiar to a particular couple."[345] Explicit recognition of the effect of inflation through the mechanism of cost-of-living indexation would assist the courts to determine the equivalent of the original annual payment in subsequent years. This approach gives an economic interpretation of the legal constraint on judges to

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[339] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(8).

[340] *Family Law Act*, R.S.O. 1990, c. F.3, s. 4(6).

[341] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(9).

[342] Gail C.A. Cook, "Economic Issues in Marriage Breakdown", Rosalie S. Abella and Claire L'Heureux-Dubé, *Family Law: Dimensions of Justice* (Butterworths, 1983) at 20-21.

[343] Cook, *ibid.*

[344] *Linton* v. *Linton* (1991), 30 R.F.L. (3d) 1 (Ont. C.A.), per Osborne, J.A.

[345] Cook, *supra*, note 342 at 20-21.

deal only with the situation at the time of judgment. "All that is required ... is an agreement on the appropriate price index to be applied."[346]

Cost-of-living indexation seems most appropriate when the financial circumstances and needs of the dependant spouse are reasonably predictable, for example, when the spouse receiving support has no early prospect of attaining financial self-sufficiency and the spouse having the support obligation receives an income that is not subject to wild fluctuation and that is likely to increase annually in amounts reflecting the inflationary spiral. Cost-of-living indexation is less appropriate for spousal support when both spouses have an income earning capacity, unless a sliding scale is included to balance future changes in the income of either spouse.

d. Disadvantages of court-ordered indexation

The Law Commission of England saw more disadvantages than advantages in the prospect of providing machinery for the indexation or inflation-proofing of periodical payments order. In its view, the formidable practical difficulties of implementation, the doubtful efficacy of automatic indexation, unfairness to the spouse having the support obligation when there is not enough money to go around and number of resulting applications for reduction outweigh the arguments in favour of such a scheme:[347]

> ... it might well be the case that indexation would exacerbate rather than reduce the problem. Often the root of the difficulty is simply that there "is not enough money to go round;" and it is thus reasonable to suppose that any automatic up-lifting, taking effect without regard to the husband's means and commitments, would result in many more applications being made by husbands for reduction, and perhaps by even more refusals to pay. In either case, the volume of litigation would be increased and bitterness, distress and humiliation engendered.

The Scottish Law Commission also expressed opposition to automatic indexation on the ground of unfairness to the spouse having the obligation to pay. The Commission observed that automatic indexation ignores the obligor's position because his or her income may not have increased and any

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[346] *Ibid.*

[347] Law Commission (England), Law Com. No. 103, *supra*, note 60, para. 28.

change in the circumstances of either party may bear no relation to an arbitrary adjustment based on a consumer price index.[348]

e. Conclusion

We agree with the conclusions of the Law Commissions in England and Scotland. Legislation should not require the court to index periodic support.

If our recommendation is not followed and legislation is enacted, that legislation should leave the use of cost-of-living indexation to the court's discretion rather than impose it automatically. Moreover, two conditions should be attached.

First, the inclusion of cost-of-living indexation in a support order must not preclude the right of either party to apply for a subsequent variation of the order. Changes other than inflation frequently affect the ability of the spouse having the support obligation to pay support as well as the needs of the spouse receiving support. For example, the spouse having the support obligation may become unemployed or may change employment, or the spouse receiving support may obtain employment or, if already employed, may receive a substantial raise. Divorce and remarriage or the formation of new cohabitational relationships may also affect the relative needs and ability to pay of the spouses. In short, cost-of-living indexation based on inflation, even if conditioned by a corresponding increase in the income of the spouse having the support obligation, does not automatically eliminate the need for further recourse to the courts.

Second, a centralized and presumably computerized recording and updating system would be necessary, at least with respect to support orders filed with the Director of Maintenance Enforcement under the *MEA*.[349] That is because the practical problems arising from a scheme of universal and mandatory indexation could be substantial, especially if such a scheme were applied with full retroactivity to all subsisting orders for spousal support. In our view, the logistics of implementation would require careful evaluation before any system of universal and mandatory cost-of-living indexation were introduced with respect to spousal support orders. The experience in

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[348] Scottish Law Commission, Scot. Law Com. No. 67, *supra*, note 61, para. 2.118.

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

Newfoundland, Ontario and Quebec, where indexation is expressly authorized under provincial legislation, should be tapped in order to assess potential technical and other difficulties. We have not undertaken this study.

C. Lump Sum Payments

1. Existing law

The Alberta *DRA* is silent about the power of the court to order the payment of lump sum support.[350]

Federally, section 15.2(1) of the *Divorce Act* empowers the courts to require a spouse to secure or pay, or secure and pay lump sum support for the other spouse. The Alberta Court of Appeal has stated that lump sum awards "remain the exception rather than the rule" and should be made only rarely.[351] A lump sum award may be appropriate where the circumstances militate in favour of a "clean break," the possibility exists that periodic payments will not be made, or there is a specific need established by the evidence that cannot otherwise be addressed.[352]

2. Court order

We think that the court should have power to award a lump sum where a marriage is declared or decreed to be a nullity under provincial law. That is because the considerations that apply to void and voidable marriages are similar to those that apply on divorce. The court should also have this power where unmarried cohabitants have split up for good. Where the marriage or marriage-like relationship has ended, a lump sum may be useful for such purposes as purchasing or furnishing a new residence, meeting incidental moving costs, purchasing an automobile, discharging outstanding debts, compensating a spouse for specific losses sustained during the marriage or

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[350] The *Justice Statutes Amendment Act*, S.A. 1997, c. 13, s. 1, enacted June 18, 1997 but not yet proclaimed, amends the *DRA* of s. 39(2)(b), by authorizing the Lieutenant Governor in Council to make regulations establishing child support guidelines for Alberta. Those regulations , may include the authority for a court to require that the amount payable under an order for child support be paid "in periodic payments, in lump sum or in a lump sum and periodic payments." They would apply to the *DRA*, Part 4, which jurisdiction includes the Provincial Court.

[351] *Lauderdale* v. *Lauderdale*, *supra*, note 79 at 200, citing *Elliot* v. *Elliott* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.), leave to appeal to S.C.C. refused (1994), 3 R.F.L. (4th) 290.

[352] *Ibid.*, citing *Elliot* v. *Elliot*, *ibid.*, at para. 105, 106.

enabling a spouse to upgrade qualifications in order to secure gainful employment or re-establish a trade or profession.[353]

The case for lump sum orders is not as clear if a marriage is still legally subsisting, or if unmarried cohabitants have not ruled out reconciliation.

On one hand, the need for a lump sum may not be as great or immediate. The possibility of a reconciliation (which might be discouraged by the air of finality imparted by a large lump sum payment) may be greater while the marriage continues. Or, it may appear futile to provide for a lump sum during marriage when the question of support could be re-opened upon divorce. These considerations might suggest that provincial law should not provide for lump sum payments.

On the other hand, and we agree, the same circumstances that justify a lump sum after divorce may be present before divorce. It is not the divorce that creates a need but the marriage breakdown. A separated spouse needs money for the same things as a divorced spouse. A lump sum support order may be especially appropriate during the subsistence of a marriage where the spouse with the support obligation has substantial capital but a limited income, where there has been a history of default with respect to periodic support payments, or where persistent hostility between the spouses warrants a clean break.[354]

The court can take the possibility of a later divorce into account in deciding whether to make or refuse lump sum support during the subsistence of the marriage. As well, the court in subsequent divorce proceedings will take any prior lump sum order into account.

As is well known, Canada's income tax law does not give the same break to a spouse who pays lump sum support that it gives to a spouse who pays periodic support. Lump sum support is not deductible for income tax purposes whereas periodic payments are. In the usual case, the spouse who makes the periodic payment pays income tax at a higher rate than the dependent spouse, so that spouse benefits from being able to claim the deduction. The

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[353] See *Payne on Divorce*, 4th ed., *supra*, note 195 at 231-32.

[354] *Ibid.*

tax consequences of a support award, lump sum or periodic, for each of the spouses is a financial circumstance to be taken into account.

RECOMMENDATION No. 19.2

Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse.

D. Security for Payment

1. Existing law

Apart from section 22(1), the *DRA* is silent about the power of the court to make an order to secure the payment of support. Section 22(1) applies in cases where the court has issued a decree of divorce or declaration of nullity. It permits the court to secure for any term not exceeding the lifetime of the spouse receiving support the payment of an annual sum. On default in payment under the order, section 24(1)(d) of the *MEA* authorizes the court to make an order requiring the spouse with the support obligation to "provide security in such form, including an assignment of debt or wages, as the Court directs for payments in arrears and subsequent payments." Section 24(3) enables the court to "provide for the realization of the security by seizure, sale or other means, as the Court directs."[355] In distributing property under the *MPA*, section 9(3) allows a court to order a spouse to give security, charge property and provide for the enforcement of the charge, or both.

Section 15.2(1) of the *Divorce Act* provides that, on or after divorce, a court may "make an order requiring a spouse to secure or pay, or to secure and pay" lump sum or periodic spousal support or both.

Statutory support provisions in most common law provinces expressly empower the court to grant orders to secure or charge property with the payment of spousal support.

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[355] The *Justice Statutes Amendment Act*, supra note 350, would amend the *DRA*, s. 39, to authorize the Lieutenant Governor in Council to include in regulations for child support guidelines the authority for a court to require that the amount payable under an order for child support "be paid or secured, or paid and secured, in the manner specified in the order." They would apply to the *DRA*, Part 4, which jurisdiction includes the Provincial Court.

(The discussion under this heading is limited to the means available to the court to provide security for the payment of periodic or lump sum support. Below, under heading E.2, we inquire whether, in addition to the power to order a spouse to pay periodic or lump sum support in a dollar amount, the court should be empowered to order that the support obligation be met by a transfer of property directly from one spouse to the other.)

2. Court order

Prior to the enactment of the *Divorce Act, 1985*, judgments of the Supreme Court of Canada had concluded that orders to pay support and orders to secure support were mutually exclusive; a court could not, therefore, grant an order to "pay and secure" the same support.[356] Corresponding limitations presumably still apply to section 22 of the *DRA*. That situation is unsatisfactory. On the one hand, security may be very valuable in a particular case as it ensures that the dependent spouse ultimately will be paid. On the other hand, enforcement of many kinds of security is a long process, while enforcement of a personal obligation may be much more expeditious.

We think that, in a proper case, a court should be able to give both remedies. To maintain flexibility, it should have the power to order security when it makes the support order or thereafter.[357]

We note that the court's power under both section 22 of the *DRA* and section 15.2(1) of the *Divorce Act*, is to order the husband or wife to secure. It is doubtful whether that includes a judicial power to effect the security by order, though some orders have purported to do so. Two things should be done to cure this problem. One is to empower the court to direct someone else to execute the security. The other is to empower the court to impose the charge. To enforce the charge, the court should have power to appoint a receiver, order sale of the property which is subject to the security, and dispose of proceeds of the sale. Finally, the court should have power to order a transfer of property in trust as an alternative way of providing security for the payment of support. (Below, under heading H. Registration of Order we

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[356] *Nash* v. *Nash*, [1975] 2 S.C.R. 507, 2 N.R. 271, 16 R.F.L. 295, 47 D.L.R. (3d) 558; *Van Zyderveld* v. *Van Zyderveld*, [1977] 1 S.C.R. 714; [1976] 4 W.W.R. 734, 23 R.F.L. 200, 68 D.L.R. (3d) 364, *sub nom. Zyderveld* v. *Zyderveld*, 9 N.R. 413, 1 A.R. 14.

[357] It should also have the power to vary the order relating to the security.

recommend that the charging order should be made specifically registrable in the same way as a mortgage of the property charged.)

Whether the security is contained in the order or in a document executed pursuant to the order, the court should retain power to vary it.

The specifics of this recommendation probably take it beyond the court powers that accompany spousal support orders made under the *Divorce Act*. We endorse the inclusion of these powers as measures intended to further ensure compliance with the spousal support order.

RECOMMENDATION No. 20.2

Alberta legislation should provide that:

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

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

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

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

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

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

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

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

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

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

E. Interests in Property

1. Existing law

Ordinarily, the court does not have jurisdiction when making a support order to make an order that changes the ownership of an interest in property. Sections 21, 23 and 24 of the *DRA* contain exceptions. Where a judgment of judicial separation or a decree of divorce for adultery has been obtained, section 21 authorizes the court to order the settlement, for the benefit of the innocent party, any property to which the spouse having the support obligation "is entitled in possession or reversion." On divorce or nullity, section 23 authorizes the court to make an order with respect to property comprised in an ante-nuptial or post-nuptial settlement. On a judgment for restitution of conjugal rights, section 24 authorizes the court to order that "a settlement be made of property" belonging to the spouse having the support obligation for the benefit of the spouse receiving support or that "part of the profit of trade or earnings be periodically paid" to or for the benefit of the spouse receiving support.

2. Transfer and settlement

Section 21 of the *DRA* authorizes the court to order a settlement of property for the benefit of a spouse on judicial separation or a decree of divorce for adultery. The power encompasses any property to which the spouse paying support "is entitled in possession or reversion."

Section 23 of the *DRA* gives the court power to vary ante-nuptial and post-nuptial settlements for the benefit of one or both of the spouses.[358] The power does no harm and may be useful in some circumstances. We recommend that it be continued.

