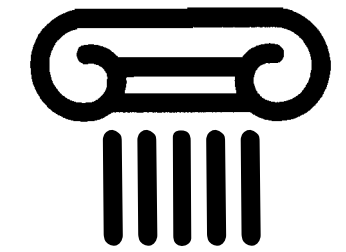

ALBERTA
LAW REFORM
INSTITUTE

FAMILY LAW PROJECT

CHILD SUPPORT

Report for Discussion No. 18.3

October 1998

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are The Hon. Mr. Justice B.R. Burrows; C.W. Dalton; A. de Villars, Q.C.; Her Honour Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin; P.J.M. Lown, Q.C. (Director); Dr. S.L. Martin, Q.C.; Dr. D.R. Owram; The Hon. Madam Justice B.L. Rawlins; N.C. Wittmann, Q.C. (Chairman); and Professor R.J. Wood.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); R.H. Bowes; C. Gauk; J. Henderson-Lypkie, M.A. Shone and V.R. Stevenson. W.H. Hurlburt, Q.C. is a consultant to the Institute.

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ACKNOWLEDGEMENTS

To take on a wholesale revision of provincial family law is an ambitious task. Not only is the task a comprehensive one, but it is also one which requires appropriate balancing of the interplay between different elements in the family law legislation, and an ability to keep up-to-date in an area where social attitudes, public policy, and the law are rapidly changing. Finding this balance has been a challenge. For example, when we first commenced the project, we did not anticipate the existence of child support guidelines and the effect they would have on provincial support legislation. However, despite the added time which is necessitated by the need to accommodate such changes, the materials are current as of June 1998.

There are a number of people who must be acknowledged for their contribution to this collection of reports for discussion. This has always been a special project, funded by the Law Foundation as part of its special projects fund. We acknowledge not only the financing, but also the understanding and patience of the Foundation, while the project has undergone some redefinition and expansion, and while the work has been internalized from external consultant to internal counsel.

The preliminary research work was carried out by Professor Julien Payne from the University of Ottawa, who had assisted the Institute in previous projects relating to family law. Professor Payne took the first cut at many of the areas which are covered in these Reports for Discussion. When the work was brought in-house, the counsel in charge of the project was Ms. Margaret Shone, and it is Ms. Shone who has borne the responsibility for carrying and managing the project through its redefinition, expansion, and various updates to its present form. This large and challenging task takes considerable time, effort, and attention, and we acknowledge with gratitude Mrs. Shone's dedication to the task at hand.

Early in the project, we were able to use the services of a consultative committee whose names are set out at the end of these acknowledgements. Madam Justice Russell also attended some of the meetings with respect to child support. Later in the project, we relied more heavily on a number of readers and commentators who took the time to examine our drafts and recommendations in detail and provide feedback on them. In particular we would like to acknowledge the assistance of Ms. Jeanette Fedorak from the Department of Justice, Ms. Jean McBean from the firm of McBean Becker, Ms. Terry Hodgkinson from the firm of Barr Picard, and Judge Hugh Landerkin from the Provincial Court Family Division in Calgary.

Our Board, as always, is assiduous in its review and commentary on the policy issues that are put before it, and the reports which describe issues and decisions. Two Board members in particular have made a very significant

contribution to this project, and it is appropriate to single out the contribution of Judge Nancy Flatters and Dr. William Hurlburt.

As with any Institute project, there are many others who have given willingly and gladly of their time to attend meetings, answer questions, or provide feedback on specific issues. To the many who fall into that category, we thank you for your understanding and contribution.

The next phase in this project will be to coordinate our efforts with the Department of Justice and the Department of Family and Social Services, as the Provincial legislative agenda unfolds over the next 3 to 4 years. We look forward to receipt of the views and comments of all those who are interested in and work in the area of family law. Those comments will be incorporated into the final product, which we hope will provide a more modern and rational family law scheme for the Province of Alberta.

Project Committee Members:

Annalise Acorn
Christine Davies, Q.C.
W.H. Hurlburt, Q.C.
Leonard J. Pollock, Q.C.
Bruce Ziff
Clark W. Dalton
Peggy Hartman
Jean M. McBean, Q.C.
Peter Lown, Q.C.

PREFACE

This report is designed to be read in conjunction with ALRI RFD No. 18.1, *Family Law Project Overview*.

The *Overview* shapes the framework for consideration of the issues raised in ALRI RFD No. 18.2 on *Spousal Support*, ALRI RFD No. 18.3 on *Child Support* and ALRI RFD No. 18.4 on *Child Guardianship, Custody and Access*. It also provides background information that is common to all three RFDs.

The *Overview* is designed so that it can be read in conjunction with any one of these RFD's individually or the set as a whole.

Following consultation and the finalization of the recommendations in these three reports and in Report No. 65 on *Family Relations: Obsolete Actions*, published in March 1993, we intend to propose that all of our recommendations be consolidated into a single family law statute for Alberta.

INVITATION TO COMMENT

The Reports for Discussion (RFDs) are not final reports. They are reports of our tentative conclusions and proposals. The ALRI's purpose in issuing the Reports for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and to make their views known to the ALRI. Any comments sent to the ALRI will be considered when the ALRI Board of Directors determines what final recommendation, if any, it will make to the Alberta Minister of Justice and Attorney-General.

Comments on this report should be in the Institute's hands by June 30, 1999. Comments in writing are preferred. Our address is:

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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
MOA	*Maintenance Order Act*
P&MA	*Parentage and Maintenance Act*
PCA	*Provincial Court Act*
RFD	Report for Discussion
SCA	*Surrogate Court Act*
SCC	Supreme Court of Canada

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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.

PART I — SUMMARY OF REPORT

Until recently, in Alberta and elsewhere, child support law gave the courts an essentially unfettered discretion to determine child support by weighing the needs of the child in relation to the ability of the child's parents to pay. That law was criticized for: (1) inadequate levels of child support (the leadership shown by the Alberta Court of Appeal in its judgment in the case of *Levesque* v. *Levesque* and the recent introduction of Federal Child Support Guidelines under the *Divorce Act* amendments help to meet this criticism); (2) inconsistencies in comparable family situations; (3) inefficiency in assessment processes; (4) inequalities based on the birth of a child within or outside marriage; and (5) complexities arising from the interconnectedness of child support, spousal support and child custody and access. The recommendations we make in this Report for Discussion (RFD) address these criticisms.

This 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. 18.3, we make recommendations with respect to the financial support obligations owed by parents, including persons standing in the place of parents, to their children. We fashion an action for child support that is based on the relationship between parent and child, irrespective of the relationship that exists between the child's parents and irrespective of the different living arrangements in which a child may be placed. Our recommendations foster equality among children by eliminating out-dated distinctions having to do with a child's status in a family as either a "child of the marriage" or a child born outside marriage.

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

Section I: Introduction

1. Child support premises

In Chapter 1, we develop two underlying "premises" that are specific to child support. They are that: (1) child support should be determined separately from spousal support; and (2) child support should take priority over spousal support, as it does under the *Divorce Act*. In divorce cases, we adopt for child support the position we took for spousal support. It is that, except where a provincial order that existed before divorce is superseded by an order granted in the divorce proceedings, the courts having jurisdiction over child support should continue to have jurisdiction under provincial legislation.

Section II: Child Support Obligation

2. Basic obligation

In Chapter 2, we examine the basic child support obligation and determine that children's support rights should be the same no matter what the relationship between the child's parents, be it marital or non-marital, cohabitational or non-cohabitational. We determine that the child support obligation embodies, or should embody, six other characteristics. They are that the obligation: (1) is owed jointly by the father and mother; (2) commences at the child's birth; (3) continues until the child reaches maturity; (4) exists independently of parental custody, access or other living arrangements; (5) is quantified by need and ability to pay; and (6) may be imposed on persons standing in the place of parents, in addition to the father and mother.

We define "parent" to mean the mother or father of a child, as determined by biological connection, adoption or a court finding. We define a "person standing in the place of a parent" to mean a person who has demonstrated a settled intention to treat a child as a child of their family.

When does a child reach maturity? Our basic cut-off age is 28 years. We require a parent to pay support for a child who is under 18 years of age and has not withdrawn from their charge. Sometimes, a child who is 18 years of age or over remains under parental charge by reason of illness, disability, or other cause. Where, for one of these reasons, a child is unable to withdraw from parental charge or to obtain the necessaries of life, the child's parents should continue to have an obligation to support the child.

2. Child support objectives

The right of a child to be supported by both parents is clear under the existing law. Under modern federal, provincial and territorial legislation in Canada, parents share the child support obligation jointly. The parents are required to contribute in proportion to their respective abilities to pay. The issues are: (1) what level of support should the child receive; (2) what proportion of support should each parent contribute; and (3) how long should the support obligation last? We discuss these issues in Chapter 3. With respect to (3), in our view, it is desirable that children become economically self-sufficient upon, or within a reasonable time after, attaining 18 years of age. With respect to (1) and (2), after discussing various approaches that have been advanced for quantifying child support, we conclude that child support law should foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child under 18 years of age, or 18 years of age or over, as defined in Chapter 2. The court should have power to make an order of child support against each parent.

3. Implementing the objectives

Different approaches could be taken to the enactment of laws designed to achieve the child support objectives. In Chapter 4, we compare the advantages and disadvantages of judicial discretion, on the one hand, and child support guidelines, on the other hand. We conclude by recommending that Alberta apply the child support guidelines provided under the *Divorce Act* (the Federal Child Support Guidelines), including the Schedules, to cases decided under Alberta law. This recommendation fosters our General Premise that consistency with the federal legislation is desirable.

4. Mother's birth-related expenses and other substantive issues

In Chapter 5, we examine two ancillary issues. We make recommendations to empower the court to order a parent to pay: (1) reasonable expenses for the

support of the mother for up to 3 months preceding the birth, at the birth, and after the birth for a period made necessary as a consequence of the birth; and (2) burial expenses for the child, or the mother if she dies as a consequence of the pregnancy or birth. We consider but decide against changing the law to make the parents of a child liable for necessaries provided to that child by a third party.

5. Domestic contracts

What effect should a written agreement made between a child's parents have on the jurisdiction of the court to make a child 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. Rather than refer to a "domestic contract," as we did in RFD No. 18.2 on *Spousal Support*, we choose to speak of a "child support agreement" which two persons enter into with respect to the support of their child. Our definition would include a domestic contract that makes provision for child support but, unlike a domestic contract, it would also include an agreement by parents who have never lived together. Subject to five modifications, we endorse the recommendation that we made with respect to domestic contracts in ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*. Under that recommendation, the court would be able to disregard any provision of a domestic contract where to do so is in the best interests of the child. The five modification are that the recommendation should: (1) extend to any child support agreement; (2) specify that either parent may apply for relief from the provisions in a child support agreement; (3) empower the court to vary, discharge or temporarily suspend and again revive the provisions in a child support agreement; (4) require the court to record its reasons where it upholds an agreement that provides for child support in an amount that is different from the amount that would be determined in accordance with the applicable child support guidelines; and (5) empower the court to make an order confirming whether or not the child support agreement constitutes a final settlement of the child support obligation and that compliance discharges all future child support claims.

6. Persons standing in the place of a parent

Several questions arise with respect to the position of a person who stands in the place of a parent to a child. Should persons who are not parents ever have a child support obligation? If yes, how should those persons be defined? When

should the obligation commence? How long should it last? How should the child support obligation be apportioned between parents and non-parents? We discuss possible responses to these questions in Chapter 7. Because the circumstances vary considerably from case to case, we conclude that, of the alternatives, judicial discretion is the best choice. Specifically, we recommend the court should have discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship.

Section III: Court Proceedings

1. Applicants

Questions exist about who may apply for a child support order. In Chapter 8, we recommend that the child or any person acting on behalf, or in the place, of the child should be able to apply for a child support order, an interim order or a variation order. In addition, the personal representative of a deceased parent (or person standing in the place of a parent) should be able to apply to vary an order that requires the deceased parent to pay support. We further recommend that the court should be able to order child support in an application for support for a spouse or parent, whether or not application has been made on behalf of the child.

The mother, or any person acting on behalf, or in the place, of the mother should be able to apply for an order for the payment of expenses relating to her pregnancy before, at and after the child's birth. Any person who has incurred burial expenses for the child or the mother, where the mother died as a consequence of the pregnancy or birth, should be eligible to apply to have those expenses reimbursed by a parent or parents.

The *Parentage and Maintenance Act* provides for the appointment of a Director who is authorized to assist in obtaining child support and payment of the mother's expenses. We recommend that this assistance be continued where the parent or another person having the care and control of the child is receiving, or has received, public financial assistance in order to support the child or mother.

2. Child 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 child 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 of property owned by a parent, or to vary an existing settlement, of property;

to order a parent 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 (but only after notice to all persons who may be entitled to be added as parties to the proceeding);

to order a parent 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 their child;

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 parent for inadequate consideration.

In addition, we make recommendations for the registration of child support orders and orders that affect interests in real or personal property. Finally, we recommend that, where it is satisfied that the order would be in the child's best interests, 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 parents.

3. Variation order

Over time, the needs of the child or the financial circumstances of the parents may change or evidence that was not previously available may come to light. For this reason, the court must have power to vary a child support order. In Chapter 10, we recommend that child support orders should be subject to variation or discharge in the circumstances described in the Federal Child Support Guidelines. The court should have power to make an order varying or suspending or discharging, prospectively or retroactively, a child support order or any provision in it where a change of circumstances has occurred since the making of the previous child support order or evidence of a substantial nature not available on the previous hearing has become available. 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 child 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 child 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 child support to the fullest extent constitutionally allowable.

4. Interim support order

Interim support orders allow the court to fill the child 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 child support order.

5. Duration of order

A child 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 child support order. With respect to the terms of a child 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; and

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;

With respect to the operation of law, we recommend that a child support order should survive the death of a parent 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 child receiving support, except where the court expressly declares otherwise (arrears of support accumulated while the child was alive should continue to be enforceable);

on the adoption of the child receiving support; and

where a child's parents commence and continue, or resume and continue, to cohabit for a period of more than ninety days.

The jurisdiction of the court under Alberta law should continue in effect unless and until a court makes a child 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 child support order or an appeal is adjudicated.

6. Related court powers

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

to add as a party another person who may have an obligation to provide support to the child;

to order that support be paid directly to the child, or into court or to a third party for the benefit of the child receiving support;

to require advance financial disclosure by the parents (or other person having child support obligation) or by a parent'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 parent;

to direct some degree of privacy in a child 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 parent'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 child support legislation should operate retroactively.

PART II — REPORT FOR DISCUSSION

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 *Child Support* and the companion RFDs on *Spousal 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 is about the right of a child to be supported by the child's parents, including persons standing in the place of parents. It does not examine the support obligation owed by extended family members. The obligation of family members to support each other is a private law obligation.

As we stated in RFD No. 18.2, our primary objective for spousal support is to modernize Alberta's out-of-date law – much of which has been little used since the enactment of federal divorce legislation in 1968.

Alberta's child support laws also require modernization. Although the principles that govern the award of child support are reasonably clear — the needs of the child weighed in relation to the ability of the parents to pay — the application of these principles to individual cases is not. The number of variables at work make it difficult for litigants, lawyers and judges to apply the principles evenly and consistently.

In one respect, the need for the reform of child support law goes further than the need for reform of spousal support law. For child support, the federal divorce legislation includes provision for child support as relief corollary to divorce, but that support is limited to "children of the marriage." Ordinarily, it does not include children born outside marriage although some children born outside marriage do fall within the definition of "children of the marriage." Because the support of children born outside marriage is a matter for provincial law, until recently, the *Divorce Act* has not had as wide-ranging an impact on child support as it has had on spousal support.[1]

We take the view that the principles underlying child support should be applied consistently irrespective of the relationship that exists between the child's parents and the different living arrangements in which a child may placed. Our view flows from General Premise 4, espoused in RFD No. 18.1, in support of equality among children.

This report follows the same order of development as RFD No. 18.2 on *Spousal Support*. As in RFD No. 18.2, it 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 two recommendations embodying certain premises that underlie our views on child support.

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[1] In practice, cases falling within provincial law under the *P&MA* are being resolved by applying the newly-enacted Federal Child Support Guidelines: *infra* note 143.

Section II deals with the child support obligation. It includes: Chapter 2, which embodies a discussion of the nature of the child support obligation; Chapter 3, which elaborates on the objectives of child support orders and the quantification of support awards; Chapter 4, which describes various legislative approaches that can be taken to the quantification of child support; Chapter 5, which explores two related issues—the recovery of birth expenses and the possibility of imposing liability on parents for necessaries provided to a minor child; Chapter 6, which examines the effect of domestic contracts on the jurisdiction of the court; and Chapter 7, which examines the obligations of persons who stand in the place of a parent in relation to a child.

Section III is on matters relating to court proceedings for child support. It includes: Chapter 8, which defines the persons who may apply for child support; Chapters 9, 10 and 11, which set out the central powers a court requires in relation to a child support order, variation order or interim support order, respectively; Chapter 12, which considers the question of the duration of a support order; and Chapter 13, which addresses additional powers a court should have in child 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 "child support" is used to signify financial support rights and obligations which exist between adults, usually the parents, and children. Such use of the term "support" is consistent with the language currently used in the federal *Divorce Act*. We use the term "support" in place of the word "maintenance" to avoid the current confusion between the meanings of "alimony" and "maintenance" under the existing law of spousal support.

D. Statutory Framework

Within Alberta, significant differences result from the existence of two bodies of child support law. The division is based on the status of a child as a

"legitimate child" or "child of the marriage" or as an "illegitimate child" or "child born of parents who are not married to each other."

1. Support obligation

In Alberta, the *Maintenance Order Act* (*MOA*) requires parents to support their legitimate child under age 16.[2] A legitimate child is a child who was conceived or born within marriage, or who was conceived or born outside marriage but whose parents married subsequently.[3] It includes a couple's adopted child.[4] The mother is not liable unless the father is unable and the mother is able to support the child.[5]

Parents are also required to support their legitimate child age 16 years or over who is disabled or destitute.[6] Enforcement of this obligation has been rare since the establishment in Canada of a social safety net, but recent cases indicate a possible revival of its use in times of economic downturn and government spending cuts.[7]

The Alberta Court of Queen's Bench held that the exclusion of an illegitimate child from the definition of "child" in the *MOA* violates the *Canadian Charter of Rights and Freedoms* and cannot be saved by section 1

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[2] *Maintenance Order Act*, R.S.A. 1980, c. M-1, ss 2(2) and 3(1). The *MOA* also imposes child support obligations on grandparents (as defined in s. 1, "father" includes grandfather and "mother" includes grandmother): *ibid.*, ss 2(2), but these obligations do not arise unless the father and mother are both unable and the grandparent is able to provide support: *ibid.*, ss 3(2)(b) and (c). The grandmother is liable only if the grandfather is unable to provide support: *ibid.*, s. 3(2)(c).

[3] *Legitimacy Act*, R.S.A. 1980, c. L-11, s. 1.

[4] *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 65.

[5] *MOA*, s. 3(2)(a).

[6] *Ibid.*, 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 adequate food, clothing, medical aid and lodging. This obligation also extends to grandparents: see footnote 1.

[7] Five cases involving the *MOA* have been reported since 1990: *Pile Base Contractors 1987 Ltd.* v. *Pasichnyk* (1993), 15 Alta. L.R. (3d) 319, 145 A.R. 313, W.A.C. 313 (C.A.); and *Zwicker (next friend of)* v. *Zwicker*, [1994] 151 A.R. 238, A.W.L.D. 334 (Q.B.); *Wani* v. *Wani* (1994), 163 A.R. 319 (Q.B.); *Massingham-Pearce* v. *Konkolus* (1995), 29 Alta. L.R. (3d) 283; and *R.* v. *Windelaar* (1996), 40 Alta. L.R. (3d) 376 (Prov. Ct.). A sixth case was reported in 1976: *Re F* (1976), 27 R.F.L. 371 (Juv. Ct.)

of the *Charter*. The Court remedied the defect by reading an illegitimate child into the definition.[8]

The *Parentage and Maintenance Act* (*P&MA*) requires the mother and father to support an illegitimate child, that is, a child born outside marriage.[9] The support obligation is not stated directly, as it is in the *MOA*. An illegitimate child is not entitled to be supported by a grandparent.[10]

The provisions in both the *MOA* and the *P&MA* originated with England's *Poor Law Acts* which commenced in 1576. The *Poor Law Acts* had the purpose of relieving the financial burden born by the local parish. As in the case of spousal support, under the existing Alberta law the only direct statement of the child support obligation is in the *MOA*. Under the *DRA* and *P&MA*, the obligation must be inferred from the power conferred on the court to award support.

2. Obtaining child support

In Alberta, the situation with respect to child support is more complex than it is with respect to spousal support.

Federally, the *Divorce Act* authorizes child support to be granted for "children of the marriage" as relief corollary to divorce. Children of the marriage include a child whom the spouses have accepted as their own. Among the children included could be a child born to one parent who has been accepted by that parent's spouse as a member of their family.

In addition to the federal *Divorce Act*, three provincial statutes provide different avenues for obtaining child support.[11] The *MOA* and the *Domestic Relations Act* (*DRA*) – Alberta's principal family law statute – govern the support of a legitimate child. The *P&MA* governs the support of a child born

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[8] *Massingham-Pearce* v. *Konkolus*, *ibid.*

[9] *Parentage and Maintenance Act*, S.A. 1990, c. P-0.7, proclaimed in effect Jan. 1, 1991.

[10] Nor does such a child have a concomitant obligation to support the parents or grandparents who are disabled or destitute.

[11] In addition, the *Provincial Court Act* (*PCA*), s. 30(1), empowers the Provincial Court to order child support on an interim basis during the adjournment of a hearing with respect to a spousal support order.

outside marriage. Part 6 of the *DRA* may also embrace a child born outside marriage, at least in some circumstances. In later chapters, we say more about the specific provisions in these statutes.

E. Need for Reform: Deficiencies of the Existing Law

The need for the reform of child support law arises from a number of shortcomings in the law which, until recently, permitted courts to exercise an essentially unfettered discretion over child support. The shortcomings have included:

(i) inadequate levels of child support (until recently),[12]

(ii) inconsistencies in comparable family situations,

(iii) inefficiency in assessment processes,

(iv) inequalities based on the birth of a child within or outside marriage, and

(v) complexities arising from the interconnectedness of child support, spousal support and child custody and access.

As one commentator has observed:[13]

> The real difficulty may well lie in the failure of the law to articulate a rationale which explains the basis of child support and which can perhaps be used to define its [purpose and] duration.

Under laws conferring judicial discretion, the needs of the child and the ability of the parents to pay have formed the cornerstone of child support rights and obligations. Lawyers and courts have followed a case by case approach to the assessment of child support. In their statements of principle, courts have asserted that the needs of the child take precedence over the needs of the parents. However, empirical data have made it clear that, far from according "a higher standard of living in the home in which the children

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[12] For recent changes, see the judgments in the cases of *Levesque* v. *Levesque*, *Birmingham* v. *Birmingham* and *Willick* v. *Willick*, *infra,* notes 15, 16 and 17; see also *infra*, heading F., for an introduction to the Federal Child Support Guidelines which took effect under the *Divorce Act* on May 1, 1997.