The *Divorce Act* does not confer jurisdiction to make orders affecting property where support is claimed by way of corollary relief on or after divorce. However, most provinces have conferred jurisdiction on courts presided over by federally-appointed judges to order a transfer or settlement of property where spousal support is sought pursuant to provincial statute.[359] (As we explained in Chapter 1, matrimonial property division and spousal support rights are distinct concepts and the two should not be confused. Where the marriage has broken down, the Alberta *MPA*[360] provides for the fair distribution of property accumulated by the spouses during the marriage. The use of property to satisfy a spousal support obligation is a separate issue.)

We can envisage cases where support would be better provided by a transfer or settlement of property than by the payment of periodic sums or lump sum support. For example, a transfer of the matrimonial home, either absolutely or in trust, might be appropriate where a separated spouse has long-term parenting responsibilities to discharge. An absolute transfer of furniture or household appliances might also be preferable to a monetary judgment, particularly in view of the relative values of new and used furniture. There may be other cases where it would be better for the spouse having the support obligation to transfer property than to have to dispose of it in order to obtain money for a lump sum payment. A court should not have to proceed by indirect means to obtain such a result; it should have the power

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[358] See also *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 68. An ante-nuptial settlement is a contract the spouses entered into before marriage, but in contemplation and consideration of it, that determines their respective property rights and interests or secures property to either of them or their children: *Black's Law Dictionary*, 4th ed. (St. Paul, Minnesota: West Publishing Co., 1968), at 119. A post-nuptial settlement is a contract entered into after marriage for like purpose. Both are embodied in the term "marriage contract" as understood in Chapter 6 of this report.

[359] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1); *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34(1); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1).

[360] R.S.A. 1980, c. M-9.

to order the transfer of property or an interest in property, including a beneficial interest in trust property.

The need for such a power is less clear if the marriage is not terminated. Our recommendation, however, is that such jurisdiction should be exercisable in any proceedings in which support is granted, though we would expect the court to use the power much more sparingly when the marriage subsists. We would expect the court to use the power as it uses the power to grant a lump sum; it should not be used to re-adjust property rights of the spouses under the *MPA*.

In many cases, spousal support will not be ordered until after the matrimonial property has been divided. Where the power to order the transfer or settlement of property to satisfy a spousal support obligation is exercised before the matrimonial property has been divided, this is a matter for the court to take into consideration under the *MPA*, section 8(m).[361]

With respect to the powers to be enacted, section 9 of the *MPA* is instructive. Section 9(2) empowers a court distributing matrimonial property to order a spouse to transfer an interest in property to the other spouse, order a sale of property and division of proceeds, or declare that a spouse has an interest in property even though that spouse does not have a legal or equitable interest. To give effect to an order, section 9(3) confers a number of additional powers. Included among them are the power to impose a trust in favour of a spouse with respect to an interest in property and to sever a joint tenancy between the spouses.

Here again, the specifics of our recommendation take it further than the powers that accompany spousal support orders made under the *Divorce Act*. As in the case of Recommendation No. 20, we endorse the inclusion of these powers as measures intended to further ensure compliance with the spousal support order.

RECOMMENDATION No. 21.2

Alberta legislation should provide that:

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[361] Under the *MPA*, s.8(m), "any fact or circumstance that is relevant" is included in the list of matters to be taken into consideration in making a matrimonial property distribution.

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

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

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

(2) An order under subsection (1) requiring a party to convey or transfer property may authorize another person to execute the conveyance or transfer on behalf of the party, in order to satisfy the spousal support obligation.

3. Possession of matrimonial home and use of household goods

The Court of Queen's Bench has jurisdiction under Part 2 of the *MPA*[362] to grant orders respecting exclusive possession of the matrimonial home and exclusive use of any or all household goods. If proceedings for a matrimonial property or matrimonial home possession order have been commenced, section 33(1) of the *MPA* requires a spouse to obtain a court order before dealing with or removing household goods from the matrimonial home without consent of the other spouse. (In ALRI RFD No. 14 on *The Matrimonial Home*, we make a number of recommendations that we think would improve on the provisions in Part 2. Because RFD No. 14 is not a final report, the recommendations are tentative in nature.)

Part 2 of the *MPA* operates independently of Part 1. That is to say, it is not necessary to apply for a matrimonial property order as a prerequisite to making application under Part 2. It would be possible to hear an application under Part 2 in conjunction with spousal support proceedings.[363]

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[362] *Supra*, note 360, ss 19 & 25.

[363] Rule 32 of the Alberta Rules of Court permits a plaintiff (applicant) to unite several causes of action in the same action.

Several provinces have enacted statutory provisions empowering their courts to grant orders for matrimonial home possession and the use of household goods in proceedings for spousal support.[364] It would be useful to do the same in Alberta.[365]

We recommend that Alberta law should allow a spouse to apply for an order for possession of the matrimonial home and use of the household goods in proceedings for spousal support. The law governing matrimonial possession and the use of the household goods should be amended in accordance with the ALRI recommendations in our project on *The Matrimonial Home*. Section 33(1) of the *MPA* should apply.

RECOMMENDATION No. 22.2

Alberta should statutorily empower the court, in proceedings for spousal support, to grant orders for exclusive possession of the matrimonial home, or part thereof, and exclusive use of any or all household goods.

4. Life insurance policy or pension or other benefit plan

a. Designation of spouse as beneficiary

Legislative provisions in several provinces authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan, to continue to pay the premiums and designate the other spouse as the beneficiary under the policy or plan, either irrevocably or for such period as is fixed by the order.[366] In Newfoundland, a court is also

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[364] *Supra*, note 359.

[365] By way of example, the *MPA*, in section 18(2) specifically permits a surviving spouse to join an application made under the *Family Relief Act* with an application for a matrimonial property order brought under Part 1 of the *MPA*.

[366] For diverse provincial statutory provisions, see *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(1)(i); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(m); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1)(k) & 40(1)(l) and s. 40(2); *Family Law Act*, S.O. 1990, c. F.3, ss 34(1)(i) & 34(1)(j); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34(1)(j); *Family Maintenance Act*, S.S. 1990, c. F-6.1, ss 7(1)(d) & 7(1)(e); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1)(i).

empowered to order a spouse to assign his or her life insurance policy to the other spouse.[367]

We recommend that Alberta enact similar provisions.

RECOMMENDATION No. 23.2

Alberta legislation should authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan

(a) to continue to pay the premiums and designate the other spouse as the beneficiary under the policy or plan, either irrevocably or for such period as is fixed by the order, or

(b) to assign his or her life insurance policy to the other spouse.

b. Revocation of irrevocable designation of beneficiary

In Saskatchewan[368] and the Yukon,[369] courts are statutorily empowered to order that an irrevocable designation of a beneficiary under a policy of life insurance, pension plan or other benefit plan be revoked.

Here again, we recommend that Alberta should enact a similar provision.

RECOMMENDATION No. 24.2

Alberta legislation should authorize a court to order that an irrevocable designation of a beneficiary under a policy of life insurance, pension plan or other benefit plan be revoked.

5. Gifts and transfers for inadequate consideration

A risk exists that the spouse having the support obligation will try to defeat the other spouse's claim for support by giving property to a relative or a successor spouse or transferring it at a gross undervalue. Section 19 of the

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[367] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1)(j).

[368] *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 8(1)(c).

[369] *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 42(1)(c).

DRA protects against this risk by empowering the court to grant an injunction to prevent a spouse from disposing of real or personal property. The court may grant the injunction either before or after making a spousal support order. Section 10(1) of the *MPA* empowers the court to order the return of property by a person who received matrimonial property from a spouse knowing that it was the spouse's intention to defeat a matrimonial property claim.

The cases in which spouses are willing to strip themselves of property are probably not frequent, but the effect on the spouse needing support could be disastrous if nothing can be done to protect against this conduct. In ALRI Report No. 27 on *Matrimonial Support*, we recommended that a revised *DRA* should include a provision under which the court could issue an injunction against a prospective stripping, trace the property, or require the person to whom the property was transferred to make a payment to the spouse whose claim has been affected. Our recommendation was:[370]

> That the proposed Act make the following provision with regard to transfers of property by a spouse by way of gift or for inadequate consideration:
>
> (1) Upon being satisfied that a party to a marriage in order to prevent the other party from obtaining or enforcing an order of support is about to make any substantial gift or transfer of property for insufficient consideration the court may make such order as it thinks fit restraining the first party from so doing and otherwise protecting the claim of the other spouse.
>
> (2) Upon being satisfied that within one year preceding an application for an order of support a party to a marriage has made a substantial gift or transfer of property for insufficient consideration in order to prevent the other spouse from obtaining or enforcing an order of support the court in its discretion may
>
> (i) order the donee or transferee to pay or transfer all or part of the property to the other spouse, or
>
> (ii) order the donee or transferee to pay to the applicant spouse for his support an amount or amounts not exceeding in total the amount by which the value of the property transferred exceeded the value of the consideration given by the donee or transferee therefor.
>
> (iii) It shall be presumed until the contrary is proven that a substantial gift or transfer of property for insufficient consideration which has the effect of preventing the other spouse from obtaining or enforcing an order of support was made in order to achieve that effect.

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[370] ALRI Report No. 27, *supra*, note 26, Rec. 51 at 171-72.

Some readers may question the need to include specific provisions in spousal support legislation, believing that the normal remedies relating to restraint on dissipation are adequate. These remedies include the remedies at common law and under statute law of long-standing for fraudulent conveyances and fraudulent preferences.[371] These remedies apply after the "dissipation" has occurred. They also include the pre-judgment remedies to prevent dissipation provided for in the Alberta *Civil Enforcement Act*, Part 3.[372]

On balance, we think that the inclusion of these provisions in the spousal support statute will prevent possible argument to the contrary by making it clear that this relief is available to a spouse who is claiming spousal support.

RECOMMENDATION No. 25.2
Alberta spousal support legislation should include specific provisions to protect against gifts or transfers of property owned by a spouse for inadequate consideration.

F. Registration of Order

1. Order to pay periodic or lump sum support

Under sections 20 and 37(1) of the *DRA*, an order for interim or permanent alimony may be registered in any land titles office. Registration of the order operates as "a charge by the debtor on the land of the debtor." Section 20 applies to alimony orders granted by the Court of Queen's Bench under Part 3. Section 37(1) relates to support orders granted and enforcement proceedings brought in the Provincial Court under Part 4. Section 17 of the *MEA*, which applies to support orders generally and not just to orders granted under the *DRA*, duplicates the language of *DRA* sections. Section 37 of the *DRA* and section 17 of the *MEA* provide for judicial removal or

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[371] In Alberta, see the *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18. The law relating to fraudulent conveyances and fraudulent preferences is technical and confusing. For more information about these remedies, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995). See also Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, 5 vols. (Toronto: The Commission, 1981-1983).

[372] This statute enacts recommendations we made in ALRI Report No. 61, *Enforcement of Money Judgments*, 2 vols. (March 1991).

variation of the registration making them preferable to section 20 of the *DRA* which does not.

We note that objection may be taken to all three provisions insofar as they empower the spouse to whom support is payable to tie up land in excess of that needed for security, and even in cases where it is perfectly apparent that the other spouse can and will pay. It may well be that our recommendations with respect to orders for security would allow the court to give better protection to the dependent spouse without unnecessary prejudice to the spouse paying support. However, the current practice is well established and we do not propose to recommend any change.

Provision for the registration of support orders should be preserved. However, because section 17 of the *MEA* is wider in scope, it seems to us that the *DRA* sections no longer serve any useful purpose. We recommend that spousal support orders be registered in accordance with the authority provided in section 17 of the *MEA*. We do not think it either necessary or desirable to enact the same provision in more than one place.

RECOMMENDATION No. 26.2

Spousal support orders should be registrable in any land titles office in accordance with the authority provided in section 17 of the *MEA*.

2. Order charging real property

We said in our discussion under heading D. Security for Payment that in order to secure the payment of support, the court should have power to impose a charge on property either directly or by ordering the spouse with the support obligation or someone else to execute it. We recommend that the charging order should be made specifically registrable in the same way as a mortgage of the property charged.

RECOMMENDATION No. 27.2

Alberta legislation should provide that where the court makes an order under subsection (1) of Recommendation No. 20.2, that order or instrument

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

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

3. Matrimonial home

Section 22 of the *MPA* provides for registration of an order for possession of a matrimonial home that consists of real property. Section 23 provides for registration of a financing statement under the *Personal Property Security Act* (*PPSA*) where the order is for possession of a mobile home. Section 26 provides for registration of an order that deals with household goods. Registration prevents a spouse from dealing with the property without the consent of the other spouse or a court order. These provisions, revised in accordance with our recommendations in RFD No. 14 on *The Matrimonial Home*, should apply where application is brought in a spousal support proceeding. Our recommendation extends the application of the *MPA*, section 22, and the *PPSA*, sections 23 and 26, to unmarried cohabitants, as we have defined them, as well as married spouses.

RECOMMENDATION No. 28.2

The *Matrimonial Property Act*, s. 23, and the *Personal Property Security Act*, ss. 23 and 26, as modified by the recommendations in ALRI RFD No. 14 on *The Matrimonial Home*, should apply where an application is brought in a spousal support proceeding.

G. Connection with Spousal Support Objectives

There is no federal or provincial statutory requirement whereby a court must expressly identify the objective or objectives that are intended to be accommodated by an order for spousal support.

This omission could present problems in subsequent variation proceedings. For example, as occurred in the case of *Keast* v. *Keast*,[373] an order for spousal support may be granted to promote the dual objectives of

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[373] *Supra*, note 226.

need and compensation. The remarriage or subsequent employment of the recipient spouse might justify rescission of the order insofar as it was based on need but should not affect the order insofar as it was compensatory or quasi-restitutionary in character. A commingling of these two objectives in a single order for spousal support would defy any future segregation or apportionment in subsequent variation proceedings. Confusion could also be generated by the types of order granted, as for example, where a time-limited order would be appropriate for compensatory purposes, with or without judgment interest, and an unlimited or potentially lifelong order would be appropriate to meet the continuing needs of a dependent spouse. Different considerations may apply if spousal support is granted to accommodate any of the other theories we identified in Chapter 3.

In order to eliminate the possibility of confusion and complexity in these troublesome areas, courts may choose to identify the objective or objectives intended to be satisfied by a spousal support order. We considered whether the power of the court to order any particular type of support – periodic or lump sum payment or transfer of property – should be tied to the objective sought to be achieved,[374] or whether the court should be required to identify the objectives which the support order is intended to satisfy. Our answer to both questions is in the negative. We leave these decisions to the court in the exercise of its discretion based on the circumstances of the particular case.

H. Consent Orders

A consent order is commonly understood to be an order to which the parties to the proceedings have agreed such that the court may grant an order without holding a hearing. (In a different context, legislation sometimes requires that a particular person give consent to an order before it is made.)

Precedent for legislation empowering the court to grant a consent order exists. In Alberta, the *PCA*, section 31, expressly empowers the Provincial Court of Alberta to grant consent orders. The Provincial Court may grant a

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[374] The Scottish Law Commission also rejected the notion of tying particular types of order to particular spousal support objectives: Scottish Law Com. 67, *supra*, note 61, para. 3.113. In passing, we note that the Scottish Law Commission proposed that an order for periodic payments should be excluded in all cases where the payment of a capital sum or a transfer of property would give effect to the principles found applicable to the facts of the particular case: *ibid.*, para. 3.121; and see *ibid.*, Draft Bill, clause 13(1) at 206-07; see now *Family Law (Scotland) Act, 1985*, s. 13(2)(b).

consent order in connection with its power under section 29 to enforce a support order made by the Court of Queen's Bench and its power under section 30 to award interim maintenance on an application by the person liable to pay support for an adjournment of a hearing. Section 31 says:

> 31(1) If the parties to an application
>
> (a) are in agreement respecting the matters in question, and
>
> (b) consent to an order on the terms agreed on,
>
> the Court in its discretion may make the order without holding a hearing.
>
> (2) An order made under subsection (1) has the same force and effect as an order made after a hearing.

Legislation in other provinces makes similar provision. For example, the British Columbia Family Relations Act, sections 10 and 11, provides:[375]

> 10(1) With the written consent of the person against whom the order is made, a court may make an order under this Act against the person without a hearing, the completion of a hearing or the giving of evidence.
>
> (2) An order made by consent shall not exceed the terms of the consent.
>
> (3) Unless the ground is specifically admitted in the consent, the giving of a written consent under this section shall not be deemed to be an admission of a ground alleged in the proceeding.
>
> 11. Where a court makes an order under this Act, the court may incorporate in its order all or part of a provision in a written agreement previously made by two or more parties to the proceeding, providing the provision is relevant to the proceeding.

We recommend that Alberta should legislatively empower the courts to make consent orders. In doing so, the legislation should authorize the court to incorporate in an order provisions taken from any written spousal support agreement previously made by the parties.

RECOMMENDATION No. 29.2

(1) Where the parties consent to a spousal support order, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.

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[375] R.S.B.C. 1996, c. 128.

(2) A court granting a spousal support order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.

CHAPTER 10 VARIATION ORDER

In this chapter, we look at the power of the court to vary an existing support order.

A. Existing Law

1. Alberta *DRA*

In Alberta, section 25 of the *DRA* permits the Court of Queen's Bench to vary, suspend or revive an order for alimony or maintenance granted under Part 3. The authority to vary can be exercised when there has been a change in the financial circumstances of either spouse, misconduct, or remarriage.[376] Under section 25, the court may vary a support order by altering the times of payment or increasing or decreasing the amount. Section 25 further authorizes the court to suspend or revive the order in whole or in part. As already discussed, only periodic payments can be ordered under the existing *DRA*.

Section 28(5) of the *DRA* authorizes a provincial court judge to vary a periodic support order granted to a deserted spouse under Part 4. The variation order may be sought by either spouse. The power to vary arises "upon proof that the means of the husband or wife have altered in amount since the making of the original order or a subsequent order varying it." This power to vary is curtailed by the *MEA*, section 12(1), which states that where a Provincial Court order is filed with the Court of Queen's Bench for enforcement, "the parts of the maintenance order that relate to maintenance are deemed to be a judgment of the Court of Queen's Bench."[377] In practice, every order made after December 31, 1986, is filed automatically with the Director by the clerk of the court that made the order. Once an order is filed, the Court of Queen's Bench acquires jurisdiction to vary the order.[378] As a

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[376] The effect of remarriage on the duration of a spousal support order is discussed in Chapter 12, heading D.

[377] *MEA*, s. 7. This provision does not apply where the creditor "files with the court and the Director a notice in writing stating that the creditor does not wish to have the maintenance order enforced by the Director."

[378] *MEA*, s. 12(2).

result, the Provincial Court loses jurisdiction to vary its own order.[379] Should the claimant decide to withdraw registration of the order under the *MEA*, it is an interesting question whether the Provincial Court would regain jurisdiction to confirm, rescind or vary its original order under the *DRA*, fix the amount of the support arrears, or do both. The words used in the statute, "maintenance or alimony," reconfirm that the Provincial Court has the jurisdiction to enforce Queen's Bench orders. The Provincial Court also has jurisdiction to make interim orders in enforcement proceedings, including proceedings to enforce a Queen's Bench order, under both the *DRA* and *PCA*. (Later in this Chapter, under heading F., we recommend that the Provincial Court should continue to have jurisdiction to vary its own orders.)

2. Federal *Divorce Act*

Federally, section 17(1) of the *Divorce Act* empowers the court to "make an order varying, rescinding or suspending" a support order or any of its provisions "prospectively or retroactively."[380] Before making an order, the court must "satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the support order or the last variation order."[381] In making the variation order, the court must " take into consideration that change." The objectives of a variation order are the same as the objectives of a support order.[382]

In interpreting section 17(4) as it applies to spousal support, the Supreme Court of Canada has stated that:[383]

> ... the change must be a material change of circumstances . . . such that, if known at the time [of the making of the original order] would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time, it cannot be relied on as the basis for variation.

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[379] *Director of Maintenance Enforcement* v. *The Provincial Court of Alberta*, Alta. Q.B., Action Nos. 8903-01888 and 8903-01889, decision dated May 19, 1989.

[380] *Divorce Act*, s. 17(1).

[381] *Ibid.*, s. 17(4.1).

[382] *Ibid.*, s. 17(7).

[383] *Willick* v. *Willick*, *supra*, note 257 at 179-80, *per* Sopinka J. writing for the majority. Two Alberta judgments on variation that refer to Willick are: *Ginn* v. *Ginn* (1995), 11 R.F.L. (4th) 377 at 385 (Alta. Q.B.); and *Green* v. *Green* (1995), 11 R.F.L. (4th) 207 (Alta. Q.B.). For the application of section 17(4) to child support, see ALRI RFD No. 18.3.

3. Other provinces

Legislation in most provinces also empowers a court to discharge, vary or suspend support orders both prospectively and retrospectively. In some provinces, that legislation includes the express power to relieve against the payment of arrears of support.[384]

B. Grounds for Variation

1. Prospective variation

a. Assumption that support order fair when granted

Although the powers conferred by section 25 of the *DRA* are quite broad, the courts tend to approach an application for variation on the basis that the original order must be taken to have been appropriate when made. As we pointed out in ALRI Report No. 27 on *Matrimonial Support*, that is for good reason:

> A general principle of the administration of justice is that the parties to litigation should bring their whole cases before the court and that the adjudication, when made, should be final, subject only to appeal. If actions could be re-opened and re-litigated freely, litigants would be harassed unduly and the administration of justice brought into disrepute.[385]

b. Material change in circumstances

In our view, as now, spouses should be able to apply for variation of a spousal support order where there has been a material change in the circumstances of either spouse. For example, the spouse obligated to pay support should be able to apply for variation or discharge of the order of support on the grounds that the financial position of the spouse receiving support has changed.[386]

c. Evidence not previously before the court

Care is sure to be taken to ensure that orders for support are fair. Nevertheless, there will be times when an order will be based on inadequate or erroneous information. In addition to permitting variation where there has been a material change in the circumstances of either spouse, in New Brunswick, Ontario, Prince Edward Island and the Yukon, a ground for variation, suspension, or discharge is that "evidence has become available

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[384] See *e.g.*, *Family Law Act*, R.S.O. 1990, c. F.3, s. 37.

[385] ALRI Report No. 27, *supra*, note 26 at 99.

[386] *Ibid.* at 38.

that was not available on the previous hearing."[387] This power is restricted to evidence that could not have been discovered at the time of the original hearing by the exercise of due diligence on the part of the person seeking variation.[388]

In ALRI Report No. 27, we favoured a limited extension of the court's power in section 25 to include the power to hear material evidence that was not previously before the court.[389] This more flexible alternative would permit evidence that was available to the person seeking the variation at the time of the original hearing, but was not then made available to the court, to be presented to the court as a ground for variation.[390] We did not foresee that the courts would have too much difficulty in controlling the situation. We anticipated that the court would "still attach importance to the previous order" and would not vary an order unless it is shown to have been unfair to one party.[391]

Our previous recommendation is a clear departure from the *Divorce Act*. We endorse it nonetheless. This is a point of detail where we think the law would be fairer.

d. Other statutory restrictions: limited term spousal support

Section 17(10) of the *Divorce Act* and section 8(2) of the Saskatchewan *Family Maintenance Act*[392] impose substantive limitations on applications to vary support orders. For example, section 8(2) of the Saskatchewan statute restricts the variation of a support order made "for a definite period or until the happening of a specified event" after the period has expired or the event

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[387] Davies, *supra*, note 71 at 229-30.

[388] *Ibid.*

[389] ALRI Report No. 27, *supra*, note 26 at 99-100; see also Rec. 23 at 104. And see *ibid.* at 111 (summary orders).

[390] Davies, *supra*, note 71 at 229-30. See *Grice* v. *Orr* (1980), 31 O.R. (2d) 300 (Ont. Prov. Ct.) *per* Nasmith Prov. J., for an example of a case in which the judge adopted the more flexible approach. In Professor Davies' opinion, the more flexible view is the correct one.

[391] ALRI Report No. 27, *supra*, note 26 at 100.

[392] S.S. 1990, c. F-6.1.

occurred.[393] Both sections trigger problems of causal connection. Also, they can be readily circumvented by a timely application to vary before the expiry of the finite support order.[394] Recent appellate court judgments in Ontario and Alberta interpret section 17(10) of the *Divorce Act* as allowing the court to order support after the limited term order has expired in circumstances similar to those that would support a variation order in any case.[395] We have concluded that the statutory restrictions serve little or no useful purpose and should not be incorporated in Alberta legislation.

2. Retroactive Variation: Discharge or Suspension of Arrears

Although enforcement falls outside the terms of reference of this report, retroactive variation of support orders and any consequential remission of arrears will and should be regulated by spousal support legislation.

a. Existing law

It is generally assumed that the courts of Alberta possess a discretionary power to reduce or discharge arrears payable under a support order granted under provincial legislation or the *Divorce Act*.

Where enforcement, rather than variation of a support order is sought, section 34(1) of the Alberta *MEA* allows the court to make various orders designed to enforce the payment of arrears of support unless "the debtor is unable because of illness, unemployment or other valid reasons to pay the arrears or to make subsequent payments required." In some provinces, enforcement legislation simply allows a court to relieve the spouse having the support obligation or the estate of that spouse, if deceased, of the obligation to pay the whole or part of the amount in default if the judge is satisfied that "it would be grossly unfair and inequitable not to do so."[396]

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[393] See Chapter 12 on Duration of Order.

[394] See Julien D. Payne, "Management of a Family Law File with Particular Regard to Spousal Support on Divorce," (1989) 10 Adv. Qtly 424, reprinted in *Payne's Divorce and Family Law Digest*, *supra*, note 20 at E-127; see also Julien D. Payne, "Further Reflections ...", *supra*, note 250.

[395] *Trewin* v. *Jones* (1997), 26 R.F.L. (4th) 418 (Ont. C.A.); *Therrien-Cliche* c. *Cliche* (1997), 30 R.F.L. (4th) 97 (Ont. C.A.); *Poohkay* v. *Poohkay* (1997), 30 R.F.L. (4th) 9; see also James G. McLeod's annotation, (1997) 30 R.F.L. (4th) 10, at 11-13.

[396] See e.g., *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 61(4) and *Enforcement of Maintenance Orders Act*, S.S. 1984-85-86, c. E-9.2, s. 56. See also *Queen's Bench Act*, S.M.

(continued...)

b. Discussion

Until recently, courts have consistently exercised a broad discretion to discharge arrears of support.

Many older cases applied a rule of thumb whereby the courts would refuse to enforce the payment of arrears of support beyond one year. The purpose of the rule was said to be to discourage the spouse entitled to support from "hoarding" or piling up the amount of the arrears owing.[397] The "rule against hoarding" is explained in terms of public policy:[398]

> ... this rule, extraordinary to the law, is based on considerations of public policy, principally the policy of the court to refuse to impose on a delinquent husband a crippling burden to meet a purpose (the maintenance of a wife or child) which has already been met by other means.