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

are supported,"[14] the traditional case by case approach frequently has relegated the household where the child lives to a state of poverty.

Until recently, courts have focused on the non-custodial parent's ability to pay child support after the deduction of that parent's ongoing personal expenses, the payment of that parent's debts and that parent's contribution toward meeting the needs of persons in that parent's current household. The account of these financial items has usually reflected an attempt by the non-custodial parent to enjoy to the fullest extent possible the same standard of living as that enjoyed when the family was intact.

This approach changed with the judgments of the Alberta Court of Appeal in *Levesque* v. *Levesque*[15] and *Birmingham* v. *Birmingham*[16] and the subsequent judgment of the Supreme Court of Canada in *Willick* v. *Willick*.[17] Legislatively, the federal government has legislated child support guidelines for courts to apply in determining child support awards in divorce cases.

F. A New Federal Approach

On March 6, 1996, in the budget speech to Parliament, the federal government announced a new child support strategy.[18] The strategy is described in "The New Child Support Package" – a booklet released the same day. The strategy has four "pillars":

- amendment of the *Income Tax Act* "to eliminate both the requirement to include child support in the custodial parent's taxable income and the deduction available to payers of child support"

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[14] *Paras* v. *Paras*, *infra*, note 24.

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

[16] *Birmingham* v. *Birmingham*, [1994] 8 W.W.R. 589.

[17] *Willick* v. *Willick* (1994), 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161 (S.C.C.) (hereinafter cited to R.F.L.).

[18] Department of Justice media release, "Government Announced New Child Support Strategy," issued March 6, 1996.

- amendment of the *Divorce Act* to allow for the introduction, by regulatory process, of federal child support guidelines "that will establish fairer and more consistent child support payments"

- strengthening of federal enforcement procedures "to help provincial and territorial enforcement agencies ensure that family support obligations are respected"

- over the next two years, doubling the maximum annual level of the Working Income Supplement (WIS) "to help low-income parents meet the extra costs related to their participation in the work force"

On February 19, 1997, Parliament passed legislation to implement the key components of this strategy. The legislation, which was introduced on May 30, 1996 as Bill C-41, amends the *Divorce Act* to create a framework for the use of child support guidelines and provide for their establishment by regulation.[19] Other provisions in the legislation facilitate the enforcement of child support payments.

On May 1, 1997, the new child support strategy came into effect. The package included Federal Child Support Guidelines (the "Guidelines") promulgated under the *Divorce Act*.[20] These Guidelines are described in more detail in Chapter 3 of this report.[21] They operate presumptively in the majority of child support cases brought under the federal *Divorce Act*. The appearance of this reform on the horizon significantly changes the landscape of child support law reform in Alberta.

Amendments to the *Income Tax Act* came into effect on the same date. According to the Department of Justice:[22]

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[19] Department of Justice media release, "Child Support Bill Receives Royal Assent," issued February 20, 1997. In June 1996, the federal Department of Justice issued a document entitled *A Working Draft of the Federal Child Support Guidelines* for public consultation purposes.

[20] *Infra*, note 143.

[21] See *infra* Chapter 3, heading B.2.A.

[22] *Ibid.*

> This legislation [*i.e.*, the Bill C-41 amendments] is part of the federal government's Child Support Initiative which also includes new tax rules for child support payments. Child support paid under a written agreement or court order made on or after May 1, 1997 will no longer be deductible to the payer, or included in the income of the recipient for tax purposes. The new tax treatment will not apply retroactively or automatically to existing orders unless either party applies for a variation in the amount of child support after April 30, 1997. Parents who want the new tax treatment to apply without modifying the amount of their existing order or agreement can do so by filing a form with Revenue Canada.

The *Divorce Act* amendments and Federal Child Support Guidelines are based on the work of the Federal/Provincial/Territorial Family Law Committee (FPTFLC) on which Alberta is represented by a lawyer from Alberta Justice. The FPTFLC published papers and reports at certain stages of its progress toward the development of recommendations. These documents are:

Discussion Paper, *Child Support: Public Discussion Paper* (June 1991)

Research Report, *The Financial Implications of Child Support Guidelines* (May 1992)

Report and Recommendations on Child Support (January 1995)

The federal Department of Justice undertook a related study on behalf of the FPTFLC:

An Overview of the Research Program to Develop a Canadian Child Support Formula (January 1995) (prepared by Ross Finnie, Carolina Giliberti and Daniel Stripinis for the Department of Justice on behalf of the FPTFLC)

G. Premises Underlying ALRI Views on Child Support

1. Relationship between child support and spousal support

The *Divorce Act* separates child support from spousal support, thereby distinguishing the factors that affect the awards. The argument for keeping child and spousal support distinct is stronger for provincial than federal family law because the right of children to obtain support from their parents under provincial law is not tied to the parents' marriage and divorce.

As stated in the RFD No. 18.1 [*Overview*], we think that it is desirable 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 bites.

The relationship between spousal support and child support is discussed at some length in chapter 1 of RFD No. 18.2 on *Spousal Support*.

RECOMMENDATION No. 1.3

Child support should be determined separately from spousal support.

2. Priority of needs of children

Should all or any child support obligations take precedence over spousal support rights and obligations?

The *Divorce Act* requires the court, where it is considering applications for child support and spousal support, to "give priority to child support in determining the applications."[23] This provision was enacted as part of the legislation introduced in order to implement the new child support strategy.

Prior to May 1, 1997, when the *Divorce Act* amendments and the Federal Child Support Guidelines took effect, case law under the *Divorce Act* established that, on marriage breakdown, "the objective of maintaining the children [at the same standard of living they would have enjoyed had the family break-up not occurred] has priority over the right of either parent to continue to enjoy the same standard of living to which he or she was accustomed when living together."[24]

The reality remains that children usually suffer financial cutbacks after marriage breakdown. In a great many cases the resources of the parents will

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[23] *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 15.3(1).

[24] *Paras* v. *Paras*, [1971] 1 O.R. 130 at 134-135, 2 R.F.L. 328 at 331-332, 14 D.L.R. (3d) 546 at 550 (Ont. C.A.). This principle was confirmed by the Alberta Court of Appeal in *Levesque* v. *Levesque* and by the Supreme Court of Canada in *Willick* v. *Willick*.

be inadequate to maintain the children and parents at their former standard of living. Divorce does not generate additional resources. It increases expenses without any correlative increase in family income and it is axiomatic that two households cannot live as cheaply as one. Only wealthy separated or divorced parents can preserve their children's former lifestyles. And rich parents are few and far between.

The fact that finances are usually tighter after marriage breakdown does not answer the question whether, as a matter of principle, the child support obligation should take priority over the spousal support obligation. Many law reformers think that this principle should be set out in legislation.

The Law Commission in England has endorsed giving legislative priority to the needs of children. The Commission found a "wide measure of agreement ... that the law should seek to emphasize as a priority the necessity to make such financial provision as would safeguard the maintenance and welfare of the children."[25] It thought "there would be important advantages if the legislation were clearly to embody the principle that the interests of the children should be seen as a matter of overriding importance."[26] Under the Commission's proposal:

> The court would be directed to take account of the interests of the children in deciding what support would be appropriate for the custodial parent. For example, the court might well decide that it would be inappropriate to make an order which would require the wife to work full-time while the children were still at school.

The Law Commission identified two advantages that would flow from giving priority to the needs of children:

> First, adequate recognition would be given to the value of the custodial parent's role, whilst discouraging the belief that such payments may be regarded as an automatic life-time provision intended for the benefit of the custodial parent (usually, of course, the wife) perhaps for many years after the children have ceased to live with her. Secondly, it is (we understand) often the case that the allocation of a larger proportion of the overall maintenance provision for the children's benefit makes the maintenance obligations more acceptable to the payer (usually, of course, the father).

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[25] 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. 24-25.

[26] *Ibid.*

In ALRI Report No. 27 on *Matrimonial Support*, we concluded that the "protection of children is an overriding object of the law" and "their interests must come first."[27] We recommended that Alberta legislation expressly declare that spousal support rights and obligations are "subject to a liability of either party to support a child."[28]

We continue to agree in principle that meeting the needs of children is a priority for society. We recommend that Alberta legislation should follow the *Divorce Act* in expressly requiring the court, where it is considering applications for child support and spousal support, to give priority to child support in determining the applications.

RECOMMENDATION No. 2.3

Alberta legislation should expressly require the court, where it is considering applications for child support and spousal support, to give priority to child support in determining the applications.

3. Interconnectedness of spousal support, child support and child custody and access

As explained in RFD No. 18.1 [*Overview*], we have decided to discuss the issues relating to spousal support, child support, and child guardianship, custody and access in three separate RFDs. We remind the reader that all three areas of law are closely interconnected. The intricacies of these relationships should be kept in mind when reading this RFD and the companion RFDs on spousal support and child guardianship, custody and access.

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[27] ALRI Report No. 27, *Matrimonial Support* (March 1978) at 23 and 29.

[28] *Ibid.* at 20 (Rec. #2).

4. Relationship between past and present families[29]

(When reading this discussion, please note that we have devoted Chapter 7 to an examination of the effect on a parent's child support obligation of the addition of a stepparent or other person who has assumed a parental role toward the child.)

During the course of a child's life, it is not uncommon for one or both parents to change partners. On marriage breakdown or marriage dissolution, a parent may enter into a new cohabitational relationship or remarry. A partner in a cohabiting relationship may terminate one relationship and form another. A single parent may marry or enter into a cohabitational relationship. A new partner may have spousal or child support rights or obligations from a previous relationship. The formation of new relationships and the creation of reconstituted or blended families places strain on limited financial resources and introduces fundamental policy issues.

a. Complexity of issues

Sequential family relationships raise numerous questions for child support. The answers to the questions may differ depending on which parent has formed the new relationship — the custodial parent or the non-custodial parent. For example, to what extent should the payment of periodic child support be affected by the assumption of responsibility by the parent having the support obligation to support dependents in a new relationship? Should the financial resources of a custodial or non-custodial parent's new partner be relevant to the adjudication of the support rights of children of a former marriage or relationship?

b. Variety of new parent relationships

The new relationship may consist of remarriage or cohabitation. Both kinds of relationship involve economic consequences. They may remove a financial need that arose on the breakdown or dissolution of a previous marriage or cohabitational relationship; they may reinforce that need; or they may create a new financial dependence where, for example, children are born of the new

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[29] The following analysis 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 Alberta Law Reform Institute, June 5, 1982, at II-109 to II-148. For ready access to this material, see *Payne's Divorce and Family Law Digest*, 1982-741 to 767: The Formation of New Relationships: Present and Prospective Judicial and Legislative Responses.

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. In divorce cases, courts have stated that the court must also consider the needs of the children of a second marriage because their right to support is equal in all respects to those of the children of the first marriage.[30]

c. Scope of provincial jurisdiction

With respect to child support, the focus is on the relationship between parent and child rather than the relationship changes experienced by the child's parents.

Generally, the province possesses the primary legislative jurisdiction over the relationship between parent and child. The province has jurisdiction to legislate with respect to child support for a child whose parents are not married to each other, are or have been married to each other, or have remarried where the former marriage was void, or, if voidable, annulled by the court.

Where the parents of a child are married to each other but the marriage has broken down, child support may be resolved as an issue corollary to divorce. But the fact that a marriage has broken down 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 with respect to a child whose parents are married but separated and living in new cohabitational relationships. As in the case of spousal support, it possibly embraces cases where the divorce court has remained silent on the issues of support rights and obligations and a support order was made under provincial legislation prior to the divorce.

H. Importance of Federal/Provincial Cooperation

The principles we endorsed in RFD No. 18.1 [*Overview*] emphasize the importance of the compatibility of provincial family law with the federal *Divorce Act* and consistency with other provincial laws. Given the importance of compatibility between federal divorce legislation and provincial statutory

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[30] See *e.g.*, *Coutts* v. *Coutts* (1995), 14 R.F.L. (4th) 234 (Sask. Q.B.), at 239, considered in *Kary* v. *Kary* (1996), 194 A.R. 194 (Alta. Q.B.), at 199; see also *Willick* v. *Willick*, *supra*, note 17, at 733 and 738 (S.C.R.).

support regimes, federal and provincial cooperation is vital, even if each level of government is constitutionally free to go its own way.

The creation of the Federal/Provincial/Territorial Family Law Committee represents a significant step toward achieving consistency in Canada's family law. In Alberta, lawyers with Alberta Justice worked with the FPTFLC in developing recommendations for the Federal Child Support Guidelines introduced under the *Divorce Act*.[31] These Guidelines are intended to assist the quantification of child support awards and the apportionment between parents of the responsibility for paying support.

In its work on child support, the FPTFLC has espoused the eight principles of child support. These principles are very similar to the understandings that have guided our examination of Alberta's child support law, and we endorse them:[32]

> #1 PARENTS HAVE LEGAL RESPONSIBILITY FOR THE FINANCIAL SUPPORT OF THEIR CHILDREN.
>
> #2 CHILD SUPPORT LEGISLATION SHOULD NOT DISTINGUISH BETWEEN THE PARENTS OR CHILDREN ON THE BASIS OF SEX.
>
> #3 THE DETERMINATION OF CHILD SUPPORT SHOULD BE MADE WITHOUT REGARD TO THE MARITAL STATUS OF THE PARENTS.
>
> #4 RESPONSIBILITY FOR THE FINANCIAL SUPPORT OF CHILDREN SHOULD BE IN PROPORTION TO THE MEANS OF EACH PARENT..
>
> #5 IN DETERMINING THE MEANS OF EACH PARENT, HIS OR HER MINIMUM NEEDS SHOULD BE TAKEN INTO CONSIDERATION.
>
> #6 LEVELS OF CHILD SUPPORT SHOULD BE ESTABLISHED IN RELATION TO PARENTAL MEANS.
>
> #7 WHILE EACH CHILD OF A PARENT HAS AN EQUAL RIGHT TO SUPPORT, IN MULTIPLE FAMILY SITUATIONS THE INTERESTS OF ALL CHILDREN SHOULD BE CONSIDERED.
>
> #8 THE DEVELOPMENT OF ANY NEW APPROACH TO THE DETERMINATION OF CHILD SUPPORT SHOULD MINIMIZE COLLATERAL EFFECTS (E.G. DISINCENTIVES TO REMARRIAGE, JOINT OR EXTENDED CUSTODY ARRANGEMENTS AND VOLUNTARY UNEMPLOYMENT OR

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[31] See *supra*, heading F.

[32] Department of Justice (Canada), *Child Support: Public Discussion Paper* (June 1991), at pp. 7-8.

UNDEREMPLOYMENT) TO THE EXTENT COMPATIBLE WITH THE OBLIGATION TO PAY CHILD SUPPORT.

CHAPTER 2 BASIC OBLIGATION

In this report, we make recommendations with respect to the support obligation owed by parents to their children. Child support rights and obligations are imposed provincially under the *Maintenance Order Act* (*MOA*), *Domestic Relations Act* (*DRA*) and *Parentage & Maintenance Act* and federally under the *Divorce Act*.

A. Existing Law[33]

1. Alberta

In Alberta, the *MOA* and the *DRA*, Parts 2, 3, 4 and 7 provide for the support of legitimate children or the children of a marriage.[34] The *P&MA* and, in some circumstances, Part 7 of the *DRA* provide for the support of children born outside marriage.[35] (As stated in Chapter 1, note 11, in addition, the *Provincial Court Act* (*PCA*), s. 30(1), empowers the Provincial Court to order child support on an interim basis during the adjournment of a hearing with respect to a spousal support order.)

a. *Maintenance Order Act*

As explained in chapter 1, the *MOA* places an obligation on the father and mother to support their legitimate child until the child reaches 16 years of age.[36] The obligation is to "provide maintenance, including adequate food,

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[33] See generally, Christine Davies, *Family Law in Canada* (Carswell, 1984) at 165-93 and 243-58.

[34] *MOA*, ss 2(2) and 3(1); but see *Massingham-Pearce* v. *Konkolus*, *supra*, note 7, regarding the inclusion of an illegitimate child.

[35] The *P&MA* also provides procedures for obtaining support for "a mother": *see* discussion in RFD No. 18.2 on *Spousal Support* at 95. "Mother" is defined to mean "the biological mother" or the "expectant mother" of a child born outside marriage: s. 1(j). The obligation (s. 16(2)) covers the "reasonable expenses" for her maintenance

(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.

[36] *Massingham-Pearce* v. *Konkolus*, *supra*, note 7.

clothing, medical aid and lodging."[37] It continues beyond that age if the child is disabled ("old, blind, lame, mentally deficient or impotent") or destitute.[38] No liability is imposed in favour of a child of any age who is able to maintain themself.[39] Before making an order, the Court must be satisfied that the liable parent is able to pay.[40]

The father bears the primary child support obligation. The mother's obligation arises only if the father is unable and the mother is able to support the child.[41] Grandparents who are able to support their grandchild have an obligation where neither the father nor the mother is able to support the child. The grandmother is liable only if the grandfather is unable to provide support.[42] 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.

b. *DRA*

A number of *DRA* provisions deal with the economic rights of a child:

- Parts 2 and 3, sections 13, 21, 23 and 24 (on marriage breakdown)[43]
- Part 4 (on the application of a deserted spouse)
- Part 7 (on an application for custody or access)

i. Parts 2 and 3

Sections 13, 21, 23 and 24 in Parts 2 and 3, are the only provisions of the *DRA* that regulate the economic rights of children on marriage breakdown, divorce or nullity of marriage. They have to do with the jurisdiction of the

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[37] *Ibid.*, s. 2(2).

[38] *Ibid.*, s. 2(1).

[39] *Ibid.*, s. 2(3).

[40] *MOA*, s. 4(1).

[41] *Ibid.*, s. 3(2)(a).

[42] *Ibid.*, s. 3(2)(c).

[43] 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 294.

Court of Queen's Bench to settle property for the benefit of the children. We review these powers in Chapter 9.

Section 24 also permits the court to order periodic payments for the benefit of children from the profit of trade or earnings of a spouse against whom a judgment for restitution for conjugal rights has been given. No criteria are provided to assist the court in making orders.

ii. Part 4

Part 4 of the *DRA*, which regulates the jurisdiction of the Provincial Court to grant periodic support to a deserted spouse, includes specific provisions on child support for the children of a married couple in the care of a spouse and for the legitimate children of a divorced couple where no support order exists.[44] These statutory provisions do not include criteria for quantifying child support,[45] although the word "reasonable" is used with respect to support for the children of a spouse who has been wronged by desertion or refusal or neglect to provide necessaries.[46]

Pursuant to a 1995 amendment, "child" is defined for the purposes of Part 4 in terms borrowed from the *Divorce Act* as it stood before May 1, 1997:

> 25.1 In this Part, "child" means a child who
> (a) is under the age of 16 years, or
> (b) is 16 years of age or over but unable, by reason of illness, disability or other cause, to withdraw from the charge of his parents or to obtain the necessaries of life.

iii. Part 7

Part 7 of the *DRA* allows the Court of Queen's Bench or a judge of the Surrogate Court sitting in chambers to make a child support order against the father or mother on an application for custody or access.[47] Part 7 also authorizes the court to order the parent or other responsible person to

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[44] *DRA*, s. 27.

[45] See generally, Christine Davies, *Family Law in Canada*, *supra*, note 33 at 253-56.

[46] *DRA*, s. 27(4).

[47] *DRA*, s. 56(5).

reimburse a person, school or institution for the costs incurred in bringing up a child.[48]

Part 7 uses the word "minor" to refer to a child. In Alberta, a "minor" is a child under 18 years of age, 18 years being the age of majority. This means that the child support obligation in Alberta differs depending on whether the application is brought in the Provincial Court under Part 4 or the Court of Queen's Bench under Part 7.

The *DRA* does not provide general definitions of "father" and "mother." Historically, the *DRA* applied to the children of married persons but section 56 is not so limited in its wording. There would seem to be no reason why it should not extend to a man whose parentage has been established and who has been added as a party to a custody or access application so that a child support order can be made against him. Whether or not a man has standing, as "father", to bring an application for custody or access under Part 7 is a different matter.[49]

c. *P&MA*

The *P&MA* requires the mother and father to support a child born outside marriage. The obligation includes the payment of :[50]

> (b) reasonable expenses for the maintenance of the child before the date of the order;
>
> (c) monthly or periodic payments for the maintenance of the child until the child reaches the age of 18 years;

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[48] *DRA*, s. 58.

[49] A 1991 amendment makes the father and mother joint guardians of their child and, for this purpose, "father" includes a man who cohabited with the mother for a least one year immediately before the child's birth. The 1991 amendment also empowers the Court to appoint as a guardian a person who has been declared to be a parent under Part 8 on Establishing Parentage. Traditionally, custody and access are incidents of guardianship. It is therefore likely that fathers who are guardians of children born outside marriage can bring an application under Part 7. In addition to fathers who are guardians, Part 8 raises a legal presumption that a man who is registered as the father of a child under the *Vital Statistics Act* is the father. A father in this category would not have standing to apply for custody or access. It is similarly questionable whether a man who is declared to be the father of a child but not appointed as a guardian would have standing to apply for custody or access under Part 7.

[50] *P&MA*, ss 6(2) (agreement) and 16(2) (court order).

(d) expenses of the burial of the child if the child dies before the date of the order.

The Act sets out that child support is to be fixed in an amount that "will enable the child to be maintained at a reasonable standard of living having regard to the financial resources of each of the child's parents." However, the Act does not provide criteria for quantifying "reasonable expenses" or "maintenance." In recent decisions, the Court of Queen's Bench has utilized the Federal Child Support Guidelines in determining the criteria for quantification.[51] A child support order may provide for payment to any person who assumes the care and control of the child.[52]

The inclusion of the mother as liable is new. Until 1991, predecessor legislation with a long history provided a summary procedure for establishing the paternity of fathers of illegitimate children for the purpose of imposing liability for child support.[53] Even though on its face the *P&MA* makes both parents liable, its main purpose continues to be use against fathers. In keeping with the history of this legislation, where the court is unable to make a specific determination, it can declare each of the persons who might be a parent to be a parent for the purposes of the Act.[54] In other words, for purposes of child support, more than one man may be declared to be the father of a child born outside marriage. As formerly, the province provides the assistance of a Director in pursuing this support.[55]

2. *Federal Divorce Act*

Under the *Divorce Act*, the Court of Queen's Bench of Alberta may grant interim or permanent support for a child.[56] As in the case of spousal support, interim support is available at once. The court must make its order in

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[51] *P&MA*, s. 16(4); see e.g. *Channer* v. *Hoffman-Turner* [1997] A.J. No. 1022 (Alta. Q.B.); *Tallman* v. *Tomke* [1997] A.J. No. 682, (1997) 204 A.R. 119 (Alta. Q.B.); *C.H.R.* v. *E.B.C.* [1997] A..J. No. 561 (Alta. Q.B.).