The law has changed with recent jurisprudence in which courts have refused to remit arrears with the same liberality as in the past.[399] The rule against hoarding is discredited and the so-called "one-year rule" discarded by the Alberta Court of Appeal in the case of *Haisman* v. *Haisman*.[400] The Court did not regard the one-year rule as "[representing] a reasoned response to concerns about hoarding."

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[396] (...continued)
1988-89, c. 4, s. 54.

[397] The *MEA* contains provisions designed to discourage the "hoarding" of arrears beyond three years by the spouse who is entitled to receive support. Section 5(2) provides that the Director of Maintenance Enforcement may refuse to enforce more than three years of the arrears payable under a maintenance order. Section 15(3) stipulates that the priority of a maintenance order over any unsecured judgment debts, other than another maintenance order, does not apply to arrears of maintenance payable more than three years before the institution of enforcement proceedings. In addition, section 31 imposes a limitation period of ten years on the enforcement of arrears that have accrued under a maintenance order.

[398] Wilson C.J. in *Patton* v. *Reed*, [1972] 6 W.W.R. 208 (B.C.S.C.), quoted in *Haisman* v. *Haisman*, (1994), 7 R.F.L. (4th) 1 (Alta. C.A.) , at 13 (leave to appeal to S.C.C. refused Sept. 14, 1995, 15 R.F.L. (4th) 51), on appeal from (1993), 7 Alta. L.R. (3d) 157, 137 A.R. 245 (Q.B.).

[399] In Alberta, *see Haisman* v. *Haisman*, *ibid.*

[400] The so-called "one-year rule" has always been more myth than reality: see R.N. Komar, "The Enforcement of Support Arrears: A History of Alimony, Maintenance and the Myth of the One-Year Rule", (1975) 19 R.F.L. 129. It has not been regarded as superseding the application of judicial discretion to the facts of the particular case: *Potts* v. *Potts*, (1989) ... (Alta. C.A.). See also *Payne on Divorce*, 4th ed., supra, note 195 at 319.

We defended the "one-year rule" in ALRI Report No. 27 on *Matrimonial Support*. Our reasons included recognition of the serious hardship which may be imposed upon a husband or wife by sudden collection measures for a large sum of money. There, we argued:

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

The contrary arguments are set out by the Court of Appeal in its judgment in the *Haisman* case. The following passage relates to child support but a ready analogy with spousal support can be drawn:

> I agree with the chambers judge (at p. 165) that the rule against hoarding invites a payor spouse to disobey the court order directing him to make maintenance payments. It assures him that if he can avoid making those payments for a sufficient period of time, a court will vary the order for payment so as to reduce or eliminate any arrears. I cannot understand how such a rule can be said to be based on public policy, at least where child support is concerned. How can it be in the public interest to allow a father to avoid what a court has found to be his financial responsibility to his child? If the father does not provide this financial support, someone else must do so. Usually it is the mother. Sometimes she uses money which otherwise she would have saved or used to improve her quality of life. Sometimes she gets help from her family or from friends. Sometimes she finds it necessary to go into debt. Sometimes she has to go on welfare. Why should the father not compensate her or the State? In my view, in the absence of any special circumstance, it is in the public interest to require the father to compensate whomever or whatever body has fulfilled his financial obligation to his child.

This case establishes that for child support, at least, "A *present* inability to pay *arrears* ... does not by itself justify a variation order."[401] The Court sums up its position this way:

> In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears.

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[401] *Haisman* v. *Haisman*, *supra*, note 398 at 11.

Similar reasoning could conceivably be applied to spousal support.[402]

3. Recommendation

In ALRI Report No. 27, we recommended that the court should have power to vary spousal support retroactively by relieving against the payment of arrears of support. We recommended further that no proceedings shall be taken for the collection of arrears which are more than one year old except with leave of the court which granted the order of support. We recommended that the court should be able to grant leave *ex parte* where a danger exists that the spouse having the support obligation will abscond or take steps to impede collection. In that event, the proceeds should be held until that spouse has been given an opportunity to argue the merits of the leave.[403]

We now reject the parts of those recommendations that foster the mythical "one-year rule." Our views have now changed with the times and we willingly embrace the more enlightened reasoning found in the current jurisprudence.

In light of the experience in other provinces, and in order to promote consistency between federal and provincial legislation, it is recommended that Alberta enact legislation that expressly empowers a court to discharge, vary or suspend a spousal support order prospectively or retroactively, as is appropriate under the circumstances of the particular case.[404] We also think that the court should have these powers where evidence of a substantial nature that was not available on the previous hearing has become available. We do not think it necessary to include the express power to relieve against the payment of arrears. This is something that can be left to the courts.

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[402] To give an example of a special circumstance, support arrears that accrued during the period of resumed cohabitation will almost certainly be remitted: *Barnesky* v. *Barnesky* (1988), 53 Man. R. (2d) 212, 16 R.F.L. (3d) 450 (Man. Q.B.).

[403] ALRI Report No. 27, *supra,* note 26 at 104. The recommendation of the Law Commission for England and Wales (Law Com. No. 25, *Report on Financial Provision in Matrimonial Proceedings* at 45) was similar to our position and was embodied in sec. 23 of the *Matrimonial Causes Act, 1973* (U.K.).

[404] Compare *Divorce Act*, s. 17(4.1); see also *Family Law Act*, R.S.O. 1990, c. F.3, s. 37.

RECOMMENDATION No. 30.2

Alberta legislation should empower the court to make an order discharging, varying or suspending, prospectively or retroactively, a spousal support order or any provision thereof if the court is satisfied that

(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, or

(b) evidence of a substantial nature that was not available on the previous hearing has become available,

and, in making the variation order, the court shall take that change of circumstance or evidence into consideration.

C. Effect of Changing Relationships

1. Spousal misconduct

We examined the subject of the relevance of spousal misconduct in Chapter 5. There, we concluded that the sexual conduct or any other conduct of divorced spouses is irrelevant except insofar as it impacts on the economic circumstances of the parties, and recommended accordingly. This recommendation is in line with section 17(7) of the *Divorce Act*. Section 17(7) adopts the same objectives in an application for variation of a spousal support order as applied to the original application for support under section 15.2(6).

2. Divorce

In Chapter 12, on Duration of Support, we discuss the effect of divorce on a support order made under provincial legislation. There, we recommend that a provincial spousal support order should terminate automatically unless the divorce decree is silent on the issue of support, in which event the provincial order should continue in force. We think that an order that continues in force should be subject to variation just like any other spousal support order granted pursuant to provincial legislation.

3. Remarriage

As discussed in Chapter 1, the appropriate response of the law to the competing demands of past and present families is a complex area. Under the *Divorce Act*, although the remarriage of either spouse is a relevant factor on any subsequent application to vary or discharge a subsisting order,[405] it is not decisive of the issue. In other words, it does not automatically justify variation or discharge,[406] but could provide grounds for an application to vary on the basis of a material change in circumstances. In Chapter 12, we recommend this position for Alberta.

4. Cohabitational relationship

We see no reason to depart from our position with respect to the initial application for a spousal support order. The establishment by either spouse of a new cohabitational relationship may give rise to a material change in circumstances which will found an application for variation of a spousal support order, but should not be grounds for variation in and of itself.

D. Relationship to Purpose of Support Order

In general, the factors to be considered and the objectives to be sought on an application to vary, suspend or rescind a support order should be the same as those that apply to the original order.

In Chapter 9, on the Spousal Support Order, we noted difficulties that could arise in an application to vary a spousal support order where the purposes to be satisfied are not made clear in the order. We concluded, nevertheless, that the decision whether or not to identify the objectives which the support order is intended to achieve should be left to the discretion of the court. In considering an application to vary a spousal support order, we think that a court will have regard to any objectives identified but we would not fetter the exercise of its discretion by imposing any statutory conditions.

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[405] Payne on *Divorce*, 4th ed., *supra*, note 195 at 343.

[406] *Ibid.*, at 345.

RECOMMENDATION No. 31.2

The court should consider the same factors and pursue the same objectives in an application to vary a spousal support order as it would in an application for a spousal support order.

E. Variation Award

The types of order that may be granted in variation proceedings– *e.g.* orders for the payment of periodic or lump sum support or the transfer of a property interest – and the inclusion of terms or conditions that may be incorporated should be the same as those available on the original application.

RECOMMENDATION No. 32.2

The court should have the same discretion and powers of disposition in an application to vary a spousal support order that it had in the original application for a spousal support order.

F. Court Enforcement and the *MEA*

It is beyond the scope of this report to specifically address the enforcement mechanisms in place with respect to spousal support orders. We make an exception, however, for the purpose of ensuring that the intent of our General Premises 2, 3, 5, 8 and 9 is met. All of these Premises speak to access to justice, consistency and the widest possible forum choice for the parties.

We propose a change to the *MEA* to provide that the Director of Maintenance Enforcement enforce an order of a Provincial Court without the necessity of that order becoming a Court of Queen's Bench order upon filing. As we have already noted, the *MEA*, section 12(1), curtails the ability of the Provincial Court to vary its order when that order is filed with the Court of Queen's Bench for enforcement.[407]

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[407] *Supra*, heading A.

Other sections of the *MEA* appear to anticipate continuing roles for both courts in the enforcement of support orders. Interestingly, section 32 refers to an application to vary that may be made to "a court," not just the Court of Queen's Bench. The current practice of automatic filing in the Court of Queen's Bench on default of payment by the person liable for support is inconsistent with this provision because it limits this power, as does section 12(1) which "deems" all orders filed in the Court of Queen's Bench to be Court of Queen's Bench orders. The *DRA*, section 28, also defines a continuing role for the Provincial Court. The *MEA*, section 6(1), similarly does so in not affecting orders made before January 1, 1987, as does section 7 which references orders made after December 31, 1986.

Under the existing law, most of the powers set out in the *MEA* are conferred on the Provincial Court by the *DRA*, Part 4.[408] Those powers include the power to:

- issue a summons, *DRA*, section 28
- attach a salary, wages or other remuneration, *DRA*, section 29
- by order, permit a party to file a support order for civil enforcement, *DRA*, section 30
- attach a debt, *DRA*, section 31
- order that money paid into court be paid to the applicant, *DRA*, section 33
- order that support be paid as a condition of adjournment, *DRA*, section 35
- at the request of the person ordered to pay support, rehear the application and confirm, rescind or vary a support order, *DRA*, section 36(2)
- cancel an order registered in the Land Titles office and direct the Registrar of Land Titles to cancel the registration under terms and conditions, *DRA*, section 37

These powers will disappear when the *DRA* is replaced by legislation based on our recommendations. It is our view that both courts should have continuing powers of enforcement to the fullest extent constitutionally allowable, and the *MEA* should be amended to so provide.

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[408] MEA, S.A. 1984, c. C-8.1, s. 39, enacted in 1984, provides for the repeal of the *DRA*, ss. 28 to 38 on Proclamation, but this provision has not been proclaimed in force.

We say this because we are concerned that this unnecessarily curtails, or causes inconvenience to, litigants who have chosen to come to the Provincial Court, including those who seek to vary a support order that has been reciprocally enforced in and by the Provincial Court. We think it would be preferable if the remedies for enforcement were also available in the Provincial Court. Automatic filing with the Queen's Bench appears to be a choice made in the interests of administrative convenience. We think it a better practice that the parties be able to choose the court where they wish to make an application, including an application to vary or enforce. This would ensure the widest access to the courts. The focus, then, is not on administrative convenience but on ensuring that parties have the widest choice of courts when making applications to resolve disputes arising on the breakdown of the relationship. This is reflective of our general premises 2, 3, 5, 8 and 9.

The Provincial Court should also be able to make, vary and enforce its own orders, except where the Provincial Court does not have constitutional jurisdiction to grant the remedy sought. In this situation, it should be possible to file a Provincial Court order with the Court of Queen's Bench for the purpose of this limb of enforcement only, but not including power to vary. Legislation should make this clear. The *MEA*, section 32(2), and the DRA, section 30(8), already require notification to the Director when an order is varied.

RECOMMENDATION No. 33.2

(1) Any court having jurisdiction over spousal support should be able to make, vary and enforce its own orders.

(2) The *MEA* should be amended to confer the same powers of enforcement on courts with jurisdiction over spousal support to the fullest extent constitutionally allowable.

CHAPTER 11 INTERIM SUPPORT ORDER

A. Existing Law

Section 16, in Part 3 of the *DRA*, authorizes the court to order the payment of periodic sums of interim support. The authority is limited to cases where the applicant has no means of support independent of the other spouse.[409]

Section 35, in Part 4 of the *DRA* and section 30(1) of the *PCA* are identical with respect to spousal support. Both sections permit the Provincial Court to order support to be paid during an adjournment granted on the application of the person having the obligation to pay support. The marginal note beside the *PCA* section labels it "interim support," but the section refers to an application by "a person ordered to pay maintenance or alimony to his spouse." The provision appears to authorize the court to make an order that could be thought of as an "interim variation order." The PCA provision provides, in addition, that the court may order payment to be made "in a lump sum or by instalments."[410]

Federally, section 15.2(2) of the *Divorce Act* empowers a court to grant an interim order for the support of a spouse pending the determination of a claim for a support order. This section expressly permits interim support by lump sum or periodic sums and authorizes the court to make orders "to secure or pay, or to secure and pay" interim support.[411] Case law establishes that the principal factors for the court to consider are the needs of the spouse claiming support and the ability of the other spouse to pay.[412] Need is to be assessed in the context of the standard of living adopted during the

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[409] Section 18 of the *DRA* also refers to interim alimony. This section protects a spouse from liability for necessaries at common law where that spouse is meeting the obligation to pay court-ordered support.

[410] *PCA*, s. 30(2).

[411] The case law interpreting the interim support provisions in the *Divorce Act* is reviewed in *Jenkyns* v. *Jenkyns* (1997), 201 A.R. 231 (Alta. Q.B.), at 234-35.

[412] *Willick* v. *Willick* (1992), 130 A.R. 391 (Alta. Q.B.), at 396.

marriage.[413] The capacity of the spouse claiming support to provide for themself is a relevant factor[414] and the test connecting the cause of the need to the marriage or marriage breakdown is not to be applied as a prerequisite to eligibility for interim support.[415]

Statutory support provisions in several provinces or territories include references to interim support orders.[416]

B. Interim Support Award

Because of its short-term purpose – to fill the gap until the issue of support is determined in the application for a support order – it is arguable that the court's power should be limited to awards of periodic support. However, the power is not restricted under either the *PCA* or the *Divorce Act* and we see no reason to impose greater restrictions under provincial legislation. Stronger argument can be levied against allowing the court to transfer property in an interim support order, but we do not propose that fetters be placed on the discretion of the court to make an order affecting property where the court thinks it appropriate. The power to order interim support should include the power to make an interim order for possession of the matrimonial home and use of household goods.

We think that Alberta spousal support legislation should include a provision respecting interim support orders similar to section 15.2(2) of the *Divorce Act*, but expanded to include the power to make orders affecting property interests. That is to say, on an application for interim support, the court should be able to make any order that it could make on an application for a support order.

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[413] *Row* v. *Row* (1991), 123 A.R. 324 (Alta. Q.B.).

[414] *Fehr* v. *Fehr* (1973), 10 R.F.L. 399 (Sask. Q.B.) and *Phyllis* v. *Phyllis* (1976), 24 R.F.L. 103 (Ont. C.A.).

[415] *Moge* v. *Moge*, *supra* note 63.

[416] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(4); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(6); *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 7(1); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(5).

RECOMMENDATION No. 34.2

The court should consider the same factors and pursue the same objectives in an application for an interim spousal support order as it would in an application for a spousal support order.

RECOMMENDATION No. 35.2

The court should have the same discretion and power of disposition in an application for an interim support order that it has on an application for a spousal support order.

CHAPTER 12 DURATION OF ORDER

In this chapter, we examine issues relating to the duration of a spousal support order, variation order or interim support order granted in a proceeding brought under provincial legislation.

Under heading A., we consider two ways in which a spousal support order may be limited in duration. First, its duration may be limited by the terms of the order itself. For example, the order may specify the date on which the order is to commence or provide for its termination at a time or upon the occurrence of a specific event. Second, the law may provide that the order shall terminate on the happening of a certain event. For example, the law may state that the order terminates where the spouses have reconciled, or one spouse has died or remarried or entered into a relationship with a new partner.

Under headings B. and C., we consider the extent to which the recommendations we make regarding the duration of support orders are appropriate to variation orders and interim support orders.

A. Support Order

1. Duration fixed by support order

A support order may contain terms that limit the duration of the obligation to pay support.

a. Start Date

The first issue relating to the duration of a spousal support order is the start date of the period over which a court may order support to be paid. Federally, the *Divorce Act* does not contain an explicit provision. Case law under the 1967 Act holds that the Act does not give the court jurisdiction to order the payment of "back maintenance" and that periodic support payments should commence with the date of the decree.[417] The "backdating" of periodic support

[417] *Chadderton* v. *Chadderton* (1973), 1 O.R. 560 (C.A.).

orders is expressly authorized by statute in several provinces.[418] For example, in Ontario, section 34(f) of the *Family Law Act* permits the court to order support to be paid in respect of any period before the date of the order. The power may exist now in Alberta but it is not explicit.

Legislation could leave the question of the start date to the discretion of the court, as it does in Ontario. Alternatively, it could limit the exercise of the court's discretion to a time at or after a specified start dates. We can think of a number of possible dates for this purpose. One would be the date on which the marriage broke down – ordinarily, the date when the spouses separated – or, alternatively, the date that the applicant spouse became eligible to apply for a support order pursuant to our recommendations.[419] Another would be the date on which the proceedings for support were commenced. Still another would be the date of the court hearing in which the order is granted.

In ALRI Report No. 27, we recommended that Alberta legislation provide that an order for periodic payments may commence at any time at or after the date of the filing of the application.[420]

We now lean toward the view that it should be possible for the court to "backdate" the period over which spousal support is ordered to be paid to the date at which the spouse in whose favour the support order is made became entitled to apply (usually the date of the marriage breakdown), but no earlier. The adoption of this position would help to guard against undue prejudice to the applicant resulting from delay.

RECOMMENDATION No. 36.2

Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings.

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[418] *Supra*, note 359.

[419] *See* Chapter 2, heading E.

[420] ALRI Report No. 27, *supra*, note 26, Rec. 17.

b. Term certain or event specified

As has been seen previously,[421] in Alberta, section 17 of the *DRA* empowers the court to order the payment of periodic spousal support until further order, or during the joint lives of the spouses or during a shorter period. This section applies on judgment of judicial separation or failure to comply with a decree of restitution of conjugal rights. Different provisions apply on a declaration of nullity. On nullity, section 22(1) empowers the court order that one spouse secure to the other spouse an annual sum of money for any term not exceeding the lifetime of the other spouse. Section 22(2) allows the court to order monthly or weekly periodic support during the joint lives of the spouses, either in addition or in the alternative to an annual sum.

Federally, section 15.2(3) of the *Divorce Act* specifically empowers the court to grant a support order "for a definite or indefinite period or until the happening of a specified event" and to "impose terms, conditions or restrictions in connection with the order as it thinks fit and just." This section applies to both periodic and lump sum support.[422]

The power to limit the time period for, or circumstances during, which support is ordered is probably implicit in the judicial discretion that judges exercise under the existing law in Alberta. Certainly, in some situations limited support will be reasonable and practicable. For example, an order for periodic payments for a limited time might be appropriate to enable a separated spouse to undergo retraining or educational upgrading in order to become self-supporting. An order for periodic payments until a specified event might be appropriate if a separated spouse with custody of a child will become self-supporting when the child attends school.

We think it would be useful for Alberta to enact a statutory provision. Setting out in the order the period for, or circumstances during, which support must be paid would bring it home to both parties that the continuation of the payments is qualified, but subject to this: if things do not

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[421] See Chapter 9, Spousal Support Order.

[422] See also *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(3); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(1); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 33 (no reference to definite or indefinite terms), *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34(1); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 7(1); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1).

work out as the court expects, the order might be varied. Of course, finite orders are not appropriate where the attainment of economic self-sufficiency is not reasonable and practicable.

We also think that a court should be able to defer the payment of support, where appropriate, as was done in the case of *Keast* v. *Keast*.[423] In that case, the court deferred the payment of compensatory support by the husband who had qualified as a doctor but would be unable to make the designated payments until his practice became established. A court should also be able to order fluctuating periodic payments where the payor can reasonably be expected to engage in seasonal employment, or the payment of lump sum support either at one time or by instalments..

The wording of section 15.2(3) of the *Divorce Act* appears to give the court the flexibility that is required and we recommend its adoption in Alberta.

RECOMMENDATION No. 37.2

Alberta legislation should provide that a court may order the payment of spousal support for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

c. Finality ordered

As we stated in ALRI Report No. 27 on *Matrimonial Support*, we can conceive of cases in which final settlement would be in the interest of both spouses. A spouse might go to extraordinary lengths to raise a lump sum for support if that spouse could be assured that it was the last demand that would be made. A lump sum might also be more beneficial to the recipient than an uncertain and possibly uncollectible claim for future periodic payments. The husband and wife may each be fully self-supporting and both may want to live their lives free of any further relationship with each other.

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[423] *Supra*, note 226.

Against this, the possibility exists that bringing the private support obligation to finality could result in a spouse having insufficient means of support or becoming a charge on public funds. There is also the fact that the scope of Alberta legislation is constitutionally limited. Where divorce proceedings ensue, an order granted under provincial legislation is never final because it cannot not bind the divorce court. An order granted under provincial legislation could achieve finality where a marriage is annulled or a marriage-like relationship is terminated.

On balance, we think (as we did in 1978) that the court should have power to make a support order that is final. The order should be the final quantification of the support obligation such that the order, once satisfied, cannot be varied in the future.

Also, the court should have power to dismiss an application for support and state specifically that the dismissal is final. These provisions would clear up uncertainty about the effect of a dismissal of an application under the present law.

Where the spouse having the support obligation does not comply with a final order, or is in default, the court should have the power to re-open the whole question of support or vary the order. The court should have the power to vary provisions for security in any case.

We recommend the adoption of the recommendation we made in ALRI Report No. 27.

RECOMMENDATION No. 38.2

Alberta legislation should provide that:

(1) This section applies if an application for a spousal support order is made in proceedings in which a declaration of nullity or decree absolute of nullity is granted or a marriage-like relationship has terminated.

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

(a) in allowing the application, order that spousal support is final and not capable of variation, and

(b) in dismissing the application, order that the liability of the parties to support each other is terminated.

(3) Where the spouse against whom a spousal support order is made does not comply strictly with it, the order is subject to variation notwithstanding that the court has made an order under subsection (2)(a).

(4) When

(a) an order is made under subsection (2)(a) and the spousal support order is fully complied with, or

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

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

(5) This section does not affect the power of the court to vary provisions to secure payment of a spousal support order.

2. Termination of Support by Operation of Law

A support order may terminate by operation of law. In this section, we examine policy issues relating to the termination of a support order made under provincial law by reason of: the death of the spouse having the support obligation or the spouse receiving support; divorce or nullification of the marriage; reconciliation of the spouses while they are still married; and the remarriage or formation of a cohabitational relationship by either spouse.

a. On death

i. Death of spouse having support obligation

If a spouse who is liable to pay spousal support dies, should the support obligation bind his or her estate?

The *Divorce Act* does not contain an express provision. The case law on the issue whether an order granted under the *Divorce Act* can bind the estate of the spouse who is liable to pay support is divided. Nevertheless, the weight of case law authority appears to support the proposition that a divorce court

order binds the estate where the order explicitly extends the obligation past death.[424]

Provincial statutes across Canada differ in their regulation of the effect of the death of the person having a court-ordered obligation to pay spousal support. In Prince Edward Island, a support order binds the estate of the person having the support obligation unless the order provides otherwise.[425] In Manitoba, New Brunswick, Newfoundland and the Yukon, statutory provisions empower the court to order that the support obligation continue and be a debt on the estate for such time as is fixed by the order.[426] In New Brunswick, supplementary statutory provisions stipulate that, unless a support order otherwise provides, it terminates on the death of the person having the obligation and the liability for unpaid amounts in the preceding twelve months constitutes a debt of his or her estate.[427] The relevant statutory provision in Ontario stipulates that "an order for support binds the estate of the person having the support obligation unless the order provides otherwise."[428] In Newfoundland and the Yukon, the provincial legislation adds a further variation by providing that a support order, which survives the death of the person having the support obligation, is subject to a subsequent order for the payment of support out of the deceased's estate under the Newfoundland *Family Relief Act* or the Yukon's *Dependants' Relief Act*.[429]

Marital support obligations are very personal and might be perceived as lasting only until death, but the death of the spouse having the support

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[424] In Alberta, the Appellate Division took this position in the case of *Krause* v. *Krause*, [1976] 2 W.W.R. 622, decided under the *1970 Divorce Act*.

[425] *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34(3).

[426] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 10(1)(h) & 40(e); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(l); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1)(i); and *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1)(h).

[427] New Brunswick, *ibid.*, s. 116(6); Prince Edward Island, *ibid.*, s. 19(4).

[428] *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(4).

[429] Newfoundland, *supra*, note 426, s. 40(5), referring to *Family Relief Act*, R.S.N. 1970, c. 124; and Yukon, *supra*, note 426, s. 36(4), referring to *Dependants' Relief Act*, R.S.Y. 1986, c. 44. On the relationship between family relief legislation and matrimonial property division, see the recent S.C.C. judgment in the B.C. case of *Tataryn* v. *Tataryn Estate*, [1994] 2 S.C.R. 807.

obligation does not eliminate any needs of the recipient spouse. In our view, the spouse's estate should be available in proper cases for the support of the surviving spouse.[430]

The question is: how should that liability be imposed and discharged? As we observed in ALRI Report No. 27, substantial difficulties of estate administration and potential unfairness to beneficiaries of the estate could result if an estate were required to provide periodic support payments over an indefinite period. Furthermore, the purchase of an annuity for the surviving spouse would not provide a satisfactory means of resolving the difficulties, because support orders are and should be variable[431]. There may be others, including children, with legal or moral claims against an estate that may not be adequate to satisfy all legitimate needs.

One option would be to require that all support claims following the death of the spouse having the support obligation should be pursued under the Alberta *Family Relief Act*.[432] We recommended this option in ALRI Report No. 27.

That recommendation has a major drawback. If an order for spousal support automatically terminated on the death of the person having the support obligation, the recipient spouse could be left without adequate means of support pending a successful application for support against the estate of the supporting spouse under the *Family Relief Act*. The adoption of that recommendation would tend to drive separated spouses to seek an order for lifelong support under the *Divorce Act*.