[52] *P&MA*, s. 17.

[53] *Maintenance and Recovery Act*, R.S.A. 1980, c. M-2.

[54] *P&MA*, s. 15(2).

[55] *P&MA*, s. 4.

[56] *Divorce Act*, ss 15.1(1), (2).

accordance with the applicable child support guidelines unless one of the exceptions set out in section 15.1(5) or (7) applies.[57]

3. Other provinces and territories

As stated in the *Overview*,[58] provincial legislation outside of Alberta has undergone radical changes in the last fifteen years. Provincial statutes which corresponded in content to Part 4 of the Alberta *DRA* have now been largely superseded by modern legislation that bears no resemblance to the traditional "deserted wives" legislation.[59] Provincial statutory support regimes are generally consistent with federal divorce legislation in that both parents are under an obligation to contribute towards meeting the reasonable needs of their child in accordance with their respective abilities to do so.[60]

B. Relevance of Birth Status of Child

1. Alberta law

The existing Alberta law requires parents to support their child, irrespective of the birth the child within or outside marriage. However, as the description of the existing law reveals, the statutory provisions and the route by which support is obtained differ depending on the child's birth status. In this respect, Alberta law continues to recognize the legal distinction drawn historically between legitimate and illegitimate birth.

The retention of this distinction is reflected in substantive and procedural differences. Substantive differences arise in the wording of the

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[57] *Ibid.*, s. 15.1(3).

[58] ALRI RFD No. 18.1 at 21.

[59] See Christine Davies, *Family Law in Canada*, *supra*, note 33 at 243-244; and see *ibid.* at 195-233 and 235-242. The former provincial statutes were known as *Deserted Wives and Children's Maintenance Acts.*

[60] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 89; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 113; *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 37; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 8; *Family Law Act*, R.S.O. 1990, c. F.3, s. 31; *Family Law Act*, .S.P.E.I. 1995, c. 12, s. 31; *Québec Civil Code*, art. 647; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 3; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 32. As for the obligations of a person standing in the place of a parent, see *infra*, Chapter 7.

obligation, the age to which the obligation extends,[61] the determination of who is a "parent"[62] and the standard of support specified.[63]

The definition of "children of the marriage" in the *Divorce Act* includes a child 18 years of age or over who is "unable, by reason of illness, disability or other cause, to withdraw from the charge of his parents or to obtain the necessaries of life." Under the *Divorce Act*, courts have interpreted the words "or other cause" to include educational purposes.[64] In Alberta, with one significant exception, children born outside marriage who are 18 years of age or over are not entitled to child support for an educational purpose under existing Alberta legislation. The exception applies to a child 16 years of age or over who is entitled to support under the *DRA*, Part 4 and who is "unable, by reason of illness, disability or other cause, to withdraw from the charge of his parents or to obtain the necessaries of life."[65] The Alberta provision was added in 1995. The purpose of this amendment appears to have been to promote consistency in child support awards granted in divorce cases and in cases brought under provincial law.[66]

Procedural differences exist with respect to the court in which an application for support is made, the nature of the proceeding as plenary or

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[61] The age cut-off for child support for a legitimate child is 16 years in the *MOA*. The *DRA*, Part 4, s. 25.1(a), specifies age 16 years, subject to the exception described in the next paragraph of the text. Part 7 makes reference to a "minor" which would indicate a cut-off at 18 years of age. The *P&MA* specifies 18 years in s. 16(2)(c).

[62] In the *P&MA*, "mother" is defined to mean either the "biological" or "expectant" mother of a child. "Father" is defined to mean either "the biological father of a child" or "the person who caused the pregnancy of a mother." There could be more than one of each as, for example, in the case of conception or carriage through the use of new reproductive technologies, such as artificial insemination or ovary transplantation. The *P&MA*, s. 15(2), which allows the court to declare more than one respondent to be a parent for the purposes of the Act, reinforces this possibility.

[63] The *P&MA*, s. 16(4), requires the court to order support in an amount "that will enable the child to be maintained at a reasonable standard of living having regard to the financial resources of each of the child's parents."

[64] See *supra*, Chapter 2, Definition of Child Support beyond age cut-off.

[65] *DRA*, s. 25.1.

[66] But see *R.* v. *Winkelaar*, 40 Alta. L.R. (3d) 376 (Alta. Prov. Ct.), at paras. 3 and 4, which indicates that the phrase "other cause" would seem to be "generally restricted to areas of illness or disability in the spirit of *eustem generus*" rather than open to "all other causes of every nature and kind whatsoever."

summary and the public availability of assistance to bring the application. Whereas the Provincial Court has jurisdiction to make custody and access orders with respect to children born outside marriage, it cannot order child support for them.[67] This jurisdictional division can result in a multiplicity of proceedings under different Acts. It directly affects a child's access to the courts, may delay the resolution of the issues between the parties and is not cost effective.

With regard to the determination of who is a "parent," the general provisions for establishing parentage, which are found in Part 8 of the *DRA,* do not apply to the *P&MA* unless the court orders that applications under both Acts be joined.[68] Although the presumptions of paternity are nearly identical in both pieces of legislation,[69] a declaration of parentage under the *DRA* is good for all purposes, unless and until set aside by court order,[70] whereas a declaration under the summary *P&MA* procedure serves only for purposes of that Act. In addition, the standard of proof of parentage differs — the *P&MA* permits the court to declare that two or more persons are the father of the child where it is satisfied that either might be a parent and the court cannot determine which one is the parent whereas the *DRA* requires the court to identify the parent specifically.[71]

Perhaps because no spousal support right is involved, the *P&MA* imposes liability for the mother's prenatal, birth and post-natal expenses. This is another detail in which the *P&MA* differs from the *MOA* and the *DRA*.

2. Other provinces or territories

As we reported in ALRI Report No. 60 on *Status of Children, Revised Report, 1991*, the majority of other Canadian jurisdictions have abolished the legal distinction between a child's birth within or outside marriage and the

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[67] An exception would be an application brought the *DRA*, Part 4 with respect to a child born outside marriage who has become a member of the family of a married couple.

[68] *DRA*, s. 68.

[69] *P&MA*, s. 12(1); *DRA*, s. 63(1).

[70] *DRA*, s. 65.

[71] *P&MA*, s. 15(2); *DRA*, Part 8.

consequences that once flowed from the distinction. Nova Scotia is one province that, like Alberta, has retained the distinction.[72] The factors for the court to consider in making a support order differ under the Nova Scotia legislation, depending on whether the child's parents are married or unmarried.[73] However, in assessing the amount of support, the court is directed to the same minimum standard.[74]

3. Charter and equality rights

It is generally accepted that section 15 of the Canadian Charter of Rights and Freedoms requires all children to be treated as equal before the law. Canada reinforced this position by ratifying the *Convention on the Rights of the Child* adopted by the United Nations in 1989. It is also consistent with the recommendations of the Alberta Law Reform Institute in Reports Nos. 20, 45 and 60 on the *Status of Children*,[75] many—but not all—of which recommendations were legislatively implemented in 1991.[76] The child support obligation of parents should not be affected by their marital relationship, be it unmarried, married, "common law," separated or divorced. This is based on the principle of equality among children.

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[72] The Nova Scotia *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 11, is similar in content to s. 16 of Alberta's *P&MA*. Where the mother is a single woman, it imposes liability for the payment of the mother's prenatal, birth and post-natal and funeral expenses in the event of her death as a consequence of giving birth to the child, in the same section that imposes liability for child support or funeral expenses in the event of the child's death. The section also empowers the court to make an order against two or more possible fathers.

[73] *Family Maintenance* Act, R.S.N.S. 1989, c. 160, ss 10 and 12.

[74] *Family Maintenance Act*, R.S.N.S. c. 160, ss 10(2) and 12(2). New Brunswick legislation gives priority to the support rights of a spouse and child of a lawful marriage over those of a "common law spouse": *Family Services Act*, S.N.B. 1980, F-2.2, s. 115(7). However, the child support obligation applies equally to all children regardless of their birth circumstance: *ibid*, s. 113.

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

[76] *P&MA*, S.A. 1990, c. P-0.7, eff. Jan. 1, 1991, and the *Family and Domestic Relations Statute Amendment Act*, S.A. 1991, c. 11, eff. Nov. 1, 1991.

4. Recommendation

We continue to agree with our recommendation in ALRI Report No. 60 on *Status of Children*[77] that the law should operate without distinction based on the birth of a child within or outside marriage. Neither should the rights of a child born outside marriage be conditioned on the existence of any cohabitational relationship between the parents.

> **RECOMMENDATION No. 3.3**
>
> **Under Alberta legislation, children's support rights should be the same no matter what the relationship between the child's parents, be it marital or non-marital, cohabitational or non-cohabitational.**

C. Modern Characteristics

The first characteristic of the modern child support obligation that has emerged in Canada is that it is based on the parent-child relationship. Six other characteristics are common to the obligation: It:

- is owed jointly by the father and mother;
- commences at birth;
- continues until the child reaches maturity;[78]
- exists independently of parental custody, access or other living arrangements;
- is quantified by need and ability to pay; and
- may be imposed on persons standing in the place of parents, in addition to the father and mother.

We discuss some of these basic characteristics in this Chapter, under heading D. Legislating the Obligation, and others in later chapters of this report.

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[77] ALRI Report No. 60, *supra*, note 75.

[78] See Chapter 2, headings D.2.D and E.2.A.

D. Legislating the Obligation

1. Legislative statement

As stated in Chapter 1, under the existing Alberta law the only direct statement of the child support obligation is in the *MOA*. Under the *DRA* and *P&MA*, the obligation must be inferred from the power conferred on the court to award support.[79]

Modern family law statutes in most Canadian provinces or territories stipulate in express terms the obligation owed by parents to support their children.[80] This is consistent with our recommendation with respect to spousal support and with our conclusion, in ALRI Report No. 27 on *Matrimonial Support*, that a general statement in family legislation of the basic obligation may be an aid to interpretation.

We think that Alberta legislation should contain a general statement of the basic private law obligation of parents to support their children. In Chapter 3, on spousal support theories, we advance reasons why the law should require a parent to support their child.

RECOMMENDATION No. 4.3

Alberta legislation should set out the basic obligation of a parent to support their child.

2. Basic characteristics

As already stated, we will discuss some of the basic characteristics of the modern child support obligation in this chapter and we will discuss others in later chapters of this report. It can be seen from the discussion that Alberta has some catching up to do in some areas.

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[79] See also *PCA*, *supra* note 11.

[80] 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.

a. Based on parent-child relationship

The modern child support obligation arises from the parent-child relationship. It exists independently of the marital status or other relationship of the parents to each other.

We agree that the child support obligation should be tied to parentage. As just stated, the relationship of the parents to each other should be irrelevant to the imposition of the child support obligation.

b. Owed jointly by mother and father

The modern obligation is owed to the child by each of the father and mother. The Ontario Court of Appeal emphasized the obligation as one placed equally on the father and mother under the *Divorce Act* in 1971, in the leading case of *Paras* v. *Paras*.[81] (Although the obligation on both parents is "equal" in theory, in practice it is apportioned according to the means and capacities of each parent to pay.)

In Alberta, the *DRA* no longer distinguishes between parents on the basis of gender. The language of the *P&MA* is also gender neutral. The *MOA* places a child support obligation on fathers before mothers, and grandfathers before grandmothers.

We agree with the modern trend and recommend that the obligation to support their child should be owed by each of the mother and father.

c. Commences at birth

As it has in the past, the modern child support obligation commences with the birth of the child. We agree that this is when the child support obligation should continue to commence in Alberta.

(Certain of the mother's expenses prior to the birth, as well as during and for a reasonable period after the birth, are also recoverable in most jurisdictions.[82] We considered the question of liability to pay support for the mother prior to, during and after the birth in RFD No. 18.2 on *Spousal*

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[81] *Supra*, note 24.

[82] In Alberta, compare *P&MA*, ss 6(2) and 16(2).

Support.[83] We consider the question of liability to pay expenses incurred by a mother who is not eligible to apply for spousal support in Chapter 5 of this report).

d. Continues until child reaches maturity

The *Divorce Act* designates the age of majority as the age up to which the modern child support obligation continues, but extends the definition where the child is unable to support themself because of "illness, disability or other cause."[84] Statutes in most provinces do likewise. The age of majority is 18 years in some jurisdictions, 19 years in others. The *Divorce Act* sets this age at 18 years for a child who ordinarily resides outside the country. Several jurisdictions extend the obligation beyond this age if the child is ill or disabled or in an education program. Some legislative provisions except parents from the obligation where the child marries or withdraws from parental charge.

We agree that the child support obligation should continue until the child reaches maturity. We examine the meaning of "maturity" in greater detail under heading E. Definition of "Child" and "Parent."

e. Exists independently of parental custody, access or other living arrangements

The obligation is not conditioned on the separation or divorce of the parents. Nor is it conditioned on any other living arrangement that may have been made for the child.

We agree that the child support obligation should exist irrespective of the living arrangements that have been made for the child.

f. Quantified by need and ability to pay

The legal right of a dependent child to support from the child's parents is based on the child's needs and the parents' ability to pay:[85]

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[83] RFD No. 18.2 on *Spousal Support*, Chapter 5, heading C.

[84] *Divorce Act*, s. 2(1). Prior to May 1, 1997, the *Divorce Act* specified age 16. For further details, see heading E.1.B of this Chapter.

[85] *Paras* v. *Paras*, *supra*, note 24.

> ... in the translation of [the equal obligation of both parents to support their child] into a monetary amount, obviously consideration must be given to the relative abilities of the parents to discharge the obligation.

This is true whether a claim for child support is pursued under the *Divorce Act* or under provincial or territorial statute.

Legislation could stipulate that the obligation of parents to support their children exists only "to the extent that the parent is capable of" providing support. Alberta's *MOA* tempers the obligation in this way. The Ontario *Family Law Act* does likewise.[86]

We accept the reality that the child's right to support is limited by the parents' ability to pay but recognize that the concept of ability to pay is capable of a wide range of interpretations. We examine the issue of quantification at greater length in Chapter 4 on Child Support Objectives.

g. Imposed on persons standing in place of parents

Most Canadian jurisdictions impose an obligation on persons who stand in the place of a parent in relation to a child. The obligation is usually supplementary or secondary to the obligation of the parents.

We think that there are circumstances in which it is appropriate to impose a child support obligation on a person who has assumed a parent-like role in relation to the child. We explore this position further in chapter 7 on persons who stand in the place of a parent.

RECOMMENDATION No. 5.3

The legislated obligation to the child should:
(1) be based on the parent-child relationship;
(2) be owed by each of the mother and father;
(3) commence on the child's birth;
(4) continue until the child reaches maturity (as defined in Rec. No. 4); and

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[86] *Family Law Act*, R.S.O. 1990, c. F.3, s. 31(1).

(5) exist independently of parental custody, access or other living arrangements.

E. Definition of "Child" and "Parent"[87]

1. Existing law

a. Alberta

i. Child

The *MOA* connects parentage to a child's legitimate birth.[88] The basic obligation is owed to a child under the age of 16, but it also extends to a child over that age who is old, blind, mentally deficient or impotent, or otherwise destitute. For most purposes, the *DRA* does not provide a general definition of "child." It refers, in Parts 2 and 3, to "children of the marriage" and, in Part 7, to a "minor." Part 4 refers to the child of a married person and, in that Part, "child" is defined in section 25.1:

> 25.1(a) "child" means a child who
> (i) is under the age of 16 years, or
> (ii) is 16 years of age or over but unable, by reason of illness, disability or other cause, to withdraw from the charge of his parents or to obtain the necessaries of life.

The *P&MA* defines "child" for the purpose of that Act to mean "a child born of parents who are not married to each other."[89] The child support obligation under the *P&MA* continues until the child reaches 18 years of age.[90]

ii. Father

Under the existing law, the primary child support responsibilities are based in biology: the man and woman who conceive a child through sexual

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[87] See generally, Christine Davies, *Family Law in Canada*, *supra*, note 33 at 213-23 and 240-42.

[88] *MOA*, s. 1. The *Family and Domestic Relations Statutes Amendment Act*, S.A. 1991, c. 11 abrogated some former distinctions between legitimate and illegitimate children but did not deal with *inter vivos* child support rights and obligations.

[89] *P&MA*, s. 1(b).

[90] *P&MA*, ss 6(2)(c), 16(2)(c).

intercourse are its parents. Various statutory presumptions help to identify the father.[91]

Under the *MOA*, father means the father of a legitimate child.[92]

The *DRA* does not provide a definition of "parent" or "father." In Part 8, on "Establishing Parentage," section 63(1) specifies the circumstances that give rise to a legal presumption of paternity. The presumption operates for all purposes of Alberta law, including child support. Section 63(1) says:[93]

> 63**(1)** For all purposes of the law of Alberta, unless the contrary is proven on a balance of probabilities, there is a legal presumption that a person is the father of a child in any of the following circumstances:
>
> (a) the person was married to the mother of the child at the time of the birth of the child;
>
> (b) the person was married to the mother of the child and the marriage was terminated by
>
> (i) a decree of nullity of marriage granted not more than 300 days before the birth of the child, or
>
> (ii) a judgment of divorce granted not more than 300 days before the birth of the child;
>
> (c) the person married the mother of the child after the birth of the child and has acknowledged that he is the father of the child;
>
> (d) the person cohabited with the mother of the child for at least one year immediately before the birth of the child;
>
> (e) the person is registered as the father of the child at the joint request of himself and the mother of the child under the *Vital Statistics Act* or under similar legislation in a province other than Alberta.

A man claims to be the father, but who falls outside the presumption, may apply by originating notice to the Court for a declaration of parentage:[94]

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[91] *DRA*, s. 63(1); *P&MA*, s. 12. Both of these provisions are quoted in this chapter, under heading E.1.A.ii.

[92] *MOA*, s. 1.

[93] The definition of "biological father" in the *CWA*, s. 1(c), incorporates this idea but goes further to include the man the biological mother acknowledges to be the father, a man who has been declared by a court to be the biological father, or a man who satisfies a director that he is the biological father of a child. The *P&MA*, s. 1(g) defines "father" as "the biological father of a child." (To cover the case of an expectant mother, this definition includes "the person who caused the pregnancy of a mother.)

[94] *DRA*, s. 64 (1).

> 64(1) A person claiming to be the father, mother or child of another person may apply by originating notice to the Court for a declaration of parentage.

The declaration "applies for all purposes of the law of Alberta."[95] It therefore prevails over any statutory presumption.

Under the *P&MA*, "father" means either "the biological father of a child" or "the person who caused the pregnancy of the mother."[96] For the purposes of that Act, section 12 raises a presumption of paternity (the principal purpose of the *P&MA* is to secure support for children born outside marriage). The presumption is identical to the presumption under s. 63 of the *DRA* with one addition. Section 12(f) includes a presumption that a person is the father of a child where "the person has been found by a court of competent jurisdiction in Canada to be the father of the child."

Like the *DRA*, the *P&MA* empowers the court to declare a man to be the father of a child.[97] A man identified as a father under this Act would have an obligation to support the child.

The *P&MA* differs from the *DRA* in one significant respect. No presumption as to paternity is to be made in circumstances that give rise to a presumption that more than one person might be the father.[98] However, where parentage is uncertain, the *P&MA* empowers the court to make an order declaring each person who might be a parent to be a parent for the purposes of this Act.[99]

In a case of conflict between presumptions made under the *DRA* and the *P&MA*, the *P&MA* would prevail. According to section 63(2) of the *DRA*:

> Where there is a conflict between subsection (1) and any other enactment, the other enactment prevails.

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[95] *DRA*, s. 64(5). It remains in force until set aside: s. 65(1).

[96] *P&MA*, s. 1(g).

[97] *P&MA*, s. 15(1).

[98] *P&MA*, s. 12(2).

[99] *P&MA*, s. 15(2).

Under each of these statutes — the *MOA*, *DRA* and *P&MA* — "father" includes an adoptive father. That is because section 65 of the *CWA* provides:[100]

> ... for all purposes when an adoption order is made the adopted child ceases to be the child of his previous parents ... and his previous parents cease to be his parents and guardians.

iii. Mother

Essentially, under the existing law, the woman who bears a child is its mother.[101] However, statutory provisions sometimes add to this understanding.

Under the *MOA*, mother means the mother of a legitimate child.[102] The *DRA* does not define "mother." The *P&MA* defines "mother" for the purpose of that Act to mean either the biological or the expectant mother of a child. (The *CWA*, in section (1)(b), defines "biological mother" to mean "the woman who gave birth to the child.") As in the case of the father, "mother" includes an adoptive mother.[103]

Although the situation is likely to arise rarely, if ever, the *DRA*, in section 64(2), empowers the court to grant a declaration of parentage declaring that the alleged mother is mother of the child.

b. Federal *Divorce Act*

The *Divorce Act* provides extended definitions of "child of the marriage," both with respect to age cut-offs and persons who stand *in loco parentis* to children.[104] "Child of the marriage" is defined as follows:[105]

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[100] *CWA*, s. 65(2).

[101] *P&MA*, s. 1(j); *CWA*, s. (1)(b).

[102] *MOA*, s. 1.

[103] *CWA*, s. 65.

[104] See *infra*, Chapter 7, regarding the support obligations owed by persons standing in the place of parents in relation to a child.

[105] *Divorce Act*, s. 1.

> 2(1) "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.
>
> 2(2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

"Age of majority" is defined as follows:[106]

> "age of majority", in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age.

c. Other Provinces and Territories

Like the *Divorce Act*, several provincial statutory support regimes provide broad definitions of "parent" or "child" for the purpose of defining the ambit of child support rights and obligations.[107] In Manitoba, the governing statute includes detailed provisions that define the child support obligations of four categories of person: (1) the biological or adoptive parents; (2) the spouse of a parent; (3) the person cohabiting with a parent; and (4) persons standing in *loco parentis*.[108] The obligation of persons in the second to fourth categories is secondary to the obligation of the persons in the first category. Provisions in the Ontario *Family Law Act*[109] and the Saskatchewan *Family Maintenance*

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[106] *Divorce Act*, s. 2(1).

[107] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 1; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1; *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 2; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2; *Family Law Act*, R.S.O. 1990, c. F.3, s. 1; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 1; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 2; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 1.

[108] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36, reproduced in chapter 7, heading A.3.

[109] R.S.O. 1990, c. F.3, s. 33(7).

Act,[110] which are virtually identical to each other in substantive content, are less precise than the Manitoba provisions. They require the court to recognize the primary obligation of each of the parents and the secondary obligation of a parent who is not a "natural or adoptive" parent.[111] (As already, stated, we discuss the obligation of a person who assumes the role of parent in relation to a child in Chapter 7.)

2. "Child"

a. Age cut-off

In principle, the obligation to support a child continues until the child reaches maturity. In Canada, the age up to which a parent owes a child support obligation tends to vary from age 16[112] to the age of majority,[113] an age which some jurisdictions set at 18 years and others at 19 years. We think that the child support obligation ordinarily should continue until the child reaches the age of majority, in Alberta age 18 years. This is the age at which the majority of children complete high school and enter a program of post-secondary education or move into the workforce.