We are inclined to modify the recommendation we made in ALRI Report No. 27. We now think that Alberta should follow the statutory precedents established in Newfoundland and the Yukon. A support order should be binding on the estate of the person having the support obligation unless the court directs otherwise. Any such order should be subject to variation by way of a subsequent order for the payment of support out of the deceased's estate

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[430] ALRI Report No. 27, *supra*, note 26 at 36.

[431] *Ibid*.

[432] R.S.A. 1980, c. F-2.

under the *Family Relief Act*, as in section 40(5) of the Newfoundland *Family Law Act*.

We think that our recommendation provides for fairness in balancing the interests of all involved and should be adopted even though it does not mirror the *Divorce Act*. It adoption may well influence the wording of orders made under the *Divorce Act*.

RECOMMENDATION No. 39.2

Alberta legislation should provide that a spousal support order survive the death of the spouse having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the *Family Relief Act*.

ii. Death of spouse receiving support

Should an order for support terminate automatically on the death of the spouse receiving support, except with respect to the enforcement of arrears of support that accrued prior to death?

Again, the *Divorce Act* does not contain an express provision. At least one case, decided under the 1970 Act, holds that the spousal support right is a personal one, enforceable only during the recipient spouse's lifetime.[433] This conclusion may depend on the particulars of that case.

In ALRI Report No. 27, we accepted this outcome, recommending that spousal support should terminate on the recipient spouse's death.[434] We stated that we could see no reason why any support should become payable after the death of the spouse to whom the support obligation is owed. "The need of the dependent spouse," we asserted, "has clearly ceased to exist."

In this report, we have seen that support orders may serve different purposes. If an order for support is exclusively needs-based, it should be terminated prospectively on the death of the person in need. However,

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[433] *Hampton* v. *Hampton* (1985), 64 B.C. L .R. 264 (C.A.).

[434] ALRI Report No. 27, *supra*, note 26 at 37.

different considerations might apply, for example, to spousal support that is payable by way of compensation.

This knowledge has caused us to reconsider our former recommendation, and to suggest that it be modified to provide that the death of the recipient spouse shall terminate a support order, except where a court expressly declares otherwise. The termination of a support order would not affect arrears that had accumulated while the spouse was still alive.

Our recommendation opens a door that may have been closed by the case law interpreting the *Divorce Act*. The case law may change now that the Supreme Court of Canada has ruled on the approach to be taken to the interpretation of the *Divorce Act* objectives.[435] As we suggested with respect to Recommendation No. 35, the enactment of this provision provincially may influence the wording of clauses in orders granted under the *Divorce Act*.

RECOMMENDATION No. 40.2

Alberta legislation should provide that a spousal support order terminate on the death of the spouse receiving support, except where the court expressly declares otherwise, but that arrears of support accumulated while the spouse was alive continue to be enforceable.

b. On divorce

Should an existing order of support continue in effect or be automatically terminated by the commencement, or completion, of divorce or nullity proceedings?

Cases may occur where the *DRA* can properly be invoked by a divorced spouse. As we stated in ALRI Report No. 27 on *Matrimonial Support*:

> It may happen that the divorce court does not deal with support in divorce proceedings. It may be that neither party asks for it, or it may be that the court declines to deal with support. In some such cases, there is an existing order of support made under the authority of provincial legislation, and indeed the existence of such an order may be the reason why support is not dealt with in the divorce proceedings.

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[435] *Moge* v. *Moge*, *supra*, note 63.

The parties may have relied upon the existing order and for that reason may have refrained from raising the question of support in the divorce proceedings. This situation is quite different from one in which a dependent spouse has not exercised her or his right to support at all.

In our view, where the divorce decree is silent on the issue of spousal support:

(1) a pre-existing order granted under provincial law should continue in effect, and

(2) it should be possible after divorce to apply for a support order under provincial law, or to apply for an order to discharge, vary or suspend a support order that was granted to a spouse before divorce pursuant to provincial law.

Section 36 of the Ontario *Family Law Act* furnishes a useful precedent to govern the jurisdictional issues that arise under provincial family law statutes in relationship to divorce. We recommend that it be enacted in Alberta, but modified to ensure that court jurisdiction under provincial legislation will continue until the divorce court makes an order.

RECOMMENDATION No. 41.2

Alberta legislation should provide that:

(1) The jurisdiction of the court under Alberta law to award or vary spousal support continues in effect unless and until the court makes an order with respect to spousal support in a divorce proceeding under the *Divorce Act* (Canada).

(2) The court with jurisdiction in a divorce proceeding under the *Divorce Act* (Canada) may determine the amount of arrears owing under a spousal support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the *Divorce Act* (Canada).

(3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to spousal support is made in the divorce or nullity proceedings, an order for support made under

provincial law continues in force according to its terms, as does the jurisdiction of the court under provincial law.

c. On reconciliation

Under existing provincial law and under the federal *Divorce Act*, a spousal support order is not terminated automatically by a subsequent reconciliation of the spouses. In the usual case, the order of support will have been made when the husband and wife were living apart. It will be based upon the circumstances attending separation, and will not be appropriate to the circumstances attending reconciliation as evidenced by resumed cohabitation. It should not be allowed to continue in existence merely because neither party takes proceedings to terminate it.

In ALRI Report No. 27, we recommended that reconciliation should terminate a spousal support order.[436] We endorse that recommendation. Termination should be automatic upon cohabitation being resumed and continued for a period of more than ninety days. We picked this time period by analogy to the *Divorce Act*, s. 8(3)(b)(ii), which provides that reconciliation for not more than ninety days does not interrupt or terminate the calculation of the period for which the spouses have lived separate and apart as a ground for divorce.

RECOMMENDATION No. 42.2

A spousal support order should terminate upon cohabitation having been resumed by the parties and continued for a period of more than ninety days.

d. On formation of new relationship

In this section, we look at the question of whether spousal support should be terminated or reduced automatically in a case where the spouse receiving support has entered a new relationship.

i. Spousal misconduct

This subject was examined in Chapter 5 on Other Substantive Issues. There we concluded that spousal misconduct affecting the marital relationship

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[436] ALRI Report No. 27, *supra*, note 26 at 124-25.

should be eliminated from consideration in the determination of spousal support rights and obligations, but that it should be possible to consider the economic consequences of spousal misconduct that aggravates or prolongs the need for support.

ii. Remarriage of spouse receiving support

Section 25 of the *DRA* permits the Court of Queen's Bench of Alberta to vary, suspend or revive an order for alimony or maintenance on the remarriage of the spouse receiving support, among other reasons. The court may vary the support order by altering the times of payment or increasing or decreasing the amount. The court may also suspend or revive the order in whole or in part. As stated previously, only periodic payments can be ordered under the existing *DRA*.

Under the *Divorce Act*, the remarriage of the spouse receiving support does not inevitably terminate spousal support obligations arising from the prior marriage. An application to vary downwards or terminate the support order after the remarriage may be viewed with favour by the court.[437] In some cases, the court may choose to attach terms and conditions to the support order, as permitted under section 15.2(3), one of which may be to expressly stipulate that spousal support shall cease in the event that the recipient remarries.

The Law Commissions in England[438] and Scotland[439] both concluded that the remarriage of a financially dependent former spouse should automatically terminate any prospective right to spousal support under a court order granted in respect of a previous marriage. In Australia, section 82(4) of the *Family Law Act* (Australia), 1975 expressly provides that a spousal support order shall terminate on the remarriage of the spouse receiving support "unless in special circumstances the court having jurisdiction otherwise orders."[440]

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[437] *Payne on Divorce*, 4th ed., *supra*, note 195 at 343-46.

[438] Law Com. No. 25, *supra*, note 403, para. 14; Law Com. No. 77, *supra*, note 148, para. 2.48.

[439] Scot. Law Com. No. 67, *supra*, note 61, para. 3.126.

[440] *Family Law Act 1975* (Australia).

Logically, where the marriage (or marriage-like relationship) has terminated and the spouse receiving court-ordered support remarries — under provincial law, this could occur where a prior marriage has been annulled or the relationship between unmarried cohabitants has ended — the effect of the remarriage should depend on the objective that was sought to be achieved by the order. If, for example, spousal support had been ordered on a compensatory or quasi-restitutionary basis in light of the recipient spouse's contributions to the marriage, there is no obvious reason why the remarriage of the spouse receiving support should automatically terminate or affect the order. If, on the other hand, the objective sought had been needs-based or spousal support had been ordered to promote the economic self-sufficiency of a dependent spouse, then the remarriage of the spouse receiving support might well be regarded as relevant on an application to vary or discharge the order.

Realistically, the attitudes of the affected individuals and of the public at large cannot be ignored. Many people would contend that, on the remarriage of a dependent former spouse, the legal obligation of support should shift to the new spouse; the former spouse should not be expected to subsidize the voluntarily acquired new lifestyle of the spouse receiving support. Otherwise, the former spouse is in the position of an insurer who must guarantee a continuing income to a person who on remarriage is, in law, a stranger.

In Report No. 27 on *Matrimonial Support*,[441] the ALRI concluded that the remarriage of a financially dependent former spouse should automatically terminate any prospective right to spousal support. We now think, in keeping with the *Divorce Act*, that the remarriage should not automatically terminate a spousal support order but that, consistent with the *Divorce Act*, the fact of the remarriage should constitute grounds for an application to vary the order. That is to say, the discretion of the court to make orders with respect to the continuation of support on the remarriage of the spouse receiving support should be preserved. We believe that this recommendation responds to the practical concerns, while promoting financial justice between the spouses.

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[441] ALRI Report No. 27, *supra*, note 26 at 37-38.

RECOMMENDATION No. 43.2

The remarriage of the spouse receiving support should terminate a spousal support order prospectively, except when the court issues a direction to the contrary at the time of making the order.

iii. Cohabitational relationship of spouse receiving support

Under the *Divorce Act*, the fact that the spouse receiving support has entered into a cohabitational relationship does not automatically terminate spousal support obligations arising from the prior marriage although, as in the case of remarriage, an application to terminate the support order may be viewed with favour by the courts. As in the case of remarriage, the court may stipulate, as a term and condition of the support order, that spousal support shall cease in the event that the recipient enters into a state of unmarried cohabitation. Unless the court has attached such a condition, the formation of a cohabitational relationship has not been held automatically to terminate an order for spousal support.[442]

No provincial statute in Canada has gone so far as to legislate that spousal support rights and obligations shall automatically terminate if the spouse receiving support enters into a cohabitational relationship with a third party, even in circumstances where the relevant provincial legislation establishes reciprocal support rights and obligations between unmarried cohabitants of the opposite sex.

The Scottish Law Commission, after consultation, concluded that it should make "no recommendation that an order for a periodical allowance should terminate automatically on cohabitation."[443]

We reached the same conclusion in ALRI Report No. 27 on *Matrimonial Support*.[444] There, we asked:

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[442] *Payne on Divorce*, 4th ed., *supra*, note 195 at 346-48.

[443] Scot. Law Com. No. 67, *supra*, note 61, para. 3.127.

[444] ALRI Report No. 27, *supra*, note 26, at 38. The power to vary a spousal support order in this situation is discussed later in this chapter.

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

RECOMMENDATION No. 44.2

The cohabitational relationship of the spouse receiving support should not automatically terminate a spousal support order.

B. Variation Order

A variation order will alter the obligation under a support order. It may go as far as to terminate prospective support and reduce or cancel unpaid arrears of support. Because, once granted, the variation order replaces the support order, we recommend that the recommendations we make with respect to the duration of spousal support orders should also apply to variation orders. Our recommendation is consistent with the *Divorce Act*.

RECOMMENDATION No. 45.2

The provisions that govern the duration of spousal support orders should apply to the duration of variation orders.

C. Interim Support Order

As stated in Chapter 11, the *DRA*, section 16, and the *Divorce Act*, section 15.2(3), both allow the court to make an interim order where an application for spousal support has been made. The *DRA*, section 35, and the *PCA*, section 30, allow the court to order spousal support during an adjournment of an application to vary a spousal support order. By definition, an interim support order will be superseded when the proceedings for a spousal support order have been completed. The interim support order will continue in effect as provided by its terms until it is varied or the application for spousal support, and any appeal, is adjudicated.

In general, we think that the court should have the same powers on an application for an interim support order that it has on an application for a spousal support order. That is to say, the court should be able to backdate the commencement of the period for which support is paid, or limit the duration of the obligation to pay support under the order or the circumstances under which support is to be paid. However, we do not think that it would be appropriate for a court to declare that compliance with an interim support order will terminate the support obligation altogether. An interim order is just what it says — an interim order. It would be a contradiction in terms to allow an interim order to terminate the support obligation with finality.

The discussion about the operation of law on the death of a spouse is as relevant to interim support orders as it is to support orders. Where divorce proceedings are commenced after an interim support order has been made, we think it should continue until the court hearing the divorce application determines the issue of support, interim or otherwise, in its proceedings. Our recommendations on the resumption of cohabitation by the spouses and the remarriage of the spouse receiving support should apply to an interim support order.

RECOMMENDATION No. 46.2

The court should have discretion to make an interim support order that will be in effect in accordance with its terms until the order is varied or the application for a spousal support order or an appeal is adjudicated.

CHAPTER 13 RELATED COURT POWERS

In this chapter, we recommend that Alberta legislation confer a number of additional powers on courts exercising jurisdiction over spousal support. Our recommendations are based on precedents found in existing Alberta legislation, federal legislation or legislation in other provinces.

A. Payments to Court Or Third Party

Statutes in several provinces empower a court to order that all or some of the money payable under a support order shall be paid into court or to another appropriate person or agency for the benefit of the dependant.[445] We think that Alberta legislation should make similar provision.

RECOMMENDATION No. 47.2

Alberta legislation should empower the court to order the payment of support into court or to a third party for the benefit of the spouse receiving support.

B. Disclosure of the Financial Means of Spouses

1. By spouses

Legislation in several jurisdictions provides for the disclosure by the spouses of information concerning their financial means.[446]

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[445] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(h); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(1)(e); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 32; *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1)(e); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 34(1)(e); *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 36(1)(d). Compare *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5, s. 14(1).

[446] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 8 and ss 10(1)(f) & 10(1)(g), *infra*, text to note 538; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 120 & 122; *Family Law Act*, R.S. Nfld. 1990, c. 60, ss 48, 49 & 50; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 29 & 54; *Family Orders Information Release Act*, R.S.N.S. 1989, c. 161, ss 1 to 7; *Family Law Act*, R.S.O. 1990, c. F.3, ss 41 & 42; *Family Law Act*, S.P.E.I. 1995, c. 12, ss 41, 42; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 20; *Family Property and Support Act*, R.S.Y. 1986, c. 63, ss 43 & 44. Compare *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5, ss 18, 19 & 20. See generally Christine Davies, *supra*, note 71 at 230-31, 239; ALRI, Report No. 27, *supra*, note 26 at 50-77.

Under the *Divorce Act*, in cases where child support is in issue, the Federal Child Support Guidelines contain certain express provisions.[447] This information, which will be before the court in many divorce cases, would also assist the court to determine spousal support. Under sections 21 to 26 of the Federal Child Support Guidelines:

- the applicant must include with the application
  - personal income tax returns and assessment notices for the three most recent taxation years
  - certain additional information where the applicant is an employee, self-employed, a partner in a partnership, a beneficiary under a trust or controls a corporation

- the respondent must provide the same information to the court and the other spouse within 30 days of service (60 days if the respondent resides outside Canada or the United States)

If one of the spouses fails to comply, the other spouse may apply

- to have the application set down for a hearing, or move for judgment, or

- for an order requiring the spouse to provide the required documents

Where the court proceeds to a hearing, "it may draw an adverse inference against the spouse who failed to comply and compute income to that spouse in such amount as it considers appropriate."

Where the spouse fails to comply with an order to provide the required documents, the court may

- strike out any of that spouse's pleadings
- make a contempt order
- proceed to a hearing, draw an adverse inference and impute income
- award costs to fully compensate the other spouse

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[447] Federal Child Support Guidelines, *supra*, note 15.

As long as the support obligation continues, both spouses have a continuing obligation at the request of the other spouse not more than once a year to provide

- the income documents and information described above
- current information, in writing, about specified expenses or circumstances of undue hardship

The failure to comply with a request may lead to a contempt order and award of costs in favour of the other spouse or to an order to provide the required documents.

Statutes in several provinces require the disclosure of financial information in an application for a spousal support order. For example, section 41 of the Ontario *Family Law Act* requires each party to "serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of court." Corresponding legislation in Manitoba imposes a mutual obligation on the parties to disclose financial information, specifies certain of the information required, and authorizes the court to order a non-compliant spouse to pay a financial penalty of up to $5,000 to the other spouse.[448]

Alberta legislation does not make provision for financial disclosure in spousal support proceedings. However, the issue has attracted the attention of the Court of Queen's Bench. On April 1, 1995, that Court issued Civil Practice Note "1" to which are appended two forms of "Notice to Disclose" for use in family law matters. The purpose of the Notice to Disclose is stated to be "to facilitate an exchange of information on a timely basis." It requires the person served to provide information in two categories: (i) income and expenses, and (ii) assets and liabilities. The information required under income and expenses includes: income tax returns and assessment notices for the last three years; the three most recent pay remittance stubs or an employer's statement outlining gross pay and deductions for the year to date; particulars of business or corporate cheques issued to that person during the last 6 weeks; and an itemized statement of current monthly revenue and expenses. The information required under assets and liabilities includes: a

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[448] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 8, 10(1)(f) & 10(1)(g). See also *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5, s. 20.

sworn, itemized list of assets and liabilities; and a copy of the last three years financial statements of privately-held businesses in which that person has an interest greater than 1%.

The Court has also developed a form for use in an interlocutory spousal support application. This form asks for the current gross monthly income of each spouse and includes heads for: employment; child tax credit; UIC, social assistance or student loans; and other.[449]

Civil Practice Note "6", on Special Chambers and Family Law Chambers Applications, reinforces the seriousness with which the Court regards the requirement to provide the required information. Section 12 provides:

> To assist in the expeditious hearing of these applications, the practice of the Court concerning the mandatory filing of information forms, including budgets, evidence and letters listing issues and authorities shall be strictly enforced.

We see advantages to the Ontario approach which requires the spouses to make financial disclosure and leaves the specifics of the information that must be provided to the Rules of Court. These Rules are enacted on the recommendation of the Rules of Court Committee which is made up of judges and lawyers. We think this is the appropriate body to recommend the precise content of the disclosure requirements. The Committee might decide to recommend the enactment of the provisions in Practice Notes "1" and "6", either "as is" or with modification to promote consistency with the Federal Child Support Guidelines. The inclusion of sanctions for the failure to disclose such as those contained in the Federal Child Support Guidelines and a penalty provision along the lines of the Manitoba section would give "teeth" to the obligation to disclose. We recommend that they be enacted.

RECOMMENDATION No. 48.2

Alberta legislation should provide that:

(1) In an application for a spousal support order or on the written request of one of the spouses not more than once a

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[449] As will be seen in ALRI RFD No. 18.3 on *Child Support*, additional information is required in connection with child support applications.

year after the making of a spousal support order, each spouse shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.

(2) Where, in an application for a spousal support order, a spouse fails to comply with subsection (1), a court on application by the other spouse, may

(a) set the application down for a hearing and proceed to judgment, or

(b) order that the documents be provided.

(3) Where the court proceeds to a hearing, it may draw an adverse inference against the spouse who failed to comply with subsection (1) and impute income to that spouse in such amount as it considers appropriate.

(4) Where a spouse fails to comply with an order that the documents be provided, the court may

(a) strike out any of the spouse's pleadings,

(b) make a contempt order against the spouse,

(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate, and

(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

(5) Where, after a spousal support order has been made, a spouse fails to comply with the written request of the other spouse not more than once a year after the making of a spousal support order to provide financial information, the court, on application, may

(a) consider the non-complying spouse to be in contempt of court and award costs in favour of the applicant up to

an amount that fully compensates the applicant for all costs incurred in the proceedings, or

(b) make an order requiring the other spouse to provide the required documents.

(6) The court may, on application by the other spouse, in addition to or in substitution for any other penalty to which the non-complying spouse is liable, order that spouse to pay to the applicant an amount not exceeding $5,000.

2. By employers or other third parties

We recommend that Alberta legislation should empower the court, in an application for spousal support, to order financial information to be provided by a spouse's employer, partner or principal. Precedents exist in Ontario and Manitoba statutes.[450]

RECOMMENDATION No. 49.2

Alberta legislation should provide that:

(1) In an application for a spousal support order, the court may order that the employer, partner or principal of one spouse, as the case may be, provide the other spouse with any information, accountings or documents that a spouse is entitled to request under Recommendation No. 48.2

(2) A return purporting to be signed by the employer, partner or principal may be received in evidence as *prima facie* proof of its contents.

3. Confidentiality

We recommend that Alberta legislation should empower the court to ensure the confidentiality of financial information produced in an application for spousal support. Manitoba legislation provides a precedent for legislation authorizing the court to make an order protecting the confidentiality of

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[450] *Family Law Act*, R.S.O. 1990, c. F.3, s. 42; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(f).

financial information.[451] (The position of the Crown in this regard is discussed below, under heading D. Binding of Crown.)

RECOMMENDATION No. 50.2

Alberta legislation should provide that:

Upon an application for a spousal support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.2 or Recommendation No. 49.2, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.

C. Disclosure of the Whereabouts of Spouse Having Support Obligation

Federally, the *Family Orders and Agreements Enforcement Assistance Act* authorizes "any person, service, agency or body entitled to have a family provision enforced" to request that a court apply to the Minister of Justice to have certain federal information banks searched for information disclosing the whereabouts of a spouse.[452] Any information that is located in these banks is released to the court on a confidential basis. That information may include: the address of the spouse who cannot be located, the name and address of that spouse's employer.

Statutes in several provinces also provide for the disclosure of information concerning the whereabouts of the spouse from whom support is sought in an application for a spousal support order.[453] For example, in Ontario, the court may make an order directing the disclosure of any information shown on a record that indicates the others spouse's place of employment, address or location.[454] We recommend that Alberta legislate a provision similar to Ontario's.

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[451] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 8, 10(1)(f) & 10(1)(g). See also *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5, s. 20.

[452] R.S.C. 1985 (2nd Supp.), c. 4, as amended by 1992, c. 1 and 1993, c. 8.

[453] *Supra*, note 197.

[454] *Family Law Act*, R.S.O. 1990, c. F.3, ss 42(3) & 42(4).

RECOMMENDATION No. 51.2

Alberta legislation should provide that:

(1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for spousal support, the moving party needs to learn or confirm the proposed respondent's whereabouts.

(2) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.

D. Binding of Crown

Legislation in both Manitoba and Ontario provides that the Crown in right of the province is bound by a court order requiring an employer or other person to produce financial information or information about a spouse's whereabouts in connection with an application for spousal support.[455] We agree with the legislators in Manitoba and Ontario that the Crown should be bound. We can see no good reason why the position of the Crown should be different from that of any other body with regard to the disclosures concerning the financial means of a spouse or whereabouts of the spouse having the support obligation. In our view, disclosure for either of these purposes is sufficiently important to justify overriding privacy protections of a general nature.

In Alberta, the *Freedom of Information and Protection of Privacy Act*[456] legislates a balance between the public interest in having access to information held by government and the privacy interest of individuals about whom information is collected. Section 5 of that Act permits another Act, or a provision of it, to prevail if the other legislation expressly so provides. We think that spousal support legislation should do so.

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[455] *Family Law Reform Act*, R.S.O. 1990, c. F.3, 4, s. 42(5); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(1)(f).

[456] S.A., c. F-18.5.

RECOMMENDATION No. 52.2

Alberta legislation should provide that:

The sections provided for by Recommendation No. 49.2 or Recommendation No. 51.2

(a) bind the Crown in right of Alberta, and

(b) in so doing, prevail over the Alberta *Freedom of Information and Privacy Act.*

E. Protection of Privacy

1. Hearing in private

Section 36(1) of the *DRA* gives the Provincial Court a discretion to hear applications for maintenance under Part 4 in private.[457] Part 3 contains no corresponding statutory provision, although such power may fall within the inherent jurisdiction of the Court of Queen's Bench.

In ALRI Report No. 27, we touched upon but did not resolve the question whether domestic proceedings, including spousal support applications, should be heard in private. We stated:[458]

> We have reservations about a departure from the salutary rule that in general courts should conduct their business in public, particularly when applications for support in the Supreme Court [now Court of Queen's Bench] are conducted under that rule. We have not, however, made any investigations which would enable us to express an informed opinion on the subject. We will therefore include a similar provision in our recommendation and in the draft legislation solely because it now exists and we do not have a sufficient basis for a conclusion that it should be changed.

Outside Alberta, several provinces statutorily empower their courts to hear spousal support applications in private.[459] It is open to question how far these restrictions are consistent with the *Canadian Charter of Rights and*

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[457] To like effect, see *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 33. And see *Income Support Recovery Act*, R.S.A. 1980, c. I-1.7, s 59 (proceedings in camera).

[458] ALRI Report No. 27, *supra*, note 26 at 116.

[459] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 58; *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 13; *Family Maintenance Act*, S.S. 1997, c. F-6.2, s. 18; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 54(5).

Freedoms. It is noteworthy that, in 1985 in response to the *Charter*, Ontario abolished closed hearings under the *Children's Law Reform Act*.[460] Nevertheless, some degree of privacy in family law proceedings may be appropriate.

RECOMMENDATION No. 53.2

Staying within *Charter* boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.

2. Publication ban

The *DRA* does not contain any prohibition against the publication of information.[461]

The statutory provisions in other provinces are often supplemented by additional provisions that prohibit the publication or broadcasting of information relating to such applications.[462] As with private hearings, it is open to question how far these restrictions are consistent with the *Canadian Charter of Rights and Freedoms*. Some degree of restriction on the publication or broadcasting of information that may identify the parties to family law proceedings may be appropriate. In this context, the Province of Québec even protects family privacy in its official law reports by referring to family law cases under the title: "Droit de la famille — # ..."[463]

We recommend that, in addition to Recommendation 50.2, Alberta legislation should give the court discretion to prohibit the publication or broadcasting of information filed in family proceedings or produced in court.

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[460] R.S.O. 1990, c. C.12, s. 163, effective January 1, 1985. And see *Payne's Divorce and Family Law Digest*, §39.7.

[461] But see s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, which restricts the publication of matters arising in matrimonial proceedings. See also *Income Support Recovery Act*, R.S.A. 1980, c. I-1.7, s. 7 (disclosure of information).

[462] See *e.g.*, *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 815.4.