Statutes in most jurisdictions include certain exceptions, some of which absolve parents from the obligation to support children under the cut-off age and others of which extend the obligation beyond the cut-off age. These exceptions are examined in the headings that follow.

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[110] S.S. 1990, c. F-6.1, s. 3(2).

[111] James C. McLeod, *Annot.: M.(C.)* v. *P.(R.)* 1997), 26 R.F.L. (4th) 1 at 2-3, comments that the meaning of the Ontario s. 33(7)(b) is unclear:

> Section 33(7) provides that a child-support order should recognize that the obligation of a natural or an adoptive parent outweighs the obligation of a parent who is not a natural or biological parent. That provision means either (1) that a court should not determine a psychological parent's child support obligation until it has determined a natural or an adoptive parent's responsibility or (2) that a natural or an adoptive parent should pay more child support than a psychological parent.

In *M.(C.)* v. *P.(R.)*, the Ontario Court of Appeal rejected the second interpretation and ordered the natural father to pay 15 per cent of child support and the step-father to pay 85 per cent.

[112] In Alberta, see *e.g. MOA*, s. 2(2); *DRA*, s. 25.1(a).

[113] In Alberta, see *e.g. DRA*, s. 56(5); *P&MA*, s. 6(2)(c) and 16(2)(c).

b. Marital status of child

A majority of provincial or territorial jurisdictions expressly confine child support rights and obligations to unmarried children under the age of majority.[114] We realize that marriage may be viewed as evidence that the child has withdrawn from parental charge (heading E.2.D. below). We are inclined to extend the obligation of parents to support a child up to the age of majority whether or not that child has married, but our recommendation would leave the criteria for withdrawal from parental charge to the courts to determine.

c. Support beyond age cut-off

i. Illness or Disability

Under the *Divorce Act*, parents have an obligation to support a child who is under the age of majority and has not withdrawn from the parents' charge or is the age of majority or over and under their charge but "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life."[115] In Alberta, the *MOA* imposes an obligation on a parent to support a child of any age who is disabled or destitute.[116] Elsewhere in Canada, modern statutes in four provinces empower their courts to order support for children over the age of majority in circumstances involving disability.[117]

ii. Education

Courts have interpreted the words "or other cause" in the definition of child in the *Divorce Act* to allow orders for support to be obtained for a child who is engaged in a program of education. This interpretation has been criticized on

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[114] *Family Law Act*, R.S.O. 1990, c. F.3, s. 31; *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1; *Family Law Act*, S. Nfld. 1990, c. F-2, subsection 37(1); *Family Law Act*, S.P.E.I. 1995, c. 12, subsection 16(1); *Québec Civil Code*, art. 634; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 32.

[115] *Divorce Act*, s. 2(1).

[116] In *Wani* v. *Wani* (1994), 163 A.R. 319 (Alta. Q.B.), a 28 year old woman with various health problems claimed to be a "destitute person who is not able to work" and brought an application under the *MOA* for support from her father. The court limited prospective support to 10 months and cancelled the arrears owing under a prior order. It recommended appropriate counselling and admonished her "to 'bury the hatchet' with her father and to get on with her life."

[117] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 36(1) and (5); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2; *Family Law Act*, R.S.O. 1990, c. F.3, ss 31(1); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 2.

the basis that "awards for children above sixteen years of age [the age formerly specified in the *Divorce Act*] ... were meant to be exceptional and that this is signalled by the other specific pre-conditions of 'illness' and 'disability.'"[118] However, "the retention of the formulation of the definition in the [current] Act might be seen as an endorsement of the prior case law."[119] As initially introduced, Bill C-41 would have added the "pursuit of reasonable education" to the list of "illness, disability or other cause" in the present Act, but this addition was not enacted.[120] The Federal Child Support Guidelines, in section 7(e), include "expenses for post-secondary education" in special or extraordinary expenses that the court may add on to the support otherwise payable. By analogy with education, the words "or other cause" have also been interpreted to include a child 18 years of age or over who is unable to find work in a depressed economy.[121]

Education is mentioned in Part 7 of the *DRA*. It empowers the court to order parents to pay expenses incurred by a school or institution that is bringing up a child.[122] The obligation is with respect to a "minor." It therefore ceases when the child reaches 18 years.

In four other provinces, the same modern statutes that empower the court to order support for disabled children who are over the specified age cut-off specifically empower their courts to order support for education.[123] In Ontario, for example, the obligation embraces a child who "is enrolled in a full-time program of education."[124]

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[118] Ziff, *supra*, note 13, quoting Merchant, *Annot.: Saunders* v. *Saunders* (1988), 14 R.F.L. (3d) 225.

[119] *Ibid.*

[120] Parliament of Canada, Bill C-41, 45-46 Eliz. II, 1996-97.

[121] *Baker* v. *Baker* (1994), 2 R.F.L. (4th) 147 (Alta. Q.B.).

[122] *DRA*, s. 58.

[123] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 36(1) and (5); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2; *Family Law Act*, R.S.O. 1990, c. F.3, ss 31(1); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 2.

[124] *Family Law Act*, R.S.O. 1990, c. F.3, s. 31(1).

d. Withdrawal from parental charge

As already stated, exceptions to the obligation to support a child exist with respect to some children who are under the cut-off age and others who are over the cut-off age.

Alberta's *MOA* saves a person with a support obligation from liability when the person to whom the obligation is owed is able to support themself. This exception includes an obligation owed to a person under age 16.

Under the *Divorce Act*, the obligation of the parents to support a child up to the age of majority does not include a child under the age of majority who has withdrawn from their charge.[125] The obligation of the parents to support a child who is the age of majority or over extends to a child who is under their charge and "unable ... to withdraw from their charge or to obtain the necessaries of life."[126] In the judgment in *Paras* v. *Paras*, the Ontario Court of Appeal observed that "ordinarily no fault can be alleged against the children which would disentitle them to support."[127] While this may generally be true, the express reference in the 1997 *Divorce Act* amendment to a child under the age of majority "who has not withdrawn from [parental] charge" may respond to situations where an older child refuses to go to school or get a job, or moves out of the family home in order to avoid complying with household rules.[128] In short, the amendment may relieve the parents of the obligation to support a child who is not under their charge, whether that child is under or over the age of majority.

Ontario legislation absolves a parent from the responsibility to support a child sixteen years of age or older who "has withdrawn from parental control."[129] The case law interpreting this provision establishes that the parent is absolved of the liability to pay support only in "the clearest of cases

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[125] *Divorce Act*, s. 2(1), as amended effective May 1, 1997.

[126] It is not always necessary that the child live with the parent in order to qualify as being under the parent's "charge" and "charge" means something more than mere financial dependency: *Reville's Divorce Act annotated* (3rd ed.) (T.W. Hainsworth), at 2-2a and 2-3.

[127] *Paras* v. *Paras*, *supra*, note 24.

[128] The cases under the Ontario legislation are instructive in this regard; see *infra* note 130.

[129] *Family Law Act*, R.S.O. 1990, c. F.3, s. 31(2).

of a free and voluntary withdrawal from reasonable parental control."[130] The exception "provides relief to parents in that limited class of case in which a young person between the ages of sixteen and eighteen freely and voluntarily chooses the personal liberty and independence of a life of his own, to one fettered by reasonable parental control."[131] The New Brunswick legislation is more specific. It directs the court determining a child support application to consider "whether the child has voluntarily withdrawn himself from parental control under circumstances that indicate that he has abandoned, or should be considered to have abandoned, any right to support."[132] It also directs the court to 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."[133]

e. Recommendation

We think it would be impractical and cause injustice if Alberta were to enact legislation that is significantly different from the *Divorce Act*. Separated spouses could easily bypass the provincial law and seek child support by way of corollary relief in divorce proceedings. As a result, the child support law that applied to children born outside marriage would differ from the law that applied to "children of the marriage" and this would contravene the principle of equality among children.

We can see merit in giving the court specific power to order support for a child who is the age of majority or over and enrolled in a full-time program of education. However, because our premise is consistency between provincial statutes and the *Divorce Act*, we do not recommend deviation from the

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[130] *Dolabaille* v. *Carrington* (1981), 32 O.R. (2d) 442 at 445, cited with approval in several subsequent cases: see e.g. *J.L.E.* v. *R.B.E.* [1998] O.J. No. 492; *Judd* v. *Judd* [1995] O.J. No. 2717; *Fitzpatrick* v. *Karlein* [1994] O.J. 1573; and *Thibeau* v. *Thibeau* [1988] O.J. No. 2703. See also: *J.J.D.C.* v. *S.L.C.* [1996] O.J. No. 3501 and *Hartikainen* v. *Hartikainen* [1992] O.J. No. 624.

[131] *Ibid.*

[132] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(6)(n). *Family Services Act*, S.N.B. 1997, c. 59, s. 3(d) amends s. 115(6) by rewording the opening words to refer to a child who has attained the age of majority and repealing paras. (l), (m) and (n); however, the amendments had not yet been proclaimed in force as of December 1, 1997. Paras. (l) and (m) have to do with education prospects and school attendance.

[133] *Ibid.*, s. 115(6)(t).

Divorce Act requirements as they have been interpreted by the courts. Our recommendation would adopt these requirements.

We see a possible danger in restricting the support obligation to a child under the age of majority who has not withdrawn from the parent's charge, or a child who is the age of majority or over and under the parent's charge. The danger is that a parent might contrive to avoid the support obligation by abusing a child so that the child leaves. We are satisfied that the courts will be alert to this possibility and will not absolve a parent of responsibility if the parent has created conditions that make it unbearable for the child to remain in the parent's charge.

We recommend that Alberta adopt the *Divorce Act* wording to define a child to whom parents owe a support obligation.

RECOMMENDATION No. 6.3

Alberta legislation should confer power on the court to order a parent to pay support for a child who

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life.

3. "Parent"

a. Establishing parentage

Generally speaking, this project does not deal with the establishment of parentage. The establishment of parentage is dealt with in the *DRA*, Part 8, which includes the court power to order blood tests. The provisions in Part 8 are based on recommendations we made in our Report Nos. 20, 45 and 60 on the *Status of Children*. Subject to the minor amendment that we recommend be made to section 63(1), we intend that the existing Part 8 provisions will be incorporated in any new family law legislation that is enacted to replace the existing law and that, to the fullest extent constitutionally possible, the powers conferred in Part 8 will be exercisable by any court having jurisdiction in family law matters.

It remains necessary to identify the persons who, as "parents," are liable for child support.

b. Mother

We recommend that Alberta law should define "mother" to mean (1) the biological mother of the child, (2) in the case of adoption, the adoptive mother, or (3) a woman the court finds to be the mother of a child. A legal presumption should provide that the woman who gave birth to a child is its biological mother. This is generally consistent with the definitions currently provided in the *P&MA* and *CWA*. Given the availability of new reproductive technologies (see heading E.3.E.), in the event of doubt as to who is, or is meant to be, the mother, the court should be able to make a finding of parentage.

c. Father

We recommend that Alberta law should define "father" to mean (1) the biological father of the child, (2) in the case of adoption, the adoptive father, or (3) a man the court finds to be the father of the child. Once again, this is generally consistent with the definitions currently provided in the *P&MA* and *CWA* and takes into consideration the impact of new reproductive technologies on the issue of who is, or is meant to be, the father in the same way as we have noted for the mother.

As an aid to identifying who is a father for the purposes of child support, we would adopt the legal presumptions in section 63(1) of the *DRA*, reproduced at page 42 of this report, with one amendment and one addition. The amendment would reword section 63(1)(d) to provide that a man is presumed to be the father of a child where he cohabited with the mother of the child for at least "12 consecutive months immediately before, during or after the time of birth of the child" and has acknowledged that he is the father of the child. We think it appropriate to adopt a wording that casts a wider net than the present wording which limits the presumption to cohabitation for "one year immediately before the birth of the child."

The addition would be a man who has acknowledged that he is the father. That acknowledgment need not meet the requirements for registration under the *Vital Statistics Act*. It may not give the man

acknowledging paternity any legal rights as a father, but it would make him liable for child support.

Where the circumstances give rise to a presumption that more than one person might be the father, we agree with section 12(2) of the *P&MA* that no presumption as to paternity should be made.

The presumptions should be coupled with the power of the court to make a finding of parentage in cases where the presumptions do not apply or the accuracy of the presumption is disputed.

Where parentage is uncertain, we agree with section 15(2) of the *P&MA* that the court should be able to make an order declaring each man who might be a father, as well as each woman who might be a mother, to be a parent for the purposes of child support.

d. Person standing in the place of a parent

We discuss the position of a person standing in the place of a parent in Chapter 7. There we refer to various definitions of this concept. Based on that discussion, we recommend that a "person standing in the place of a parent" be defined to mean a person who has demonstrated a settled intention to treat a child as a child of their family.

e. Impact of new reproductive technologies on legal parentage

The law is less clear about the obligations of third parties who contribute genetic material, sperm or ovum, for use in assisted reproduction. The issues arising from procreation through the use of new reproductive technologies require separate study. We do not propose to examine them here.

RECOMMENDATION No. 7.3

For purposes of child support law, Alberta should adopt the following definitions:

(1) "parent" means the mother or father of a child;

(2) "mother" means

(a) the biological mother of the child,

(b) in the case of adoption, the adoptive mother of the child, or

(c) a woman who has been found by a court to be the mother of the child;

(3) "father" means

(a) the biological father of the child,

(b) in the case of adoption, the adoptive father of the child, or

(c) a man who has been found by a court to be the father of the child.

(4) "person standing in the place of a parent" means a person who has demonstrated a settled intention to treat a child as a child of their family.

RECOMMENDATION No. 8.3

For the purposes of Recommendation 7.3,
(a) a woman is presumed to be the biological mother of the child where she gave birth to the child,

(b) a man is presumed to be the biological father of the child where

(i) he satisfies one of the criteria set out in section 63(1) of the *DRA* , but repealing section 63(1)(d) and substituting "the person cohabited with the mother of the child for at least 12 consecutive months immediately before, during or after the time of birth of the child and has acknowledged that he is the father of the child", or

(ii) he has otherwise acknowledged that he is the father of the child.

RECOMMENDATION No. 9.3

Where circumstances exist that give rise to a presumption under Recommendation 8.3(b) that more than one person might be the father of a child, no presumption as to paternity should be made.

RECOMMENDATION No. 10.3

For the purposes of child support,
(a) where the court is satisfied that any one of two or more persons may be the father of a child and is unable to determine which one of them is the father, the court should be able to make an order declaring each person who, in the opinion of the court, might be a father to be a father, and

(b) where the court is satisfied that any one of two or more persons may be the mother of a child and is unable to determine which one of them is the mother, the court should be able to make an order declaring each person who, in the opinion of the court, might be a mother to be a mother.

CHAPTER 3 CHILD SUPPORT THEORIES

A. Terminology

In RFD No. 18.2 on *Spousal Support*, we commented on the considerable variation that exists in the terminology used to conceptualize the reasons for support and how to achieve the ends involved. Here, as there, we have not attempted to resolve the 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 child 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 should model its child support legislation on the *Divorce Act* provisions and adopt the Federal Child Support Guidelines. In other words, Alberta should accept the "theory" behind these provisions and implement that theory using the *Divorce Act* "model."

B. Existing Law

1. Alberta

The existing Alberta statutes give little guidance to help the determination of child support rights and obligations. No purpose is clearly spelled out in legislation, no objective clearly stated.

Like spousal support, the granting and assessment of periodic sums for child support falls within the ambit of a broad and essentially unfettered judicial discretion to order periodic payments. This is so whether the claim is brought under the *MOA*, the *DRA* or the *P&MA*.

The *MOA* imposes liability on a parent to support their legitimate child.[134] This liability is subject to the inability of the child to support

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[134] *MOA*, ss 2(1) and (2).

themself[135] and the ability of the parent to provide support.[136] The order may "prescribe the period or periods" during which support is to be paid, "fix the instalments" in which support is to be paid and the "amounts of the instalments," and apportion liability among any one or more of the persons who are liable, under the Act, to pay support.[137]

Parts 2 and 3 of the *DRA* simply authorize the court to settle property,[138] or order periodical payments from the profit of trade or earnings,[139] for the benefit of the children of the marriage. In Part 4, section 27(4) authorizes the judge to order the payment of "a weekly, semi-monthly or monthly sum" of child support "that the judge considers reasonable having regard to the means of both the spouses." No standard is included in section 27(5), (6) or (7) which permit child support to be ordered for children in other circumstances. (Amendments to the *DRA*, enacted in 1997 but not yet proclaimed, provide for the application of child support guidelines to child support cases brought under Part 4.[140]) Part 7 authorizes the court to order the payment of "any sum from time to time that the Court considers reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the minor is entitled."[141]

For children born outside marriage, the *P&MA* requires the Court to "fix an amount ... that will enable the child to be maintained at a reasonable

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[135] *Ibid.*, ss 2(3).

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

[137] *Ibid.*, s. 6(b), (c) and (e).

[138] *DRA*, ss 13, 21 and 23.

[139] *Ibid.*, s. 24.

[140] *Justice Statutes Amendment Act, 1997*, S.A. 1997, c. 13, s. 1. The amendments empower the Lieutenant Governor in Council to make regulations
- designating the Federal Child Support Guidelines as the child support guidelines to be followed;
- establishing Alberta child support guidelines to apply in their stead;
- authorizing the court to exempt in whole or in part the application of the child support guidelines where adequate financial arrangements have been otherwise made.

[141] *Ibid.*, s. 56(5).

standard of living having regard to the financial resources of each of the child's parents."[142]

2. Canada

a. Divorce Act after the 1997 amendments: application of the Federal Child Support Guidelines[143]

As already stated, *Divorce Act* amendments passed on February 19, 1997 create a framework for the introduction of child support guidelines.[144] The new legislation separates child support orders from spousal support orders, creating section 15.1 to govern child support. Except where special provision for a child has been made through other means or reasonable arrangements for child support have been made on the consent of the parents, section 15.1 requires the court to apply the applicable child support guidelines. The exceptions are set out in sections 15.1(5) and 15.1(7). Section 15.1(5) authorizes a court to:

> ... award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Section 15.1(7) authorizes a court to

> ... award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

The "applicable guidelines" means either the Federal Child Support Guidelines or comprehensive child support guidelines established by a

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[142] *P&MA*, s. 16(4).

[143] Federal Child Support Guidelines, established under the *Divorce Act*, s. 26.1, by SOR/97-175, gazetted April 16, 1997, effective May 1, 1997.

[144] See Chapter 1, heading F.

province where the Governor in Council has designated that province for this purpose.[145]

Federal Child Support Guidelines took effect May 1, 1997. The Guidelines set out four objectives, define terms, and direct what the amount of child support shall be. They authorize the court to adjust the amount in certain circumstances, specify the form of payment and security, and vary a child support order in changed circumstances. They direct how the court shall determine the spouses's annual income and specify each spouse's obligation to provide income information.

The objectives of the Guidelines are:[146]

> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support awards and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Attached to the Guidelines as schedules are 12 Federal Child Support Tables — one for each province or territory. The tables specify monthly child support amounts to be paid by the spouse ordered to pay child support. The amounts in each table vary depending on that spouse's annual income level and the number of children being supported. The tables cover annual income levels ranging from $6,700 to $150,000. They progress in $100 intervals. Four columns set out the different amounts payable for one, two, three or four children.[147]

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[145] *Divorce Act*, s. 2(5).

[146] Federal Child Support Guidelines, *supra*, note 143, s. 1.

[147] To establish amounts for the support of five or more children, persons are asked to contact the federal Department of Justice. The Department of Justice will also assist by providing a mathematical formula for calculating specific child support amounts between the $100 levels.

The tables embody amounts calculated using complex mathematical formulae built from a body of underlying principles and presumptions. A note that accompanied draft tables published in 1996 explained that:[148]

> 4. The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada. The amounts were calculated using a mathematical formula and generated by a computer program.
>
> 5. The formula sets support amounts to reflect average expenditures on children by a parent with a particular number of children and level of income. The calculation is based on the support payer's income. The formula uses the basic personal deduction from income tax to recognize personal expenses, and takes other federal and provincial or territorial income taxes and credits into account. At lower income levels, the formula sets the amounts to take into account the combined impact of taxes and child support payments on the support payer's limited disposable income.

Section 7 of the Guidelines allows a court to order the payment of certain expenses over and above the amount provided in the applicable table. Before doing so, the court is required to take into account "the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and the family's pattern of spending prior to the separation." The allowable heads of expense are:[149]

> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> (d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;
>
> (e) expenses for post-secondary education; and

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[148] Department of Justice (Canada), "*A Working Draft ...*," *supra*, note 19.

[149] The court considered certain of these expenses in *Middleton* v. *MacPherson* (1997), 150 D.L.R. (4th) 519 (Alta. C.A.). It allowed the following expenses beyond the basic program: the child's professional counselling; lunch supervision, field trips, skiing, swimming and private music lessons; and ballet lessons (under s. 7(1)(f)). A school application fee, although reasonable, was not an extraordinary expense under s. 7(1)(d).

(f) extraordinary expenses for extracurricular activities.

The court has discretion to make an order outside the Guidelines in exceptional circumstances. One example, in section 10, is a case where the court "finds that the spouse making the request, or a child in respect of whom the request is made, would ... suffer undue hardship" if the Guidelines were applied. The circumstances that may cause undue hardship include cases where:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person; and

(d) the spouse has a legal duty to support any child, other than a child of the marriage, who is

  (i) under the age of majority, or

  (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

The hardship exception does not apply if the application of the Guidelines would leave the household of the parent claiming undue hardship with a higher standard of living than the household of the other spouse.

A second example is a case where the child is the age of majority or over. Under the Guidelines, section 3(2), where the child is the age of majority or over, the court may either apply the Guidelines or determine "the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

A third example, found in section 9 of the Guidelines, is a case where a spouse exercises a right of access to, or has physical custody of, a child for 40% or more of the year.

A fourth example is a case where the person from whom child support is sought stands in the place of a parent. The Guidelines, in section 5, permit the court to order the payment of child support in "such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child."

Section 19(1) empowers the court to impute an amount of income to a spouse. The court has discretion to do so where it considers it appropriate in the circumstances. A number of such circumstances are specified. They include cases where:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income; and
>
> (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

To facilitate the transition to the new Federal Child Support Guidelines, Alberta Justice has set up Queen's Bench Child Support Centres in Calgary and Edmonton. These Centres have two primary roles: (1) a public assistance function (the Centres provide legal information only),[150] and (2) a judicial and

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[150] Components of the public assistance function are to:

- Provide information and material about the Guidelines and the court process and documentation required to obtain or vary a child support order, including assistance with form

(continued...)

court services function.[151] As part of their function, the Centres maintain an index of decisions on the Guidelines made by courts across Canada which is updated weekly.[152] The index is available to lawyers and members of the public but case summaries are available only to the Court.[153]

b. *Divorce Act* before the 1997 amendments

Prior to the 1997 amendments, the *Divorce Act* guided and directed the court on child support by legislating the objectives of child support together with the factors which the court had to consider in making child support decisions.

As to the objectives, the Act recognized that the spouses have a joint financial obligation to support the children of the marriage. That obligation was to be apportioned between the spouses according to their relative abilities to pay. Section 15(8) provided:

> 15(8) An order made under this section that provides for the support of a child of the marriage should
>
> (a) recognize that the spouses have a joint financial obligation to maintain the child; and
>
> (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

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[150] (...continued)
completion and computer calculations;
- Distribution of, and assistance with, procedure packages (Notice to Disclose, Variation Applications, Interim Applications, Opposing Applications and Consent Applications) to unrepresented parties which can also be purchased and ordered by mail;
- Provide group education/training sessions on the Guidelines to affiliated service agencies and to the legal community, including Bar Associations.

[151] Components of the judicial and court service function are to:
- Provide legal research and consultation on specific issues pertaining to the Guidelines, child support and family matters, and available for special projects, including drafting of court forms, and preparing procedure packages for unrepresented parties;
- Be available during Family Chambers to assist the court with calculations under the Guidelines;
- Assist the court with reviewing all applications for consent orders and desk divorces as to calculations under the Guidelines and comparing with supporting material as well as ensuring the proposed order is in the proper form (conforms with s. 13 of Guidelines and the Alberta Rules of Court);
- Act as friend of the Court for Queen's Bench Confirmation Hearings.

[152] See also: James C. MacDonald and Ann C. Wilton, *Child Support Guidelines: Law and Practice* (Carswell, 1998), a new looseleaf service.

[153] Telephone conversation with Catherine J. Greene, Senior Program Coordinator, Queen's Bench Support Centre, Edmonton. (May 1998).

These objectives gave little guidance to courts in determining the amount of a support award because they did not specify the objective of the support itself: yes, the parents had an obligation to support their child, but to what end?

The factors were the same as those that apply to an order for spousal support. Section 15(5) required the court making a support order to consider:

> 15(5) ... the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, 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 or child.

3. Other provinces

The objectives of child support formerly set out in the *Divorce Act* are mirrored in some provincial legislation, for example, the Ontario *Family Law Act*[154] and the Saskatchewan *Family Maintenance Act*.[155] The Ontario Act says:

> 33(7) An order for the support of a child should
>
> (a) recognize that each parent has an obligation to provide support for the child;
>
> (b) recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent; and
>
> (c) apportion the obligation according to the capacities of the parents to provide support.

Likewise, several provincial statutes stipulate specific factors that the court shall take into account in determining the right to and amount of child support. Often, these factors are incorporated in the same provision that regulates spousal support.

We mentioned that Alberta has enacted legislation to provide for the application of child support guidelines in child support cases brought under

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[154] R.S.O. 1990, c. F.3, s. 33(7).

[155] S.S. 1990, c. F-6.1, s. 3(2).

the *DRA*, Part 4.[156] With the introduction of the Federal Child Support Guidelines under the *Divorce Act*, all provinces or territories except the Yukon have done likewise.[157] All of these jurisdictions provide that child support guidelines are to be established by regulations. Regulations have been enacted in Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan but apparently not yet in British Columbia, New Brunswick, Newfoundland, Nova Scotia and the Northwest Territories. Except in Prince Edward Island, the regulations that have been enacted incorporate the Federal Child Support Guidelines. Prince Edward Island has established its own comprehensive guidelines which apply provincially and under the *Divorce Act*.[158]

4. Summary

The right of child to be supported by both parents is clear under the existing law. Under modern federal, provincial and territorial legislation in Canada, parents share the child support obligation jointly. The parents are required to contribute in proportion to their respective abilities to pay.

The issues arise in relation to the determination of :

(1) the level at which the child is entitled to be supported,

(2) the proportion to be contributed by each parent.

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[156] *Supra* note 140.

[157] *Family Relations Amendment Act*, S.B.C. 1997, c. 20 (proclaimed in force February 4, 1998 except ss. 1(a), 3, 4, 17, 18, 19 and 24); *The Family Maintenance Amendment Act*, S.M. 1997, c. 56 (proclaimed in force June 1, 1998); *An Act to Amend the Family Services Act*, S.N.B. 1997, c. 59 (in force since February 28, 1997); *Family Law Amendment Act*, S.Nfld. 1997, c. 33 (in force since December 19, 1997); *Children's Law Act*, S.N.W.T. 1997, c. 14 (in force since October 16, 1997); *An Act to Amend the Family Maintenance Act*, S.N.S. 1997, c. 3 (to be proclaimed); *An Act to Amend the Family Services Act*, S.N.B. 1997, c. 59 (in force since February 28, 1997); *Family Law Amendment Act*, S.O. 1997, c. 20 (in force since December 1, 1997); *An Act to Amend the Family Law Act*, S.P.E.I. 1997, c. 16 (Act and regulations proclaimed in force November 27, 1997); *An Act to Amend The Civil Code and Code of Civil Procedure as Regards Determination of Child Support Payments*, S.Q. 1996, c. 68 (proclaimed in force May 1, 1997); and *The Family Maintenance Act*, S.S. 1998, c. F-6.1 (proclaimed in force March 1, 1998).

[158] SOR/98-9 makes the P.E.I. guidelines the applicable guidelines under the *Divorce Act*, s. 2(1), in P.E.I. The Manitoba guidelines are proposed for designation under the *Divorce Act*: *Child Support Guidelines Regulations*, Man. Reg. F20-58/98, s. 26(2).

Where a person stands in the place of a parent in relation to the child, a further issue has to do with the proportion to be contributed by that person. We deal with this issue later, in Chapter 7.

C. Relationship to Public Law

We stated in RFD No. 18.2 on *Spousal Support* that 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 society's economic victims and their children.[159]

D. The Theories

1. Nurturance to overcome dependency

A clear objective of child support is to ensure the care and nurturance of a child from birth until the child is able to manage life independently. Of this objective, it has been said:[160]

> The duties of nurture to a child are based on natural dependency, and on one view, parents are charged with the responsibility of providing offspring with the social goods which are needed to overcome that dependency and cope as an adult. Generally, this includes a proper education and nowadays this must in the normal case include some form of post-secondary schooling. After that, the parents can be viewed as having acquitted themselves of this duty, and they should not, for example, be required to underwrite the effects that unemployment may have on a child. In the case of a child who is ill or disabled, where the social goods are not realistically attainable, liability may be continuing. ... [but] in time it might be thought that such children become a matter of communal responsibility.

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[159] Legislation assists governments (in this case, the province) to obtain reimbursement for the cost of providing child support when a parent can provide all or part of the necessary money but does not do so. In Alberta, s. 14 of the *Social Development Act* subrogates the government to " all the rights to maintenance or alimony" that a social allowance recipient has "for himself or his dependent children or both under an Act, order of a court or agreement" in the period during which the social allowance is paid, unless the amount has already been paid to the person entitled to receive it.

Statutory provisions elsewhere similarly authorize the appropriate authorities to obtain reimbursement for social assistance payments made to dependent spouses and children from the financially independent spouses and parents upon whom the primary obligation for family support is imposed by the private law system.

[160] Ziff, *supra*, note 13.

This objective does not indicate what monetary amount is required to meet the child support obligation.

2. Provision of a reasonable standard of living

It is generally agreed that the dollar amount that parents are obligated to provide to support their child should be based on the needs of the child and the means available to the parents. This is, in essence, the objective stipulated previously in section 15(8)(a) of the *Divorce Act.* But, as jurisprudence under the former *Divorce Act* provision has shown, simply stating this objective does not assist decisions about the quantum of support that the parents are obligated to provide. We describe a wide range of possibilities under heading E. Quantification. Both the statute and the case law recognize that the ability of the parents to pay support is often a limiting factor.

3. Joint parental responsibility

Under modern federal, provincial and territorial legislation in Canada, parents share the child support obligation jointly.[161] This is as it should be.

4. Fair apportionment between parents

The existing law requires parents to contribute to their joint responsibility in proportion to their respective abilities to pay.[162] However, issues arise in relation to the determination of the proportion to be contributed by each parent. Where a person (who is not a "parent" as defined in law) stands in the place of a parent in relation to the child, a further issue has to do with the proportion to be contributed by that person. As has been said, we deal with this issue later, in Chapter 7.

5. Promote child's self-sufficiency

The *Divorce Act* recognizes a duty of self-sufficiency in a spouse. As a corollary to the parent's duty to nurture a child to independence, should the law recognize a duty in a child to contribute increasingly to their own economic well-being as the child matures? The question becomes important to quantification of the support obligation owed to a child above the usual cut-

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[161] Prior to May 1, 1997, joint parental responsibility was stipulated to be a child support objective in section 15(8) of the *Divorce Act*.

[162] The *Divorce Act* expressly so stated in section 15(8) prior to its amendment in 1997.

off age (on our recommendation, a child 18 years or older) who is seeking support by reason of "illness, disability, or other cause" (which could include post-secondary education). Is there a point at which the child should be required to contribute to their own economic well-being and, if yes, to what extent? We are inclined to think that, in ordinary circumstances, a child who has reached the age of majority should contribute to their own economic well-being and that Alberta law should, "in so far as practicable, promote the economic self-sufficiency of a child [upon attaining or] within a reasonable period of time" after the child has attained the age of majority.[163]

RECOMMENDATION No. 11.3
Alberta law should, in so far as practicable, promote the economic self-sufficiency of a child upon attaining, or within a reasonable period of time after the child has attained, the age of majority.

E. Quantification

The broad objectives of child support law enjoy general acceptance. The difficult issues arise in relation to the specifics of quantification in accordance with those objectives. To what level of support should a child be entitled under the law? What standard of living should a child have? How should the parents' respective contributions be calculated?

In the past, in principle, courts tended to endorse standards that are higher than subsistence level support but, until quite recently, the awards made often amounted to little more. The usual approach was two-pronged. First, the court looked at the economic viability of the custodial parent.[164] Second, the court assessed the ability of the non-custodial parent to pay support on the basis of what was left after that parent had looked after current expenses, debts and dependents. Prior to 1994, it was extremely rare for courts to allocate more than 50 percent of the income of the non-custodial parent to meet spousal and child support obligations, regardless of the economic circumstances of the parties and the number of children who were

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[163] This wording parallels that found in the *Divorce Act*, s. 15.2(6)(d).

[164] See Carol J. Rogerson, "Judicial Interpretation of Spousal and Child Support Provisions of the Divorce Act, 1985" (1991) 7 C.F.L.Q. 271 at 294, 304.

placed in the sole custody of one parent (usually the mother). Empirical data (compiled prior to 1994) indicate that, on average, a custodial parent would not receive more than twenty per cent of the income of the non-custodial parent.[165] It is not surprising, therefore, that single mothers and their children represented a significant percentage of the poor.

This picture is changing — legislatively, with the 1997 introduction of the Federal Child Support Guidelines for use in divorce cases and judicially, with the Alberta Court of Appeal decision in the case of *Levesque* v. *Levesque*[166] and the Supreme Court of Canada decision in *Willick* v. *Willick*,[167] both decided in 1994. The case of *Levesque* v. *Levesque* is the leading Alberta case on the quantification of child support. This judgment must be read in the light of *Willick* v. *Willick* decided by the Supreme Court of Canada.

These and other sources show that an award of child support is capable of being quantified in any one of many ways.

In Chapter 4, we recommend that Alberta adopt the Federal Child Support Guidelines which we describe there in greater detail. Background documents prepared when the Guidelines were being developed reveal that the amounts set out in the Guideline tables are designed to produce a standard of living for a child that is commensurate with the financial capability of the child's parents and to ensure that the non-custodial parent contributes a fair share of the costs of raising the child. The court has discretion to adjust the amounts specified in the table upwards or downwards, depending on the category into which the exception falls.

This recommendation does away with the necessity to look closely at the methods that could be used to quantify child support. Nevertheless, to round out the discussion, we will give examples of some approaches that have been taken to the quantification of child support by courts and legislators in Canada, and elsewhere, in the past. We have considered them in arriving at

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[165] Department of Justice (Canada), *Evaluation of the Divorce Act, 1985, Phase I: Collection of Baseline Data* (June 1987), Principal Investigator, Professor C. James Richardson at 266; see also *Moge* v. *Moge* (1992), 43 R.F.L. (3d) 345 at 378-79 (R.F.L.).

[166] *Levesque* v. *Levesque*, *supra*, note 15.

[167] *Willick* v. *Willick*, *supra*, note 17.

the recommendation that Alberta adopt the Federal Child Support Guidelines.

1. Some approaches

a. Basic needs

One approach to child support would be to set a minimum standard based on a child's basic needs. This standard might look to the amount of social allowance payments provided to ensure essentials such as accommodation, food and clothing for a child requiring public support. Taking this approach would place a child at risk of experiencing a severe drop in standard of living on marriage breakdown. The child would not be entitled to enjoy the benefit of the financial capabilities of their parents.

b. Actual cost of raising child

Courts have stated that the costs of a child's upbringing should be considered in assessing child support.[168] The question is: on what basis should the actual costs be determined? Should courts rely on empirical data yielding average costs of raising a child, evidence of past spending on this particular child, budgeting by the custodial parent to meet the child's present needs, or some other guide?

A major problem with assessing the actual cost associated with raising a child is that empirical evidence demonstrates that actual spending varies with the ability of a child's parents to pay. Studies show that higher spending occurs where the parents' incomes are higher, and lower where the parents' incomes are lower.

Calculating the costs themselves also poses a challenge. In the leading Alberta case, *Levesque* v. *Levesque*, the Court of Appeal distinguished "hard" costs from "soft" or "economic" costs. "Hard" costs refer to money spent for the child and raises issues about "how-much-is-enough." It raises issues as to the appropriate question based on "what is best for the child" or "what is essential for the child," and so forth? "Soft" or "economic" costs have to do with the question whether an expenditure, or some part of it, is a child care

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[168] See *Paras* v. *Paras*, *supra*, note 24; see also *Vnuk and Felotic* (1976), 23 R.F.L. 117 (B.C.S.C.).

expense (*e.g.,* housing).[169] In her judgment in the leading Supreme Court of Canada case, *Willick* v. *Willick*, Madam Justice L'Heureux-Dubé spoke in terms of "direct" costs and "hidden" costs:[170]

> Direct costs include the children's share of rent, food, and washing, as well as reasonable sums for clothes, recreational needs, schooling, pocket money, babysitting, and transportation, to name a few. They also include the costs incurred by both parents of making reasonable arrangement for visits by the non-custodial spouse. Hidden costs, on the other hand, include an estimate of the value of the additional housekeeping, shopping, child rearing and nurturing tasks undertaken by the custodial spouse, as well as the opportunity costs incurred as a result of these responsibilities.

Expert opinion about the costs of raising a child has been admitted in isolated cases.[171] From 1971 until the enactment of the Federal Child Support Guidelines, the practice in Alberta was "to expect the custodial parent, usually the mother, to produce an expense budget."[172] Even so, until *Levesque*, lawyers and courts tended to apply their perception of the "going rates" for child support orders. This practice has been criticized for producing awards that were too low and results that were not very predictable.

c. Standing Enjoyed Prior to family breakdown: the *Paras* formula

Under the *Divorce Act*, the generally accepted objective in terms of the level of support after marriage breakdown is the continuation of the child's standard of living prior to breakdown. This standard was set over 25 years ago in the case of *Paras* v. *Paras*, decided in 1971 by the Ontario Court of Appeal:[173]

> ... the objective of maintenance [under the *Divorce Act*] should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred

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[169] *Levesque* v. *Levesque*, *supra*, note 15 at 595-597.

[170] *Willick* v. *Willick*, *supra*, note 17 at 203.

[171] See *Stevens* v. *Stevens* (1985), 45 R.F.L. (2d) 18 (Sask. Q.B.); see also *Smith* v. *Smith* (1986), 4 R.F.L. (3d) 210 (Ont. Prov. Ct.).

[172] *Levesque* v. *Levesque*, *supra*, note 15 at 597.

[173] *Paras* v. *Paras*, *supra*, note 24.

The "*Paras* formula" requires proportionate contributions by the spouses to the "sum which would be adequate to care for, support and educate the children."[174]

The *Paras* case had to do with interim child support. In subsequent cases, courts, including the Alberta Court of Appeal in the *Levesque* case and the Supreme Court of Canada in the *Willick* case, have endorsed the same test for permanent support.[175]

Apportioning the child support obligation under the *Paras* formula involves:

> ... arriving at the sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.

The court recognized that "in the vast majority of cases, after the physical separation of the parents, the resources of the parents will be inadequate" to allow children and parents to continue their former standard of living. Under the *Paras* formula, maintaining the children takes priority

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[174] The Law Commission of England has endorsed a similar approach: 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. 24-25:

> The first matter on which there was a wide measure of agreement was that the law should seek to emphasize as a priority the necessity to make such financial provision as would safeguard the maintenance and welfare of the children. ... the existing law directs the court to exercise its powers to make financial orders for the benefit of a child of the family so as to place the child, so far as it is practicable and (having regard to the spouses' means and obligations) just to do so in the financial position in which he would have been had the marriage not broken down, and each spouse had properly discharged his or her financial obligations and responsibilities towards that child.

And see *Matrimonial Causes Act* (England), 1973, s. 25.

[175] Another case is *Friesen* v. *Friesen* (1985), 48 R.F.L. (2d) 137 (B.C.C.A.), cited in *Willick*. And see *infra* Chapter 10 on Variation Orders. The child support expectation is "conditioned by the standard of living of the parents at the time" of the marriage break-up, but it is not limited by it: the *Willick* case establishes that children can expect to share in changes in their parents' fortunes after marriage break-up as well:

> [The *Divorce Act* is written to shelter the child] as much as possible from the consequences of divorce by providing for escalating needs and by permitting the child to benefit from any improvement in the lifestyle of one or both of the parents.

over the right of either parent to continue to enjoy the same standard of living to which he or she was accustomed when living together. The court predicted that its approach would tend to preserve a higher standard of living in the home of the custodial parent:

> Generally speaking, such a formula would tend to preserve a higher standard of living in the home in which the children are supported at the expense of some lessening of the standard of living of the other parent, thus creating indirectly a benefit to the parent who continues to support the children.

In justifying this result, it observed:

> This ... may be the only manner in which the primary obligation of each parent to the children can be recognized and would be in keeping with the scheme of the [*Divorce*] *Act* to ensure that on the break-up of the family the wishes and interests to be recognized are not solely those of the spouses. Nor should the possibility of such an indirect benefit be a reason for limiting the scale of the children's maintenance.

The *Paras* formula assumes the prior existence of a family consisting of the child and two parents. Its application is limited by the fact that not all children will have lived in a household consisting of both parents: the standard was not fashioned for children born outside marriage.

d. Fixed percentage of Custodial Parent's Costs: The One-Third Rule of Thumb

In some cases, in the absence of specific evidence, courts have applied a rough rule of thumb to separate the household and personal living expenses of the custodial parent from child-connected expenses. It has been suggested that one-third of the custodial parent's expenses represents basic household costs that continue with or without children, that a further one-third represents the personal expenses of the custodial parent, and that the final one-third represents child-connected costs.[176]

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[176] See *Giles* v. *Giles and Wood* (1980), 15 R.F.L. (2d) 286 (Ont. C.A.); *Blanchard* v. *Blanchard* (1987), 64 Nfld. & P.E.I.R. 15, 197 A.P.R. 15 (Nfld. S.C.); *Williamson* v. *Perry* (1986), 76 N.S.R. (2d) 257, 189 A.P.R. 257 (N.S. Fam. Ct.). And see generally, Judge Norris Weisman, Assessing Quantum of Support — Determining the Indeterminate, published in *Cutting Edge Arguments for the Family Law Practitioner: The Dollar Realities of Reform*, Law Society of Upper Canada, Friday, June 5, 1987 at A-2 to 44. See also Judge R. James Williams, Child Support (An Update and Revision of Quantification of Child Support (1989) 18 R.F.L. (3d) 234) Federation of Law Societies of Canada and Canadian Bar Association, 1990 National Family Law Program, Calgary, Alberta, July 1-5, 1990.

e. Fixed Percentage of Parents' Combined Income: *Levesque* Litmus Test

To get around the difficulties involved in determining the actual costs of raising a child, the Alberta Court of Appeal has set out a "'litmus test' for reasonableness" for judges to apply when both parents work outside the home and there are no issues of spousal support.[177] Under this test, in a one-child family, the child would be supported at the level of 20% of the parents' combined gross income; in a two-child family, the support level would be 32%. The Court describes the test as a "rough one," a "modest guide," offered "merely as a warning bell to protect against inadequately-put cases." It is neither "a formula for the calculation of an award" nor "a default rule to apply in the absence of evidence." The Court acknowledges that "many reasons might exist for variance ..."

f. Fixed percentage of non-custodial parent's income: Federal Child Support Guidelines

Under the Federal Child Support Guidelines used in divorce cases, tables quantify the amount of support payable on the basis of the non-custodial parent's income. The Guidelines are presumptive. There are exceptions. For example, they permit the court to depart from the specified amounts where applying the Guidelines may cause undue hardship to a spouse or child,[178] the parents share custody (each has access or physical custody 40% or more of a year), the child is over the age of 18 years or the person from whom support is sought stands in the place of a parent.[179]

g. Fixed Percentage of Total incomes of parents' new households

Some cases exemplify an interesting combination of a *Paras*-type formula and the rule of thumb approach which allocates one-third of household expenses to child-connected expenses.[180] Determining the quantum of child support by reference to the total incomes of the new households of each parent, instead of by reference to the respective incomes of the parents, is one way of dealing with the "second family conundrum."

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[177] *Levesque* v. *Levesque*, *supra*, note 15, at 601.

[178] The exceptions for hardship are narrowly defined: Guidelines, s. 10(2).

[179] For related discussions of the Guidelines, see Chapter 1, heading F., and Chapter 4, heading A.1.B.ii.

[180] See, *e.g.*, *Williamson* v. *Perry*, *supra*, note 176.

Two approaches to the treatment of the income of a new spouse are discussed in the case of *Snelgrove-Fowler* v. *Snelgrove*, decided in Alberta in 1993: the "household income approach" and the "savings approach."[181] We include reference to this case because the conceptual analysis is illuminating. However, we caution that neither approach can be taken to describes the law in Alberta. That is because in *Levesque* v. *Levesque*, decided the next year, the Alberta Court of Appeal directed that the income of a subsequent partner should not be taken into consideration.

The "household income approach" consists of adding "the entire income of the new spouse to the former spouse's income to arrive at a household income." The "savings approach" involves adding to the parent's income a dollar figure attributable to that part of "the subsequent spouse's income ... which, by virtue of the shared living arrangement, frees up money the parent would otherwise have had to pay for groceries, rent and other basic living expenses." In the *Snelgrove-Fowler* case, the judge attributed the "admittedly arbitrary" amount of one-third of the income of each new spouse to the income of the child's parents before apportioning child support responsibility between them.