[463] *Ibid.*

RECOMMENDATION No. 54.2

The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information filed in a spousal support proceeding or produced in court.

F. Terms and Conditions

The power of a court to make an order in an application for spousal support should include the power to make any provision in the order subject to such terms and conditions as the court deems proper.[464]

RECOMMENDATION No. 55.2

Alberta legislation should empower the court to make any provision in an order made in connection with an application for spousal support subject to such terms and conditions as the court deems proper.

G. Costs

1. In general

In general, the power of a court to make an order in an application for spousal support should include the power to make an order for the payment of costs.

RECOMMENDATION No. 56.2

Alberta legislation should empower the court to make an order with respect to the payment of costs.

2. Interim Costs and Disbursements

Section 16(4) of the *DRA* gives the court discretion to order the payment of interim disbursements. On occasion, courts have ordered interim disbursements in addition to interim support to enable a dependent spouse to retain experts to analyse the complex business affairs of the other spouse.

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[464] See, *e.g. Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(1).

Statutory support provisions in several other provinces or territories also include references to interim costs.[465]

We think that Alberta legislation should provide specific authority for the making of orders for interim costs and disbursements.

RECOMMENDATION No. 57.2

Alberta legislation should give the court discretion, on an application for interim support, when it thinks it fit and just to do so, to make an order requiring one spouse to make a payment or payments to or for the benefit of the other party on account of interim costs and disbursements of and incidental to the application.

H. Application of Rules of Court

In 1996, the *PCA* was amended to add section 19.1. Section 19.1(2) states;

> Where this Act or regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may
> (a) apply the Alberta Rules of Court, and
> (b) modify the Alberta Rules of Court as needed.

This amendment is in keeping with our General Premises, which promote the widest possible access to justice in the courts having jurisdiction over family law matters. We emphasize our view that the Provincial Court should have discretion to apply the Alberta Rules of Court in all proceedings except where they conflict with a provision in the family law statute or regulations.

RECOMMENDATION No. 58.2

Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family law matters.

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[465] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 10(1)(e) ("court costs and reasonable solicitor's costs"); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(o) ("payment of expenses, legal or otherwise, arising in relation to an application for support"); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 7(1)(g) ("costs incurred in obtaining an order").

I. Retroactive Effect of Legislation

In RFD No. 18.3 on *Child Support*,[466] we mention that several cases challenged the application of the *P&MA*, which took effect January 1, 1991, to situations where the child was born before this Act became law. In order to avoid difficulties such as this, we recommend that the legislation enacting our recommendations should be expressed to operate retroactively.

RECOMMENDATION No. 59.2

The legislation enacting the new spousal support law should expressly state that it operates retroactively.

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[466] RFD No. 18.3, Chapter 8, under heading A.2.

PART III - LIST OF RECOMMENDATIONS

RECOMMENDATION No. 18.2
(1) Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse.
(2) The power should not be limited to the joint lives of the spouses. 137

RECOMMENDATION No. 19.2
Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse. 144

RECOMMENDATION No. 20.2
Alberta legislation should provide that:
(1) Upon or after making a spousal support order the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following:

(a) charge specified property or a specified interest in property with the payments,
(b) order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security instrument charging specified property or a specified interest in property with the payments,
(c) order the party liable under the order or other person on his behalf to convey specified property or a specified interest in property to a trustee upon specified trusts, and
(d) suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it.

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

(a) appoint a receiver of rents, profits or other money receivable from the property or interest, or
(b) order sale of the property or interest upon notice to all persons having an interest in it, and
(c) in the event described in either paragraph (a) or (b), direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.

(3) Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter. 147

RECOMMENDATION No. 21.2
Alberta legislation should provide that:
(1) In granting an application for spousal support, the court may make any one or more of the following orders:

RECOMMENDATION No. 48.2

Alberta legislation should provide that:

(1) In an application for a spousal support order or on the written request of one of the spouses not more than once a year after the making of a spousal support order, each spouse shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.

(2) Where, in an application for a spousal support order, a spouse fails to comply with subsection (1), a court on application by the other spouse, may

(a) set the application down for a hearing and proceed to judgment, or

(b) order that the documents be provided.

(3) Where the court proceeds to a hearing, it may draw an adverse inference against the spouse who failed to comply with subsection (1) and impute income to that spouse in such amount as it considers appropriate.

(4) Where a spouse fails to comply with an order that the documents be provided, the court may

(a) strike out any of the spouse's pleadings,

(b) make a contempt order against the spouse,

(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate, and

(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

(5) Where, after a spousal support order has been made, a spouse fails to comply with the written request of the other spouse not more than once a year after the making of a spousal support order to provide financial information, the court, on application, may

(a) consider the non-complying spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or

(b) make an order requiring the other spouse to provide the required documents.

(6) The court may, on application by the other spouse, in addition to or in substitution for any other penalty to which the non-complying spouse is liable, order that spouse to pay to the applicant an amount not exceeding $5,000. 202

RECOMMENDATION No. 49.2

Alberta legislation should provide that:

(1) In an application for a spousal support order, the court may order that the employer, partner or principal of one spouse, as the case may be, provide the other spouse with any information, accountings or documents that a spouse is entitled to request under Recommendation No. 48.2.

(2) A return purporting to be signed by the employer, partner or principal may be received in evidence as *prima facie* proof of its contents. 202

Appendix A

George Norton's Proposal for Spousal Support Guidelines

The uncertainty, unpredictability and inequities that arise from the exercise of an unfettered judicial discretion over spousal support raise the question whether quantitative formulae can be devised to regulate spousal support on marriage breakdown or divorce. Quantitative spousal support guidelines exist in only a handful of counties in the United States and provide a mathematical formula only for the purpose of assessing interim or temporary support.[467]

Arguments for the application of quantitative guidelines to permanent spousal support have been presented by Mr. George Norton, a practising attorney in Palo Alto, California. Mr. Norton observes:[468]

> Lenore Weitzman in her book, *The Divorce Revolution* (New York: The Free Press, 1986) theorizes that no-fault divorce has led to a substantial injustice for supported spouses (usually women) and children, many of whom are systematically impoverished after divorce as a result of no-fault. Without arguing for or against her thesis, one has to acknowledge that a problem exists for many women because there are no clear-cut criteria for setting spousal support in the law. Weitzman's statistics, which show that the standard of living for women decreases after divorce and often continues to decrease, while it increases for men soon after the divorce, are troubling. Child support awards have been made more adequate by recent minimum support laws and guidelines in California and many other states, and stricter enforcement of child support laws have helped women and children. Spousal support, however, remains an area of unpredictability because of the wide divergence of awards. This undoubtedly works to the detriment of women in many cases. In contrast, there are very few examples in which an objective commentator can say that spousal support awards result in substantial injustice to men paying support.

Mr. Norton articulates the following six ground rules for spousal support rights and obligations:[469]

> Support for a divorced spouse is a governmentally required transfer of future income. The principal purposes of this enforced transfer are:

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[467] George H. Norton, "Support Schedules in California: Selected Custody and Spousal Support Issues" (1987), 4 Calif. Fam. Law Mthly 57, at 68. See also George H. Norton, "Explaining and Comparing the California Child and Spousal Support Guidelines" (1987), 4 Calif. Fam. Law Mthly 1.

[468] Norton, "Support Schedules in California: Selected Custody and Spousal Support Issues," *ibid.* at 69.

[469] *Ibid.* at 70.

(1) The government should not be required to support divorced persons.

(2) The supported spouse's basic needs (food, clothing, shelter and health care) should be met.

(3) Society has an interest in providing a means for a supported spouse to care for his or her young children.

(4) There should be rehabilitation of the supported spouse, that is, a transition period for a non-gainfully employed or low earning spouse to become self-supporting to the extent reasonably possible.

(5) The parties' reasonable expectations should be met. This is a concept similar to implied contract, but is, in fact, the implied contract of society, not of the individuals in each marriage. It includes a degree of hindsight, as well as the consideration of the expectation of the parties when they marry.

(6) Certain concepts of fairness should be met, that is, a synthesis of accepted ethical and practical concepts (present mores) should be reflected.

On the basis of these ground rules, Mr. Norton presents the following proposal for a spousal support statute:[470]

The author proposes that a new spousal support statute would be based on the following principles:

(1) Earned income of both parties (except as discussed below) should be the commodity divided by support. The courts should consider:

(a) Actual present and earned income including perquisites, retirement contributions, and deferred income.

(b) Reasonably anticipated earned income and earning capacity of both parties based on substantial evidence.

(c) A supporting spouse's earning potential when actual income or earning potential is voluntarily reduced, thus affecting the reasonable needs of minor children or the basic living needs of the supported spouse.

(d) The expectation that the supported spouse will meet his or her earning potential for purposes of setting support within a reasonable period of time, regardless of whether he or she chooses to do so.

(e) Training and education of the supported spouse that is reasonably calculated to increase his or her earning potential on a cost effective basis.

(f) The needs of young children (under seven years of age unless a child has special needs) that reasonably limit the supported spouse's working ability.

(g) That money allocated from either party to children for child support will be excluded from consideration while required for support of children. (Under

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[470] *Ibid.* at 71-73.

California's present child support statute, this is not the same amount as child support being paid.)

(h) The tax consequences of support.

(2) Courts may order that all or part of any support award may be made in the form of a lump-sum or instalment payment of money or transfer of property (including separate property). If a support award is made in the form of property, the court's decision must clearly explain the basis of the award in effectuating the purposes of this statute.

(3) Courts may consider separate property income (actual or imputed) in awarding support. This will be at the discretion of the court under all of the facts of the case. More specific criteria may be considered by the court in the future.

(4) Courts may consider property assets that the parties will realize in the future stream of income (such as goodwill or retirement payments) as part of the stream of earned income in awarding support. The court may divide these assets in the form of non-modifiable support not terminating on remarriage or death. Present and future tax consequences of doing so shall be equitably considered.

(5) The basic guideline for initially dividing the stream of earned income (as defined above) should be that set forth in the California Guidelines. The Guidelines are based on the following premises:

(a) Money allocated to children from both parties is excluded from spousal support.

(b) Net income after consideration of the reasonable tax consequences to both parties, including tax on support, is the normal stream of income being divided.

(c) The payee shall receive the percentage of net income allocated by the Guidelines after reasonable tax considerations. (After subtracting income allocated to children, 40 percent of the high earner's income minus 50 percent of the low earner's income.)

There is no magic to the formula set out in (5)(c), above. It reflects the present thinking of courts and lawyers in a large number of California counties, but is higher than the amount used in other counties. Some counties have a rule of thumb for support of 33 percent instead of 40 percent of the high earner's income minus 50 percent of the lower earner's income. After long marriages, some spouses think that they should receive 50 percent of all earned income. The Guidelines were probably based on the concept of a higher earner receiving some reward for the talent and work required to do so. The articulated rationale for this concept is maintaining incentive to continue earning. Some people think that this reflects a false value system.

Any formula guideline is subject to future revision, but is probably better than ad hoc setting of support in individual cases. An ad hoc approach may be affected by the court's personal beliefs or adverse reactions to a party. A guideline will provide substantially greater uniformity of result and hence more predictability than operating with no guideline. Many experienced attorney have found that clients more readily accept the concept of guidelines than the broad range of support awards that results when there is no guideline.

(6) There should be no obligation to support any party for a period of time greater than the period of time the parties were married or lived together. This arbitrary limitation on spousal support would answer the difficult question of how long a spouse who cannot or

will not earn remains the financial responsibility of his or her former spouse. Marriage is not an insurance policy. There is a time when society, rather than a former spouse, should bear this burden if a spouse cannot or will not earn.

(7) Duration of support and future reductions of support should be affected by the following factors:

(a) Length of the marriage.

(b) Actual or reasonably anticipated earnings of the supported spouse.

(c) Impairment of future earning capacity of a spouse resulting from the lifestyle arrangement of the spouses during the marriage.

(d) Health of the parties.

(e) Reasonable retirement date of the payor.

(f) Any other important equitable consideration except fault.

(g) Future reductions and termination of support are allowed based on anticipated future income or earning capacity as stated by a court. Such future reduction or termination in an initial order must be accompanied by provisions for modification of support up to a period not less than: (i) for marriages of less than 10 years, half the length of the months married; (ii) for marriages of 10 to 20 years, not less than the number of months in the following formula (minimum period = (months married/240) x (months married)); (iii) all support orders shall terminate after a period equal to the length of the marriage, unless otherwise agreed by the parties. Months married in (i) to (iii) above may, at the discretion of the court, include months the parties resided together unmarried and may exclude months separated.

(h) Remarriage shall terminate spousal support, except when an order is made that support should not terminate, on a motion by a party intending to remarry and good cause is shown. If a party remarrying is subsequently divorced, he or she may request reinstitution of support from a prior spouse, if support would have otherwise continued until the time of the motion and, the term of the remarriage was less than five years or half the length of the prior marriage, whichever is less. If support is reinstituted, the court may consider changes in circumstances, but it may not award support to a point in time later than previously could have been ordered. This reflects a policy of the state to encourage remarriage without undue risk or penalty to the remarrying spouse.

While endorsing these specific guidelines to govern the settlement and adjudication of spousal support rights and obligations, Mr. Norton proposes that the courts retain "reasonable discretion" to deviate from the guidelines in individual cases. He further proposes educational programs to inform high school students, the public at large, and persons contemplating marriage, of

the division of property and of support rights and obligations on the dissolution of marriage.[471]

[471] *Ibid.* at 73-74.