Under the Federal Child Support Guidelines, where undue hardship is claimed, the court must deny the claim if it is of the opinion that the household of the spouse claiming undue hardship would have a higher standard of living than the household of the other spouse.[182] We note that this "standard of living test" takes into account the incomes of "any other person who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person," not just the income of a new spouse.[183]

2. Multitude of variables

As is evident from the discussion of approaches to the quantification of child support, a multitude of factors hold the potential to affect the result. The possible permutations and combinations into which these factors can be arranged for the purpose of quantifying child support is almost boundless.

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[181] *Snelgrove-Fowler* v. *Fowler* (1993), 138 A.R. 192 (Q.B.).

[182] Federal Child Support Guidelines, s. 10(3) and (4).

[183] *Ibid.*, Schedule II, Definitions, para. (c).

The discussion raises some issues that relate to the assessment of the child's needs. How should these needs be determined? Should the same child support amounts apply to all children or should the amounts vary with the circumstances of each child taken individually? If absolute figures are chosen, should they cover basic needs at a minimal level or should they reflect average spending on children by families across a broad section of society? Should different figures be used for children in different age groups? If each child's needs are assessed individually, what should the standard be? Should child support be pegged at what is required to meet the child's essential needs, maintain the standard of living that the child has enjoyed in the past or satisfy some notion of what is desirable for the child in the future? The questions go on.

The discussion also raises some issues that relate to the assessment of the ability of the child's parents to pay. Should the assessment of a parent's ability to pay be based on income alone, or should the parent's capital assets or other resources form part of the consideration? Should the assessment of income be based on net income or gross income? Should it be based on a parent's actual income or should account be taken of the parent's income-earning capacity either at the time of the assessment or looking into the future? Should account be taken of other sources of assistance available to the parent, such as contributions from grandparents, inheritance monies or new partners? What, if any, allowance should be made for a parent's employment costs? debts? child access expenses? Should a parent be left with enough money to maintain at least a subsistence standard of living?[184] What account should be taken of support obligations, legal or moral, owed to children in a second family or to other dependents? How, if at all, should cost-of-living adjustments be handled? What should be done about other changes in a child's needs or a parent's ability to pay?

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[184] Compare, *e.g.*, the differing approaches taken by the Alberta Court of Appeal in *Levesque* v. *Levesque*, *supra*, note 15 at pp. 603 and L'Heureux, L.J. of the Supreme Court of Canada in *Willick* v. *Willick*, *supra*, note 17 at pp. 195. See also *Murray* v. *Murray*, (1991), 123 A.R. 68 (Alta. Q.B.); *Hutton* v. *Hutton* (1985), 48 R.F.L. (2d) 451 (Ont. Dist. Ct.); and *Stunt* v. *Stunt* (1990), 30 R.F.L. (3d) 353 at 365 (Ont. Gen. Div.) (Hoilett, J.). The latter cases refine the *Paras* formula by making it appropriate to "subtract from each parent's income the so-called subsistence level of income and use the remainders as the basis for establishing the ratios, based on which the parents, respectively, should be required to assume child support obligations." A subsistence deduction for the parent forms part of the calculation on which the amounts tabled in the Federal Child Support Guidelines are based.

F. Recommendation

We have endorsed the general premise that Alberta law should be consistent with the *Divorce Act*. The theory on which child support in divorce cases is based is not spelled out in the *Divorce Act*. An idea of fairness to the child and parents can be inferred from certain sections of the *Divorce Act*:

- section 2, which restricts the definition of "child of the marriage" to a child who
  - (a) is under the age of majority and who has not withdrawn from [parental] charge; or
  - (b) is the age of majority or over and under [parental] charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.
- section 15.1(5)(b), which gives the court discretion to depart from the Guidelines where their application "would result in an amount of support that is inequitable" given that special provisions have been made in another way;
- section 15.1(7), which allows the court to depart from the Guidelines where both parents consent and the court is satisfied that "reasonable arrangements have been made for the support of the child."

The Federal Child Support Guidelines shed additional light. Section 1(a) embodies the objectives of establishing a "fair standard of support" for children and ensuring that children "benefit from the financial means of both spouses."[185] Where a child is the age of majority or over, section 3(2)(b) authorizes the court to order support in an amount that departs from the Guidelines where the court considers the Guideline approach to be inappropriate. In doing so, it should have "regard to the condition, means, needs and other circumstances of the child" as well as the financial ability of each parent to contribute. One implication could be that an adult child has a duty of contribution that is not expected of a child under the age of majority. In this case, the Guidelines are a factor to consider and not presumptive for such a child.

In short, each of the five theories we identified earlier in this chapter, under heading D. can be seen to play a part. The underlying theory appears

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[185] Federal Child Support Guidelines, *supra*, note 143, s. 1(a).

to be care of the child from birth until the child becomes responsible to maintain themself. The child should be provided with a "fair standard" of support. The responsibility for child support should be shared jointly by the parents and apportioned between them. The child support obligation ceases when the child removes themself from parental charge, attains the age of majority or, if over the age of majority, becomes capable of providing themself with the necessaries of life.

We have framed a recommendation analogous to our recommendation that spousal support law should foster the equitable sharing of the economic consequences of marriage or marriage breakdown.

RECOMMENDATION No. 12.3
Alberta child support law should foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child who is under the age of majority and assistance to their child who is over the age of majority but unable, by reason of illness, disability or other cause, to provide the necessaries of life for themself.

G. When Do The Theories Apply?

We have stated that the child support obligation is based on the relationship between parent and child. The obligation should not differ depending on whether the child was born within or outside marriage. In order to give effect to the child support obligation, the court should have power to make a child support order against a parent of a child, regardless of whether the child was born within or outside marriage. In Chapter 9, we examine the specific powers that should be available to a court making a child support order.

RECOMMENDATION No. 13.3
The court should have power to make an order of child support against each parent of a child.

CHAPTER 4 IMPLEMENTATION MODELS

A. Two Approaches

In Chapter 3, we recommended that Alberta child support law should foster the responsibility of parents to provide a reasonable standard of living for their child and the fair apportionment of this responsibility between them.

In this chapter, we will look at two contrasting approaches that may be taken to child support legislation and at various models that could be adopted in order to implement the child support theory we have recommended be adopted.

The two contrasting approaches to the structuring of support were discussed in RFD No. 18.2 on Spousal Support:

> 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.
>
> 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.

In spousal support cases, two issues dominate the discussion: (i) is this spouse entitled to support; and (ii) if yes, how much support? In child support cases, the question of entitlement (at least for a child up to age 18) would be answered automatically in the affirmative. The issues that dominate here are: (i) how much support; and (ii) for what proportion of that support is each parent responsible?

From a conceptual standpoint, the two contrasting approaches and the possibilities for their modification are the same for child support as they are for spousal support, despite these differences in the issues that receive emphasis.

B. Judicial Discretion

Several approaches may be taken to legislation built on judicial discretion to decide child support rights and obligations. We explored them in RFD No. 18.2 on *Spousal Support*. They are: (1) continue broad unfettered judicial discretion; (2) specify objectives; (3) identify factors to consider; (4) legislate principles; (5) rely on judicial guidelines; or (6) combine approaches. We will consider the implications of each of these alternatives for child support. We will also consider a seventh alternative: (7) legislate a minimum standard.

1. Continue broad judicial discretion

As we stated in RFD No. 18.2, current legislation in Canada confers a very broad discretion on the courts in the adjudication of support claims. The flexibility of an unfettered judicial discretion is purchased at a high price in terms of its uncertainty, inconsistency and unpredictability. Until recently, the relatively unfettered judicial discretion that courts have exercised over child support often resulted in inadequate levels of child support.[186]

2. Specify objectives

In Chapter 3, we looked at the child support objectives specified in some provincial statutes and, formerly, in the Divorce Act.[187] We saw that specifying objectives gives some guidance to the courts, but the effect on decision-making is not much different from the conferral of a broad judicial discretion.

3. Identify factors to consider

The Federal Child Support Guidelines specify factors to guide decision-making in those circumstances where the court has discretion to depart from

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[186] See *e.g.*, Canadian Institute of Research, on commission from the ALRI, *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (March 1981); Department of Justice (Canada), *Evaluation of the Divorce Act, 1985, Phase I— Collection of Baseline Data* (June 1987) and *Phase II— Monitoring and Evaluation* (May 1990).

[187] See Chapter 3, heading B.2.b.

the Guidelines in order to cover additional expenses[188] or to mitigate undue hardship which would be experienced by the parent who is liable to pay support or the child if the tables were applied without modification.[189]

As seen in Chapter 3, prior to May 1, 1997, the Divorce Act took a two-pronged approach to the award of child support. In addition to objectives, it specified factors for the court to consider in making a child support order.

Statutes in several provinces list various factors for the court to consider in making a child support order (as, formerly, did the list in the *Divorce Act*[190]). Typically, this consideration is mandatory. The court must consider the factors set out in relation to "all of the circumstances" or in addition to any "other relevant factors." The lists vary in length and content from one jurisdiction to another.

In some provinces, the same list of factors applies to both spousal and child support. Marriage breakdown provides the context for the operation of these combined lists. The lists that have been legislated in British Columbia and Saskatchewan are fairly brief.[191] The British Columbia provision provides:[192]

> 93(2) If a spouse or child will be living separate and apart from the spouse or parent against whom the application is made, the court may, as it considers appropriate adjust the amount of its order under subsection (1) to take into account the needs, means, capacities and economic circumstances of each spouse, parent or child, including the following:
>
> (a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
>
> (b) any other source of support and maintenance for the applicant spouse or children;

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[188] Federal Child Support Guidelines, *supra* note 143, s. 7.

[189] *Ibid.*, s. 12.

[190] The former *Divorce Act* factors are reproduced in Chapter 3, heading A.2.B

[191] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(2); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 5(1).

[192] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(2).

> (c) the desirability of the applicant spouse or child having special assistance to achieve financial independence from the spouse or parent against whom the application is made;
>
> (d) the obligation of the spouse or parent against whom application is made to support another person; and
>
> (e) the capacity and reasonable prospects of a spouse or child obtaining an education or training.

Two of the Saskatchewan factors are particularly interesting. One is the inclusion of:[193]

> ... the cost to the respondent of exercising access to that child.

The other is anticipation of the introduction of quantitative guidelines signalled by the inclusion of:[194]

> ... any regulations made pursuant to this Act establishing guidelines for maintenance orders.

Much longer combined lists are incorporated in provincial statutes in New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Yukon.[195] In these lists, some of the factors are general in application, others are specific to children and still others, to spouses. The New Brunswick list includes the following factors of relevance to child support.[196] The four factors specific to spouses are not reproduced.[197]

> 115(6) In determining the amount, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including

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[193] *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 5(1)(d).

[194] *Ibid.*, s. 5(1)(e).

[195] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(6); *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 39(9); *Family Law Act*, S.O. 1986, c. 4, s. 33(9); *Family Law Act*, R.S.P.E.I. 1988, c. 12, s. 18(5); and *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 33(5).

[196] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 115(6); paras. (l), (m) and (n) are specific to child support alone.

[197] Paras. (o)-(r) are specific to spousal support.

(a) the assets and means of the dependant and of the respondent and any benefit or loss of benefit under a pension plan or annuity;

(b) the capacity of the dependant to provide for his or her own support;

(c) the capacity of the respondent to provide support;

(d) the age and the physical and mental health of the dependant and of the respondent;

(e) whether any physical or mental disability or other cause exists that impairs the ability of the dependant to support himself;

(f) the length of time the dependant and respondent cohabited;

(g) the needs of the dependant, having regard to the accustomed standard of living while the parties cohabited;

(h) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(i) the legal obligation of the respondent to provide support for any other person;

(j) the desirability of the dependant or respondent remaining at home to care for a child;

(k) any contribution by the dependant to the realization of the career potential of the respondent;

(l) where the dependant is a child, his or her aptitude for and reasonable prospects of obtaining an education;

(m) where the dependant is a child, whether the child is in full time attendance at school;

(n) where the dependant is a child, whether the child has voluntarily withdrawn himself from parental control under circumstances that indicate that he has abandoned, or should be considered to have abandoned, any right to support;

...

(s) any other legal right of the dependant to support other than out of public assistance programs; and

(t) 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.

In other provinces, separate lists guide decision-making in spousal and child support cases. Manitoba and Nova Scotia are examples.[198] The list of child support factors in each of these provinces is short. They focus on the child's needs and parents' abilities to pay. The Nova Scotia section reads:

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[198] *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 37, 40; and *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 10, 11 and 12.

> 10(1) When determining the amount of maintenance to be paid for a dependant child, the court shall consider
>
> (a) the reasonable needs of the dependent child;
>
> (b) the reasonable needs and ability to pay of the parent or guardian obliged to pay maintenance;
>
> (c) the ability to pay of another parent or guardian who is supporting the child; and
>
> (d) the ability of the child to contribute to his own reasonable needs.

The Manitoba legislation identifies items to be considered in assessing the child's needs: "the cost of residential accommodations, housekeeping, food, clothing, recreation and supervision for the child" and "the need for and cost of providing a stable environment for the child."[199]

In deciding whether a child who is the age of majority or over is unable to obtain the necessaries of life,[200] one suggestion is that "the income received by a child from social assistance or student loans should be taken into account."[201]

The FPTFLC considered modifying the approach of identifying factors by providing the courts with data on the average costs of raising children.[202] It envisaged that the data would be keyed to parents in different income groups. The data would give courts a reference point from which to begin determining support awards. In rejecting this approach, the FPTFLC expressed reservations about how good the reference point would be. The FPTFLC concluded that this innovation would not improve the present system enough. In particular, it would leave unresolved the problem of determining how the costs of raising children should be shared between the two parents and families in similar situations would continue to receive significantly different child support awards.

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[199] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 37.

[200] *Divorce Act*, s. 2 (definition of "child of the marriage"; Federal Child Support Guidelines, s. 3(2).

[201] Ziff, *supra*, note 13.

[202] Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support (Department of Justice, Canada, 1995) at 5-6.

4. Legislate principles

In RFD No. 18.2 on *Spousal Support*, we described the approach taken in the *Family Law (Scotland) Act, 1985*.[203] That Act legislates five basic principles which represent an attempt to structure the exercise of judicial discretion in a manner that would balance the need for flexibility, consistency and justice. Compared with the objectives seen in Canadian legislation, the principles are more fully developed. Each principle is associated with specific factors that the court must consider in applying the principle. The Act requires that a support order be justified by an applicable principle and that the order be reasonable having regard to the resources of the parties.

The principles legislated in Scotland guide courts making spousal support orders. Similar principles could be designed to guide courts making child support orders. However, it would be impractical for Alberta to move in this direction: the principles of compatibility with the federal *Divorce Act* and consistency with other provincial legislation militate against it.

5. Rely on judicial guidelines

The courts could be left to provide their own guidelines, as the Alberta Court of Appeal has done in the case of *Levesque* v. *Levesque*. In that case, the Court identified the need for guidelines under the *Divorce Act*. It recognized that "[t]he function of appellate courts is to flesh out broad statutory grants of 'discretion' with guidelines" and proceeded to set out its "Guidelines for Child Support Awards in Two-income Families." *Levesque* provided direction to judges determining child support cases under the *Divorce Act* prior to the 1997 amendments and to lawyers and litigants attempting to settle child support issues out of court. In theory, it continues to guide decisions in child support cases that are governed by Alberta statutes.[204]

6. Legislate minimum standard

Nova Scotia legislation suggests the application of a minimum standard for use by courts to determine what is a "reasonably suitable" amount to order for child support. The legislation permits the court to consider "as a

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[203] ALRI RFD No. 18.2 at 64.

[204] See *Galloway* v. *Galloway*, [1997] A.J. No. 791, (1997) 5 Alta. L.R. (3d) 121 (Alta. Prov. Ct.), where the Court held that the Federal Child Support Guidelines did not bind the Provincial Court under the *DRA*, Part 4. The Court applied *Levesque* and stated reasons for so doing.

minimum standard the amount of family benefits paid for by the Province" under its public assistance legislation.[205] The same minimum standard applies to children born within or outside marriage.

7. Combine approaches

Legislation in some provinces combines different approaches to legislating the criteria by which child support rights and obligations are to be determined. Prior to the 1997 amendments, the *Divorce Act* combined objectives and factors. The Scottish principles are linked to factors for the court to consider in awarding support.

In RFD No. 18.2 on *Spousal Support*, we pointed out that no combined approach is perfect. A combined approach might shore up the shortcomings of any single approach, but the experience under Canadian legislation suggests that the effect of legislating objectives and factors is much the same as legislating an unfettered judicial discretion.

C. Fixed Formula

1. Meaning of "child support guidelines"

In RFD No. 18.2 on *Spousal Support*, we stated that one way to ensure that support is awarded in an appropriate amount would be to provide comprehensive guidelines for its assessment and periodical review. Taking this approach, child support rights and obligations would be "resolved by reference to fixed mathematical formulae which might then be adjusted to take into account particular factors."[206]

We observed that quantitative support guidelines can operate either as presumptive guidelines or as advisory guidelines. Advisory guidelines permit a wide ambit for the exercise of an overriding judicial discretion.

We further observed that quantitative support guidelines may be imposed judicially or by legislation.

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[205] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 10(2) and 12(2), referring to the *Family Benefits Act*.

[206] Law Commission (England), Law Com. No. 103, *Family Law—The Final Consequences of Divorce: The Basic Policy—A Discussion Paper*, October 1980, para. 80, quoted in ALRI RFD No. 18.2 at 69.

2. Establishment

a. Judicial guidelines

The litmus test for child support awards laid down by the Alberta Court of Appeal in the case of *Levesque* v. *Levesque* provides a good example of a judicially-imposed quantitative formula for determining child support. It pegs child support at 20% of the combined gross income of the parents for one child, or 32% for two children. The formula is fixed; however, its application is advisory, thus protecting litigants from unfair results arising from its strict application.

b. Legislated guidelines

Child support guidelines are in effect in many jurisdictions, including the United States, Australia and the United Kingdom. They are amply described in a growing body of literature.[207] Much can be learned from the experiences in these jurisdictions. However, because Canada has produced a child support guideline model of its own (described at length in Chapter 3), we have devoted our attention to it.

D. Two Approaches Compared

The charts on pages 91 and 92 compare two contrasting approaches to the reform of child support law. The chart on page 91 gives some pros and cons of

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[207] Examples include: United States. *Principles of the Law of Family Dissolution: Tentative Draft No.3* (2 volumes), the American Law Institute's upcoming supplement to their project on family law ; Linda H. Elrod "The Federalization of Child Support Guidelines" (1990) 6 *Journal of the American Academy of Matrimonial Lawyers*, 103; and Steven L. Abel "Child Support Guidelines: A comparison of New York, New Jersey, and Connecticut -- a Synopsis" (Oct. 1995) *Family and Conciliation Courts Review*, 426. (The American Law Institute project as a whole has five parts: child custody; child support; division of property upon dissolution; compensatory spousal payments; and non-marital cohabitation. An introductory chapter and chapters on the division of property upon dissolution and compensatory spousal payments have been published. The chapters on child support and child custody were presented to the ALI in May, but have not yet been published — they are first published as tentative drafts, number 1 and 2, and then as a final draft.) Australia. Australia Parliament, House of Representatives, Joint Select Committee on Certain Family Law Issues, *The Operation and Effectiveness of the Child Support Scheme* (Canberra: Australian Government Publishing Service, 1994); and Australia Parliament, House of Representatives, Joint Select Committee on Certain Family Law Issues, *The Operation and Effectiveness of the Child Support Scheme: Recommendations and Conclusions* (Canberra: Australian Government Publishing Service, 1994). United Kingdom. Department of Social Security, *Notes for Advisers: Child Support - A New Approach* (London: DSS, 1992); Roger C. Bird, *Child Maintenance: The New Law*, 2ed. (Bristol: Family Law, 1993); D. Burrows, *The Child Support Act 1991 - A Practitioner's Guide* (London: Butterworths, 1993); E. Jacobs and G. Douglas, *Child Support: The Legislation* (London: Sweet and Maxwell, 1993); and British government, *Children Come First*, Cmd. 1263, 1990, 2 vols.

maintaining judicial discretion. The chart on page 92 gives some pros and cons of adopting a child support formula. The Federal Child Support Guidelines meet some of the criticisms.

Maintain judicial discretion

Pro

- Broad judicial discretion gives flexibility to provide fairness in individual cases.

- In Alberta, *Levesque* decision ensures high awards, relative to parental ability to pay, with priority being given to the needs of children.

Con

- Families in similar circumstances often end up with significantly different child support awards.

- Risk of loss of respect for the legal system if it appears to treat children inequitably.

- Burden of demonstrating costs of raising children, needs and abilities of parents to pay falls on individual litigants.

- Budgets prepared by custodial parent are often limited to tangible expenditures and do not consider all elements of child's need and family's standard of living.

- Realistic budgeting is complicated by fact that family is going through a period of change.

- Fact that child will ultimately live at custodial parent's standard of living is generally ignored.

- Builds tension within families.

- Costly to litigants and state.

- Justice system not accessible to all persons.

Adopt a child support formula

Pro

- Will help parents, lawyers and judges set fair and consistent child support awards.
- Holds potential to increase acceptance of parental responsibility for children.
- By removing an important source of conflict at the time of the family breakdown, may promote positive relations among the family members, particularly the child and the non-custodial parent.
- Has potential to lower legal costs for parents.
- Has potential to lower legal aid, court and enforcement costs for the state.
- Approach is child-centred.
- Formula-generated awards are easy to administer and apply.
- Helps establish the importance of the legal obligation to pay child support compared with the obligation to honour personal other debts.

Con

- Users unlikely to have access to the data on which formula is based.
- Formula may be unclear about what it is intended to do, on what average it is based or how it was actually constructed, making it difficult to challenge in a particular case.
- Federal Child Support Guidelines (FCSG) build in custodial/non-custodial distinctions rather than parenting responsibilities; reliance on this older idea may serve to increase the areas of contested custody.
- FCSG give limited credit for significant care of the child by the non-custodial parent.
- Unclear how formula will work, *e.g.*:
    - demographics of family over time
    - balance between first and second families
    - significance of which party paid expenses
    - effect on settlement of actions
- Proposition that the pattern of disposable income should be used to set the formula is questionable.
- Formula is too simple and too lock-step to accommodate many, if not most, situations: *e.g.* the formula is tied solely to income; it does not take account of actual expenses.

E. Reform in Alberta

As we see the options for reform, Alberta has three principal choices:[208]

- continue judicial discretion, with appropriate fetters, for cases decided under provincial statute
- apply the Federal Child Support Guidelines to cases decided under provincial statute
- develop Alberta Child Support Guidelines for use under provincial statute and have them accorded status as the "applicable guidelines" for use under *Divorce Act*.

1. Continue judicial discretion

Alberta could choose to continue judicial discretion, modified as Alberta wishes using one or more strategies of the sort discussed under heading C. However, this would mean that different approaches would be taken to the award of child support on divorce and under provincial law. Expectably, different approaches would lead to different awards in similar cases. If and when divorce proceedings are commenced, a child support order made under a provincial statute would be reconsidered where the child comes within the definition of "children of the marriage" under the *Divorce Act*. Support awards for other children would continue to be governed by provincial law. This category would include children born outside marriage who have not become "children of the marriage" of a divorcing couple and "children of the marriage" (as defined by the *Divorce Act*) whose parents do not bring divorce proceedings. The prospect of different outcomes resulting from the categorization of children along these lines offends our principle of equality for children.

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[208] In *Kary* v. *Kary* (1996), 194 A.R. 194 (Alta. Q.B.), in quantifying child support, the court compared three alternative methods: the *Levesque* formula (see *supra*, note 15), the federal child support guidelines (as then proposed), or the *Levesque* litmus test. The court noted that Alberta courts were already applying the guidelines: the question whether Alberta courts should use the federal guidelines was discussed in *Brusselers* v. *Shirt* (1996), 183 A.R. 27 (Alta. Q.B.), and a recent panel of three Alberta Court of Appeal judges had decided to apply the federal guidelines prospectively in order to forestall a plethora of future applications to vary. With respect to the calculation of interim child support, two alternative methods were compared in *Elliott* v. *Elliott* (1997), 201 A.R. 268 (Alta. Q.B.): the federal guidelines (as then proposed) or the *Levesque* litmus test. In *Jenkyns* v. *Jenkyns* (1997), 201 A.R. 231 (Alta. Q.B.), in ordering interim child support, the court applied the *Levesque* formula.

2. Apply Federal Child Support Guidelines to Alberta cases

Alberta could choose to apply the Federal Child Support Guidelines to cases decided under provincial statute. These Guidelines grew out of recommendations made by the Federal/Provincial/Territorial Family Law Committee (FPTFLC), a committee composed of federal, provincial and territorial representatives, including representatives from Alberta Justice. One of the principles adopted by the FPTFLC was the equality of all children. That is to say, the FPTFLC recommendations were created with provincial as well as federal implementation in mind.

The application of the federal Guidelines to Alberta cases would foster the consistency of awards. We think it would be both efficient and fair to apply the same guidelines to all cases where a child's parents are living apart. The status of the child's parents in relation to each other should not make a difference. We cannot think of any circumstances that would warrant approaching child support differently under provincial law.

3. Develop comprehensive Alberta Child Support Guidelines

Alberta could develop comprehensive Alberta Child Support Guidelines and seek designation under the *Divorce Act* so that they would apply to divorce cases as well as cases decided under provincial statute.[209]

Some observers argue that the *Levesque* test may produce higher awards than the Federal Child Support Guidelines for parents in most income groups. By developing its own guidelines, Alberta might be able to substitute child support amounts that come closer to the litmus test articulated by the Alberta Court of Appeal in the *Levesque* case than the amounts set out in the Federal Child Support Guidelines. However, it is well to remember that the *Levesque* litmus test is just that. It leaves judges with considerable discretion to make adjustments for the circumstances of an individual case. In other words, it is advisory in nature. Although the Federal Child Support Guidelines allow adjustments to be made, the discretion to

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[209] The *Divorce Act* contains a mechanism for substituting comprehensive child support guidelines established by a province for the Federal Child Support Guidelines. It authorizes the Governor in Council to make an order designating a province for this purpose and specifying the laws of the province that constitute the guidelines: *Divorce Act*, ss 2(5) and (6). The enactment of this provision opens the door for Alberta to fashion its own guidelines for use in all child support cases.

depart from the amounts specified in the tables arises only where deviation from the Guidelines can be justified under the criteria (factors) provided.

Designing comprehensive child support guidelines for Alberta would be a demanding task. Many questions of principle and policy would have to be answered before a formula could be developed and dollar amounts calculated. The list of issues is long and the possibilities for their resolution complex. To name but a few: Who should bear the support obligation? How should it be apportioned? On what basis should the formula amounts be determined? Will child-rearing costs be averaged across population groups? From whence will the standard come? Will it be income based only or will assets be an additional factored considered? Will net or gross income be used? Will the formula be based on the income of one or both parents on an individual basis or on the basis of household income? How, if at all, will there be an accounting for tax implications and government benefits? Will the parent be entitled to a subsistence deduction? Will the application of the formula be mandatory or advisory? What provision will be made for exceptional circumstances such as undue hardship, other support obligations (legal or moral) or debt load? What effect will custody and access arrangements have on the application of the formula? Will the formula differ for children in different age groups? Will the formula vary with the number of children? Will it apply to children over the age of majority? How will changes in the circumstances of the parents be handled?

Designing guidelines specifically for Alberta would also mean considerable duplication of the effort that went into the development of the proposed Federal Child Support Guidelines and in which Alberta participated through its representatives on the FPTFLC.

F. Recommendations

1. Substantial conformity with the *Divorce Act*

A proper determination of the right to and quantum of child support cannot be undertaken in a statutory vacuum. We have adopted the general premise that the federal and provincial statutory support regimes should be compatible. This premise provides that Alberta law should be compatible with the *Divorce Act* provisions unless there is strong reason to depart from them.

Controlled discretion has advantages, support guidelines have advantages. Forceful arguments can be made for both. In our view, the advantages of compatibility are great enough to outweigh any balance in favour of one or the other. It ensures equality in the treatment of children in Alberta, regardless of the statute or court in which the application is made.

As we recommended for spousal support, we think it desirable to model the Alberta child support legislation on the *Divorce Act*.[210] We recommend that Alberta apply the Federal Child Support Guidelines to cases decided under Alberta law.

RECOMMENDATION No. 14.3

Rather than create its own child support guidelines, Alberta should apply the Federal Child Support Guidelines, including the Schedules, to cases decided under Alberta law.

2. Separate awards for each dependent

We considered whether Alberta courts should be required to segregate the quantum of support for each dependent, be it spouse or child. We concluded that legislation should not require separate awards, leaving such awards within the discretion of the court. Our reason was that agreements reached by parents often deal with complex interweaving of property distribution, lump sum transfers, spousal and child support. Such agreements may not lend themselves to the separation of support amounts for each dependent one by one. However, this is not always the case. We recognize there may be cases where a time-limited award may be appropriate for a child.[211] We also note that the terms of an agreement may trigger the court's discretion to depart from the Federal Child Support Guidelines.[212]

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[210] ALRI RFD No. 18.2 at 78.

[211] See Chapter 12, Duration of Order, heading A.1.B.

[212] *Divorce Act*, s. 15.1(5).

CHAPTER 5 OTHER SUBSTANTIVE ISSUES

A. Mother's Expenses Before, At and After Child's Birth

The *P&MA* makes the father and mother liable to pay the mother's expenses relating to the child's birth. The expenses include:[213]

> (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;
> ...
> (e) costs of any or all Court proceedings taken under this Act.

The application to recover these expenses must be brought within 2 years after the expense was incurred.[214]

We raised the issue of the payment of these expenses in connection with spousal support. We think that it is to the child's benefit to allow the mother to recover these expenses or a portion of them, whatever the status of the relationship between the mother and father. Benefits that might accrue to the child from a financial contribution to the mother include allowing the mother to take time off work before the child's birth or to obtain credit in order to arrange for appropriate birthing facilities or assistance.

RECOMMENDATION No. 15.3

Where no spousal support order has been made in connection with this expense, Alberta legislation should empower the court to order a parent to pay
(a) reasonable expenses for the support 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

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[213] *P&MA*, s. 16(2).

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

(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;

(b) costs of any or all Court proceedings taken under this Act.

B. Burial Expenses

The *P&MA* also empowers the court to order a parent to pay the child's burial expenses if the child dies before the date of the order.[215] Although this expense is not incurred to support the child, it is an expense related to the child and we think it reasonable that it should be apportioned fairly between the parents. We recommend that Alberta legislation empower the court to order the parents to pay burial expenses for the child.

In addition to the child's funeral expenses, the Nova Scotia legislation includes liability to pay the mother's funeral expenses. We think that this is appropriate and recommend that Alberta legislation empower the court to order the father to pay burial expenses for the mother if her death is a result of the pregnancy or childbirth.

RECOMMENDATION No. 16.3

Alberta legislation should empower the court to order a parent to pay
(a) burial expenses for the child;
(b) burial expenses for the mother if she should die as a consequence of the pregnancy or birth

C. Liability for Necessaries Provided to a Minor

At common law a child is liable to pay for "necessaries" which the child buys.[216] However, a child has no authority to pledge the credit of their parents. In fact, the person who supplies the "necessaries" to the child may have a heavier burden to prove that the goods or services provided were

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[215] *P&MA*, s. 16(2)(d).

[216] Other contracts that a minor enters into may be void or voidable. For further discussion of the issue of liability for contracts entered into by a minor, see ALRI Report No. 14 on *Minor's Contracts* (January 1975).

"necessaries" where the minor "lives with a parent or guardian who can and usually does supply him with necessaries."[217] One early case suggests :[218]

> ... that there is a presumption that a minor living with his parents is adequately supplied with necessaries which arises because the provision of necessaries is normally a matter of parental discretion with which the courts will be reluctant to interfere.

In short, in the absence of agency created in one of the normal ways, a parent is no more liable than a stranger for debts incurred by a child without their authority.[219]

Should the law be changed to make the parents of a minor liable for necessaries provided to that minor? Two provinces — Ontario and Prince Edward Island — have enacted legislation to for this purpose.[220] The Ontario legislation provides:[221]

> (2) If a person is entitled to recover against a minor in respect of the provision of necessities for the minor, every parent who has an obligation to support the minor is liable for them jointly and severally with the minor.
>
> (3) 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.

In RFD No. 18.2 on *Spousal Support*, we expressed our doubts about the effectiveness, in contemporary society, of the common law right of a wife to pledge her husband's credit for necessaries after separation and her implied agency to render him liable while they are living together. We recommended the statutory abolition of these common law doctrines.[222]

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[217] *Ibid.* at 3.

[218] *Ibid.* at 3-4, citing *Bainbridge* v. *Pickering* (1779), 96 E.R. 776.

[219] Davies, *Family Law in Canada*, *supra*, note 33 at 122.

[220] *Family Law Reform Act*, R.S.O. 1990, c. F.3, s. 45; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 44. Section 127 of the *Family Services Act*, S.N.B. 1980, c. F-2.2, which (like Ont. and P.E.I.) deals with spousal agency of necessity, includes no provision relating to minors.

[221] *Family Law Reform Act*, R.S.O. 1990, c. F.3, ss. 45(2) and (3) (ss. (1) and (4) are reproduced in RFD No. 18.2 on *Spousal Support* at 98).

[222] ALRI RFD No. 18.2, Recommendation No. 11.2.

Given our reservations about continuing the spousal remedy, we seriously question the need to create a new remedy or remedies to deal with the provision of necessaries to minors. We also think it likely that persons supplying goods and services to minors could find methods of ensuring payment more effective than relying on an obligation of the parent. We do not recommend the enactment of a statutory provision imposing liability on a parent for necessaries supplied to a minor.

CHAPTER 6 EFFECT OF CHILD SUPPORT AGREEMENT

A. Meaning of "Child Support Agreement"

In RFD No. 18.2, we discussed the effect of a "domestic contract" on the court's jurisdiction to order spousal support. There, we defined a "domestic contract" to mean "a marriage contract, separation agreement or cohabitation agreement." Where children are involved, these contracts typically contain provisions on child support as well as matters relating to the rights and obligations that exist between the parents.

With respect to child support, using the definition of a "domestic contract" would tie child support to the relationship of the child's parents to each other whereas we have said that child support should be based on the relationship of the parents to the child. A "domestic contract" is likely to cover parental agreements for the support of most children. However, the definition does not cover children born outside marriage whose parents have never lived together and who have not become children of a marriage. An expanded definition is required.

We propose to define a "child support agreement" as an agreement that two persons enter into with respect to the support of their child. Our definition would include a domestic contract that makes provision for child support.

B. Existing Law

As has been seen, the existing law distinguishes between children who are born within marriage or accepted as children of a marriage and children who are born outside marriage.

1. Children of the marriage

a. Alberta *DRA*

With one exception, the *DRA* is silent about the effect of domestic contracts on court jurisdiction over child support. Section 23 permits the court to make an order that applies "the property comprised in an ante-nuptial or post-nuptial settlement made on the parties to the marriage" for the benefit

of the children of the marriage. This power can be exercised "when a decree absolute of divorce or a declaration of nullity is given."

Of course, children are not parties to a domestic contract. Case law establishes that neither parent has the authority to waive or restrict the statutory obligations that each parent owes to dependent children.[223]

Moreover, the superior courts enjoy *parens patriae* jurisdiction. This jurisdiction empowers them to make orders for the benefit of minor children and other persons under disability, and it may be exercised on behalf of a child to override a parent's decision depriving a child of adequate support.

b. Federal *Divorce Act*

Section 15.1(5) of the *Divorce Act* permits the court to depart from the Federal Child Support Guidelines if the court is satisfied that the application of the Guidelines "would result in an amount of child support that is inequitable" given the special provisions made in a written agreement between the spouses or otherwise made for the benefit of a child. Section 15.1(7) is also relevant. It permits departure on the consent of both spouses if the court is satisfied that reasonable arrangements have been made for the support of the child.

Prior to May 1, 1997, section 15(5) 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 child support. The case law on this section clearly establishes that child support is a right of the child:[224]

> Child maintenance, like access, is the right of the child ... For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child. ... Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.

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[223] See *infra*, note 224 and accompanying text.

[224] *Richardson* v. *Richardson* (1987), 38 D.L.R. (4th) 699, [1987] 1 S.C.R. 857 at 859, cited with approval in *Willick* v. *Willick*, *supra*, note 17.

This did not mean that courts should ignore an agreement between spouses dealing with child support. To the contrary, the "correct approach" was to regard the contract "as affording strong evidence that the agreement made adequate provision for the needs of the children at the date the agreement was made."[225] The provisions of the contract did not fetter the court where, in the court's opinion, the contract failed to make adequate provision for the child.

2. Children born outside marriage

With respect to children born outside marriage, the *P&MA* provides that a parent may enter into an agreement to pay any or all of the expenses statutorily enumerated.[226] The list of "expenses" includes "monthly or periodic" child support.[227] The agreement must be in the form prescribed in the regulations under the Act. It may be made with the Director, the other parent, or any other person having the care and control of the child, and the parties may vary it at any time by entering into a new agreement. The Act stipulates that an agreement that "is not entered into in accordance with [these requirements] does not prevent a person from making an application" for a court order.[228] The court has power to vary or terminate an order or filed agreement.[229] The agreement terminates on death or adoption.[230]

3. Other provinces or territories

In RFD No. 18.2, we stated that statutes in several provinces empower a court to set aside an agreement in proceedings for spousal support. Most of these statutes confer the same power in proceedings for child support. That is to say, the provisions of an agreement may be set aside:

- if the agreement provides inadequate child support or results in unconscionability,
- if the child is receiving or would qualify for public assistance, or

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[225] *Willick* v. *Willick*, *supra* note 17 at 179, *per* Sopinka J.

[226] *P&MA*, s. 6

[227] *P&MA*, s. 6(2)(c).

[228] *P&MA*, s. 6(6).

[229] *P&MA*, s. 18.

[230] *P&MA*, s. 19(1).

• if there is default in the payment of support under the agreement.[231]

C. ALRI Report No. 53

In Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*,[232] we recommended that courts be statutorily empowered to disregard any provision in a domestic contract pertaining to child support or parenting arrangements, where to do so is in the best interests of the child. Section 17(1) of the draft legislation we proposed would provide:[233]

> 17(1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

D. Discussion

The recommendation in Report No. 53 accords with current statutory provisions in several provinces[234] and also reflects existing common law principles. However, we would now like to see four modifications.

First, section 17(1) applies to a "domestic contract." Its application should be extended to include any child support agreement.

Second, the parent paying support should be able to apply for relief from the requirements of the child support agreement.

Third, as we recommended in RFD No. 18.2 on *Spousal Support*, the court should have the power to "vary, discharge or temporarily suspend and again revive" the provisions of a child support agreement. This power would include the power to release the parent paying support from the contractual undertakings in an appropriate case, for example, where the parent's

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[231] *Supra*, chapter 8, p. 177.

[232] ALRI Report No. 53, (June 1989) at 61-65.

[233] ALRI RFD No. 53, Part IV - Draft Legislation, s. 17(1) at 63.

[234] See, *e.g.*, *Marital Property Act*, S.N.B. 1980, c. M-1.1, ss 38(1); *Family Law Act*, R.S. Nfld. 1990, c. F-2, ss 66(1); *Family Law Act*, R.S.O. 1990, c. F-3, ss 56(1); *Family Law Act*, S.P.E.I. 1995, c. 12, ss 55(1).

changed financial circumstances render the agreed payments excessive. The necessary authority should be legislatively conferred on the courts.

Fourth, we think that it should be possible for parents to enter into reasonable settlements even though they involve a discharge of all future child support claims. There may be circumstances where it is preferable for a parent to provide a lump sum rather than periodic payments for the support of a dependent child.[235] In order to give effect to such an agreement, the court should be able to make a final order confirming that compliance with the terms of a child support agreement constitutes a final settlement respecting child support. In this regard, we note that the *Divorce Act*, section 15.17(5) and (6), requires the court to record its reasons where it awards an amount that is different from the amount specified in the applicable table in the Federal Child Support Guidelines.

In the case of a domestic contract, we note the interdependence of various provisions. The presence of contractual undertakings made with respect to the possession, ownership and division of property or occupancy of the former matrimonial home and the payment of mortgage, tax, repair and maintenance expenses incidental to such occupation would be reflected in the amount of lump sum or periodic support to be paid to a parent for child support. The agreement by a non-custodial parent to pay the travelling expenses incurred by the children in visiting that parent would be another a consideration relating to support.

To sum up, we recommend that the power to vary, terminate, suspend or confirm the provisions of a child support agreement should be exercisable on the application of either parent, the child or a person on behalf of the child. The court should be entitled to set aside or substitute provisions of a child support agreement 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 a dependent child.

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[235] See, *e.g.*, *Howorko* v. *Howorko* (1980), 20 R.F.L. (2d) 43 at 53-54 (Sask. Unif. Fam. Ct.).

RECOMMENDATION No. 17.3

Alberta should enact those provisions set out in Part II of the draft legislation proposed in Part IV of ALRI Report No. 53 that relate to domestic contracts providing for child support, but modified

(a) to extend to any child support agreement,

(b) to specify that either parent or the child may apply for relief from the provisions in a child support agreement,

(c) to empower the court to vary, discharge or temporarily suspend and again revive the provisions in a child support agreement,

(d) to require the court to record its reasons where it upholds an agreement that provides for child support in an amount that is different from the amount that would be determined in accordance with the applicable child support guidelines,

(e) to empower the court to make an order confirming whether or not the child support agreement constitutes a final settlement of the child support obligation and that compliance discharges all future child support claims.

CHAPTER 7 PERSONS STANDING IN THE PLACE OF A PARENT

At times, the law imposes a child support obligation on a person who stands in the place of a parent in relation to a child. In Alberta, the obligation arises at common law. Some provinces set it out in statute. The obligation imposed can take any one of a variety of forms. We will explore several possibilities in this chapter.

A. Existing Law

1. Alberta

Alberta legislation is silent about the child support obligation of a person who stands in the place of a parent in relation to a child. The *MOA* imposes a support obligation on certain relatives of a child whose parents are unable to provide adequate child support, but this obligation is based on kinship, not functional relationship.

This means that the *in loco parentis* doctrine developed at common law is operative. The accepted definition of *in loco parentis* comes from the case of *Shtitz* v. *C.N.R.*:[236]

> A person *in loco parentis* to a child is one who has acted so as to evidence an intention of placing himself towards the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants.

Subsequent cases establish that more than mere financial support of the child is necessary: the person must intend to step into the parent's shoes and relate to a child as if the child were their own.[237] Factors of relevance to the determination include: the extent of the financial support provided, the "permanence" intended by the relationship, the parental functions performed, and the presence or lack of presence of the child's parents.

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[236] [1927] 1 D.L.R. 951 (Sask. C.A.) at 959, cited in *Simon* v. *Simon*, [1986] A.J. No. 173 (Alta. Q.B.), an Alberta case that describes the common law position. The concept was defined as early as 1879 in the British case of *Bennet* v. *Bennet* (1879), 10 Ch. D. 474.

[237] Julien D. Payne, *Payne on Divorce*, 4th ed. (Carswell, 1996), at 146-147.

2. Federal *Divorce Act*

The *Divorce Act* defines "parent" indirectly. The definition of "child of the marriage" refers to two spouses or former spouses who stand in the place of parents, or a spouse or former spouse of a parent where that spouse or former spouse stands in the place of a parent:[238]

> 2(2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

The Federal Child Support Guidelines, in section 5, give the court discretion to award support against a spouse who stands in the place of a parent for a child in "such amount as the court considers appropriate having regard to these Guidelines and any other parent's legal duty to support the child." "Spouse" includes a former spouse.[239]

Section 2(2) appears to statutorily embed the common law doctrine of *in loco parentis*. Because section 2(2) is written in the present tense, it appears to refer to the time at which support is being sought, but judicial decisions suggest that the obligation may survive an attempt by the person standing in the place of a parent to terminate the *in loco parentis* relationship.[240]

3. Other provinces and territories

As stated in Chapter 2, several provincial statutory regimes provide broad definitions of "parent" or "child" for the purpose of defining the ambit of child support rights and obligations.[241]

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[238] *Divorce Act*, s. 2(2).

[239] *Divorce Act*, s. 15.

[240] See *infra*, heading B.4, How long should the obligation last?

[241] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 1; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1; *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 2; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2; *Family Law Act*, R.S.O. 1990, c. F.3, s. 1; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 1; *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 2; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 1.

Legislation in Ontario provides an example of one approach. The Ontario *Family Law Act*, section 1, defines "parent" broadly, to include:[242]

> ... a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

Section 33(7) then limits the obligation of a parent who is not a "natural or adoptive" parent by making the obligation owed by a "natural or adoptive" parent outweigh it. Section 33(7) provides:

> 33(7) An order for the support of a child should,
>
> (a) recognize that each parent has an obligation to provide support for the child;
>
> (b) recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent; and
>
> (c) apportion the obligation according to the capacities of the parents to provide support.

The provisions in the Saskatchewan *Family Maintenance Act*[243] are identical in substantive content.

Legislation in Manitoba provides an example of another approach. Section 36 of the Manitoba *Family Maintenance Act* distinguishes the child support obligation owed by persons in four different categories: (1) the biological or adoptive parents; (2) the spouse of a parent; (3) the person cohabiting with a parent; and (4) persons standing *in loco parentis*—a grandparent, for example.[244] It provides:

> 36(1) Each parent of a child has the obligation, subject to *The Child and Family Services Act*, to provide reasonably for the child's support, maintenance and education, whether or not the child is in that parent's custody, until the child attains the full age of 18 years.
>
> (2) A spouse has the obligation to provide reasonably for the support, maintenance and education of any child of the other spouse, while the child is in the custody of the

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[242] R.S.O. 1990, c. F.3, s. 33(7).

[243] S.S. 1990, c. F-6.1, s. 3(2).

[244] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36.

spouses and until the child attains the full age of 18 years, but the obligation is secondary to that of the child's parents under subsection (1) and is an obligation only to the extent that those parents fail to provide reasonably for the child's support, maintenance or education.

(3) A person who is cohabiting with, but is not married to, another person has the obligation during cohabitation to provide reasonably for the support, maintenance and education of any child of that other person, while the child is in the custody of the persons or either of them and until the child attains the full age of 18 years, but the obligation is secondary to that of the child's parents under subsection (1) and is an obligation only to the extent that those parents fail to provide reasonably for the child's support, maintenance or education.

(4) A person who stands *in loco parentis* to a child has the obligation to provide reasonably for the support, maintenance and education of that child until the child attains the full age of 18 years, but the obligation is secondary to that of the child's parents under subsection (1) and is an obligation only to the extent that those parents fail to provide reasonably for the child's support, maintenance or education.

(5) A court on application where is it satisfied that a child is unable, by reason of illness, disability or other cause, to withdraw from the charge of any person named in this section or to provide himself with the necessaries of life may extend the obligation to provide support to that child beyond age 18 on such terms as the court considers just in the circumstances.

B. Discussion

1. Should persons who are not parents have a child support obligation?

It is, of course, open to question whether stepparents or other persons standing in the place of parents to dependent children should be under any legal obligation to support those children. Two considerations are: (a) whether it is fair to impose a future child support burden on a person because that person has extended benefits to a child in the past, and (b) whether the prospective liability is likely to inhibit a person from giving any financial support to a child, to the child's detriment.

The policy implications of imposing an obligation were outlined in submissions made to the Law Reform Commission of Canada when it reviewed the *Divorce Act*, 1968:[245]

> The social and economic implications of making maintenance and custody provisions applicable to stepparents should be carefully considered and public comment invited thereon. While the section 2 definition of "child" now makes the [*Divorce*] *Act* [1968] applicable to stepparents who stand *in loco parentis*, there have been few cases and little discussion on the principles involved. What, for example, is the impact of bringing in a stepfather in this way on the economic and social relationship between the child and the

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[245] Richard Gosse and Julien D. Payne, "Children of Divorced Spouses: Proposals for Reform," *Studies on Divorce*, Law Commission of Canada, 1975 at 140-141.

> natural father? What are the implications with regard to remarriage by the natural father and his assumption, if he does remarry, of new economic and social responsibilities? Should provision be made so that the natural father and stepfather can share financial responsibility? Should the stepfather be liable for support for his wife's children, as a matter of policy, regardless of whether he ever stands *in loco parentis* to them? Where provincial legislation imposed no liability on the stepparent before divorce, is it right to impose liability on divorce? Is it right to impose any responsibility at all on the stepparent for the children of his spouse when the marriage turns sour?

In spite of these unanswered questions, the Law Reform Commission of Canada concluded that the general view of society would endorse recognition to some degree of stepparent rights and obligations.

2. How should those persons be defined?

The persons who may have a child support obligation because they stand in the place of a parent need to be identified. Should such persons be defined only in terms of their relationship to the child, or should they be defined by their relationship to one of the child's parents? Must the person and the child live or have lived together? Or, phrased slightly differently, should a custodial connection be required?

a. Relationship to child

The common law defines the child support obligation in terms of the person's relationship, voluntarily undertaken, to the child.[246] Most legislative provisions contain some reference to the existence of a parental relationship. The Ontario legislation defines parent broadly to include a person who has accepted a child as a member of their family. The Manitoba Act, in section 36(4), places an obligation on a person who stands in the place of a parent in relation to a child.

b. Relationship to a parent

The Federal Child Support Guidelines specify a spouse (or former spouse) who "stands in the place of a parent for a child." The Manitoba legislation defines two categories of persons who owe a child support obligation solely in terms of the person's relationship to the child's parent. Section 36(2) places an obligation on the spouse of a parent "while the child is in the custody of the spouses." Section 36(3) places an obligation on a person "who is

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[246] James G. McLeod, annot: *P. (B.L.)* v. *P. (S.M.)* at (1996) 26 R.F.L. (4th) 180, asks whether a man must know that he is not the child's biological father before he can voluntarily consent to stand in the place of a parent to the child. The case law shows a lack of consensus on this issue.

cohabiting with, but is not married to" a parent "during cohabitation ... while the child is in the custody of the persons or either of them."

c. Is custody necessary?

The obligation of a parent to support a child exists irrespective of custody, access or other living arrangements. As noted previously, in Manitoba, the obligation of the spouse or cohabitant of a parent is statutorily connected to custody.[247] Living together does not appear to be a criterion of *in loco parentis* at common law, although a situation where a court finds that a person who lives apart from the child stands *in loco parentis* would be unusual.

3. When should the obligation commence?

The obligation of a parent commences on birth.[248] At common law, the obligation of a person standing in the place of a parent commences when that person accepts and treats the child as their own. The Manitoba legislation illustrates that this may change by statute.[249]

4. How long should the obligation last?

Generally speaking, the support obligation owed by a parent lasts until the child surpasses the age cut-off and does not come within an exception that extends the obligation beyond that age. The obligation owed by a person who has stood in the place of a parent may or not be of similar duration. Unlike the relationship of parent to child, which the law recognizes as lifelong, circumstances may cut short the relationship between a child and a person who stands in the place of a parent. For this reason, the duration of the obligation of a person who stands in place of a parent is less readily determined.[250]

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[247] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36. This section is discussed in detail in chapter 14A.

[248] A parent may also have an obligation to pay the expenses of the mother during a period prior to the child's birth, at birth and a reasonable time afterward: in Alberta, see *P&MA*, s. 16(2).

[249] *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36.

[250] The Manitoba Court of Appeal decision in *Carignan* v. *Carignan* (1989), 55 Man. R. (2d) 118, 22 R.F.L. (3d) 376 (Man. C.A.), contains an extensive review of the leading cases decided under the *Divorce Act* up to that time. For more recent cases, see *Payne on Divorce*, *supra* note 237 at 148-149.

The case law varies. On one view, the obligation ceases on the unilateral withdrawal of the person from the relationship. That is, some cases indicate that, "except in extreme circumstances," a person who voluntarily assumes the role of parent can voluntarily terminate the relationship.[251] On another view, the one taken in Alberta, children should not be cut abruptly adrift:[252]

> If a dependency relationship [has been in place], then an entitlement should exist. At that point it is too late for a payor to shirk his or her obligations towards that innocent casualty.

In Alberta, a person who voluntarily takes on the status of stepparent cannot later abandon the child.[253] Still other cases fall between these two extremes, holding that *in loco parentis* status may be terminated unilaterally at any time as long as the child is not abandoned or put at physical risk.[254] One Alberta case holds that the termination of a common law relationship does not enable a parent unilaterally to withdraw status from a partner who stood *in loco parentis* to a child while the couple was living together.[255]

5. How should that obligation be apportioned between parents and non-parents?

It is generally agreed that children's needs should not be assessed according to different standards depending on the nature of a parent's relationship to the child:[256]

> ... the standard of support should not depend on whether the claim is made on behalf of a step-child or a natural child of the payor.

However, the portion of responsibility born by a parent may vary with the circumstances. When persons standing in place of a parent enter the equation governing the apportionment of liability for child support, the difficulties increase.

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[251] *Slama* v. *Slama* (1991), 126 A.R. 210, 38 R.F.L. (3d) 187 (Alta. Q.B.).

[252] Ziff, *supra*, note 13.

[253] *Theriault* v. *Theriault*, (1994) 149 A.R. 210 (Alta. C.A.).

[254] *Desjardines* v. *Desjardines* (1991), 113 A.R. 168, 31 R.F.L. (3d) 449 (Alta. Q.B.).

[255] *Langdon* v. *York* (1994), 161 A.R. 279 (Alta. Q.B.).

[256] Ziff, *supra*, note 13 at 198-201 (footnotes omitted).

a. Primary v. Secondary Obligations

As has been seen, where the child support obligation is legislated provincially, the obligation of persons who stand in the place of a parent is usually viewed as being outweighed by or secondary to the obligation of the parents. The same approach is apparent from case law under the *Divorce Act* as it stood before May 1, 1997.[257] To take an example, the fact that the father was making some contribution to the support of his children under a subsisting court order would not preclude a divorce court from making an additional order for child support against the mother's husband who stands in the place of a parent in relation to the children. But the primary obligation would remain with the father against whom remedies should be exhausted before the husband is called upon.[258] However, this view is not unanimous, and, in 1994, the Alberta Court of Appeal rejected it in the case of *Theriault* v. *Theriault*.[259]

This issue has raised questions about the interpretation of the Ontario provision.[260]

b. Factors

Where a child support order is founded on the exercise of judicial discretion, the question of factors to consider arises. Should the factors that affect a child support order differ depending on the nature of a person's relationship to the child? One suggestion is that the court awarding child support against a

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[257] Prior to May 1, 1997, section 15 of the *Divorce Act* provided that a spouse who stands in the place of a parent to a dependent child may be ordered to pay interim or permanent support for the benefit of that child.

[258] See *Johnson* v. *Johnson* (1976), 23 R.F.L. 293 (Alta. S.C.); *Lewis* v. *Lewis* (1987), 11 R.F.L. (3d) 402 (Alta. Q.B.) ; and *Williamson* v. *Williamson* (1991), 31 R.F.L. (3d) 378 (N.B.Q.B.).

[259] *Supra*, note 253 at 164; see also *Payne on Divorce*, *supra* note 237 at 149-151.

[260] James G. McLeod, annot: *M. (C.)* v. *P. (R.)* (1997), 26 R.F.L. (4th) 1 (Ont. C.A.). In providing that a child support order should recognize that the obligation of a natural or an adoptive parent outweighs the obligation of a parent who is not a natural or biological parent, s. 33(7) (b) of the *Family Law Act*, R.S.O. 1990, c. F.-3, could mean either one of two things. It could mean that a court should not determine the support obligation of a person standing in the place of a parent until it has determined the parent's responsibility and that a person standing in the place of a parent should be required to contribute to child support only if the parent is unable to pay enough to meet the child's reasonable needs. Alternatively, it could mean that a person standing in the place of a parent should never be required to pay more than the child's parent. The Ontario Court of Appeal acted on the first interpretation.

person who is not the parent of the child should be able to take into account factors such as:[261]

(1) the length of time that the child was accepted and treated as a member of the family, and

(2) the economic and social relationships that existed between that person and the child.

This would be in addition to consideration of:[262]

(3) the continuing liability, if any, and capacity to meet that liability, of the parents of the child.

c. Recommendation

We have recommended that the Federal Child Support Guidelines should apply in Alberta.

The tables incorporated in the Federal Child Support Guidelines under the *Divorce Act* are based on the assumption that the "children of the marriage" of a divorcing couple will have one support-paying spouse and one custodial spouse, with exceptional calculations being provided for cases of split custody or joint custody. Section 5 of the Guidelines gives the court discretion to depart from the tables where support is sought from a *spouse* who stands in the place of a parent for a child.

We think that the court should have discretion to order *any person* who stands, or has stood, in the place of a parent for a child to pay child support. Beyond this, we would let the court work from the common law to answer the questions we have raised.

We recommend that Alberta follow the federal precedent in leaving the resolution of these issues to the court's discretion.

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[261] Richard Gosse and Julien D. Payne, *supra*, note 245 at 140-141.

[262] *Ibid.*

RECOMMENDATION No. 18.3

Alberta legislation should give the court discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship.

SECTION III — COURT PROCEEDINGS

In Section III, we consider the powers ideally required by a court exercising jurisdiction over child support.

In Section II (Chapters 2-7), we made recommendations relating to the child 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 child support.

In Chapter 8 we look at who may apply for a child 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 child 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 child support proceedings.

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. We recognize that, in reality, constitutional provisions limit the ability of the Alberta legislation to assign jurisdiction and confer powers designed to assist the resolution of family disputes.[263] However, it lies beyond the scope of this project to examine the roles played by the Court of Queen's Bench and the Provincial Court (Family Division) under the existing law and explore the constitutional viability of alternative possibilities. Our recommendations on matters relating to court proceedings should apply, to the fullest extent constitutionally possible, to any court exercising jurisdiction over child support in Alberta.

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[263] The constitutional limitations are summarized in ALRI RFD No.18.1, the *Overview* to the reports in this project.

CHAPTER 8 APPLICANTS

In this chapter, we consider who should be eligible to apply to court for a child support order.

A. Child Support Order

1. Existing law

a. Federal *Divorce Act*

The *Divorce Act* permits either or both spouses to apply for child support for "any or all children of the marriage."[264]

b. Alberta

Under Parts 2 and 3 of the *DRA*, a property settlement in favour of children of the marriage may be made or periodical payments of "any profits of trade or earnings" ordered, in conjunction with an application brought by a spouse for spousal support.[265] Under Part 4, a married or divorced person may apply for support for children of the marriage. Under Part 7, a court may order child support in conjunction with an application for custody or access made by the father or mother of a minor, or a minor, who may apply without a next friend.[266] The *DRA* also empowers "each guardian" during the continuance of the guardianship to "act for and on behalf of the minor," and "appear in court and prosecute or defend an action or proceedings in the name of the minor."[267]

Under the *P&MA*, an application for child support and payment of the mother's expenses may be made by:[268]

> (a) a parent,
>
> (b) a child,

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[264] *Divorce Act*, ss 15(2) and 17(1)(a).

[265] *DRA*, s. 24.

[266] *DRA*, s. 56(5).

[267] *DRA*, s. 46(a) and (b).

[268] *P&MA*, s. 7(2).

(c) a person who has the care and control of a child, or

(d) the Director on behalf of the Government, where the Government has a right of subrogation under section 14 of the *Social Development Act*.

The *MOA* entitles the following persons to apply for a support order:[269]

(a) the person entitled to maintenance,

(b) the chief elected officer of the municipality in which the person entitled to maintenance resides,

(c) the Minister of Family and Social Services if the person entitled to maintenance resides in an improvement district,

(d) the Minister of Municipal Affairs if the person entitled to maintenance resides in a special area,

(e) the superintendent of a hospital if the person entitled to maintenance is a patient therein, or

(f) if the person entitled to maintenance is a minor, a parent or guardian of the child, or a director under the *Child Welfare Act*, or the child by its next friend.

Section 14 of the *Social Development Act*[270] 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) of that Act 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.

Where parents fail to provide adequate support for a dependent child for whom a social allowance is being or has been paid, section 51 of the *Income Support Recovery Act*[271] specifically authorizes the Director to apply for a child support order under Part IV of the *DRA*. The Director may do so if no agreement is reached with a parent or a parent does not comply with the terms an agreement. When the Director applies, section 51 directs that the proceedings are to be "conducted in the same manner and to the same effect as if the application ... were made by a wife."

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[269] *MOA*, s. 4(1).

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

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

c. Other provinces or territories

Provincial statutes in several provinces expressly empower "the dependant or a parent of the dependant" to bring an application for child support.[272] Some provinces permit any person to apply on behalf of a child.[273] Many provincial statutes also include express provisions permitting a governmental agency that is paying or has paid social assistance benefits to family dependants to apply for a support order either directly or on behalf of the child.

2. Time within which application must be brought

The application of the *P&MA* in cases where the child was born before this Act became law has been challenged in several of cases. The predecessor legislation restricted the time within which an application for child support could be brought to within two years after the birth of the child or 12 months after the putative father's acknowledgement of paternity.[274] The *P&MA* permits the court to order child support where the application is commenced before the child reaches the age of 18 years providing that the child is under 18 years of age when parentage is declared and the father is still alive when the order is made.[275]

It is clear that the *P&MA* applies to children born before it came into effect on January 1, 1991.[276] That is because the *P&MA* has as its purpose treating all children equally:[277]

> ... the purpose of the *PMA* is to put children of unwed parents in the same position as those of wed parents. The law is clear: natural parents have an obligation to provide for the needs of their child; the obligation is shared and cannot be unilaterally abandoned to the detriment of the child and the custodial parent.

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[272] *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 115(2); *Family Law Act*, S. Nfld. 1988, c. 60, ss 39(2); *Family Law Act*, S.O. 1986, c. 4, ss 33(2); *Family Law Reform Act*, R.S.P.E.I. 1988, c. F-3, ss 18(2); *Family Property and Support Act*, R.S.Y. 1986, c. 63, ss 34(2). Compare *Maintenance Order Act*, R.S.A. 1980, c. M-1, ss 4(1)(a) and (f). See also *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 23(1). See also Christine Davies, *Family Law in Canada*, Carswell, *supra*, note 33 at 221-23.

[273] See *e.g.*, *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 91(3).

[274] *Maintenance and Recovery Act*, R.S.A. 1980, c. M-2, ss. 14(1).

[275] *P&MA*, ss. 16(3)(a), 15(3) and 7(5).

[276] *J.A.L.K.* v. *J.R.* (1996), 141 D.L.R. (4th) 25.

[277] *T.L.W.* v. *D.C. (1997), 200 A.R. 357; 146 W.A.C. 357 (Alta. C.A.), at 362.*

The *P&MA* gave a child born outside marriage a statutory right for the first time to pursue remedies that treat the child equally with children born within marriage.[278] However, the mother cannot reapply for child support under the *P&MA* on behalf of the child where her right to apply has been abrogated by the expiration of the limitation period under the former Act.[279]

In order to avoid a repetition of difficulties with the application of new legislation, the provisions enacting our recommendations should be expressed to operate retroactively. We make this recommendation in Chapter 13.

3. Recommendations

a. Child

A child should have standing to initiate an application for support.

b. Person acting on behalf of child

In most situations, a parent is the person who will be acting on behalf of the child. However, we do not think that standing to apply on behalf of a child should be limited to a parent, as it is in some provincial statutes.[280] We prefer the wording "any person."

c. Social allowance payments

We agree that Alberta legislation should permit application for a child support order to be made by a person acting on behalf, or in the place of, a child. We intend our recommendation to include any governmental agency or department that is paying or has paid social assistance benefits for the child.

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[278] *Ibid.*

[279] *D.D.S.* v. *R.H.* (1993), 141 A.R. 44; 46 W.A.C. 44; 10 Alta. L.R. (3d) 2125 (Alta. C.A.). The Charter was not argued in this case. See also: *M.B.* v. *M.R.* (1996) 194 A.R. 206 (Q.B.) where the court refused to dismiss for want of prosecution an application initially brought in time under the *Maintenance and Recovery Act* but not pursued for many years; and *Rath* v. *Kemp* (1996), 26 R.F.L. (4th) 152 (Alta. C.A.) which held that the limitation provisions in the former Act did not apply to an application brought within one year of the father's acknowledgement of paternity, but more than two years after the birth of the child.

[280] *Supra*, note 272.

RECOMMENDATION No. 19.3

The following persons should be eligible to apply for child support:

(a) the child, or

(b) any person acting on behalf, or in the place, of the child.

d. Motion of court

Formerly, in British Columbia, the *Family Relations Act* permitted the court to order child support in an application for relief made to it by or on behalf of a spouse or parent, whether or not an application for relief was made on behalf of the child.[281] Under the current provision, the court may order child support in an application by a parent for judicial separation or dissolution of marriage or a declaration that a marriage is null and void, whether or not application has been made on behalf of the child.[282] We think this is a good idea.

RECOMMENDATION No. 20.3

Where a court is satisfied that, in an application for relief made to it by or on behalf of a parent, application for support should also have been made on behalf of a child, the court may make an order for child support.

e. Unborn Child

We have considered whether a person should be able to commence proceedings for child support before the child is born. In certain circumstances, it may be useful to set the machinery in motion before birth so that support can be awarded promptly upon birth.[283] We recommend that

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[281] *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 17.

[282] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93.

[283] See Scottish Law Commission, Scot. Law Com. No. 67, *Family Law—Report on Aliment and Financial Provision*, November 4, 1981, para. 2.69; see also Draft Bill, clause 2(3); see now *Family Law (Scotland) Act*, 1985, ss. 2(5). Regarding the recovery of prenatal, birth and burial expenses, see Chapter 5, heading A.

application be possible, but that the action not be heard or disposed of prior to the child's birth.

RECOMMENDATION No. 21.3

Alberta legislation should allow an application for child support to be made prior to the child's birth, but no such action should be heard or disposed of prior to the birth of the child.

B. Variation Order

1. Applicant

The same persons or agencies eligible to institute an original application for child support should be entitled to apply for an order to vary, suspend or rescind a support order.

In addition to the persons 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. We recommend that Alberta legislation do likewise in cases where the support order survives the death of that person.

RECOMMENDATION No. 22.3

The following persons should be eligible to apply for a child support variation order:

(a) the child,

(b) any person acting on behalf, or in the place, of the child; or

(c) where the person against whom the child support order was made is deceased, that person's personal representative.

2. Timing

In RFD No. 18.2 on *Spousal Support*, we mentioned that section 37(3) of the Ontario Family Law Reform Act prohibits applications for variation within six months of the support order except with leave of the court. We expressed our opinion that such a restriction is unnecessary and recommended against

including it in Alberta legislation. We are of the same view with respect to child support.

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. 23.3

The same persons who are eligible to apply for a child support order should be eligible to apply for an interim support order.

D. Pregnancy and Burial Expenses

1. Expenses relating to the mother's pregnancy

We have recommended that the court have power to order a parent to pay reasonable expenses related to the pregnancy for the support of the mother during a period before, at and after the birth of the child, as described in Recommendation 15.3, as well as the costs of Court proceedings in this regard.[284] Where no spousal support order has been made in connection with such expenses, the mother should be eligible to apply for this support.

As in the case of child support, we think that any person acting on behalf, or in the place of, the mother should also be able to apply. This recommendation should include any governmental agency or department that is paying or has paid social assistance benefits for the mother in this situation.

RECOMMENDATION No. 24.3

Where no spousal support order has been made in connection with such expenses, the following persons should be able to apply for the reasonable expenses described in Recommendation 15.3 related to the pregnancy for the support of the mother before, at and after the child's birth:
(a) the mother, or
(b) any person acting on behalf, or in the place, of the mother.

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[284] *Supra* Recommendation 15.3.

2. Burial expenses

We recommend that Alberta legislation impose liability on the parents to pay burial expenses for the child or for the mother if her death is a result of the pregnancy or childbirth, or both.

RECOMMENDATION No. 25.3
Any person who has incurred burial expenses for

(a) the child, or
(b) the mother if her death is a consequence of the pregnancy or birth

should be eligible to apply to court for reimbursement of those expenses by a parent or parents.

E. Assistance with Application

The *P&MA* provides for the appointment of a Director who is authorized to assist in obtaining child support and payment of the mother's expenses.[285] Under this Act, a request for the Director's assistance may be made by a child or parent of a child born outside marriage, a person who has the care and control of the child or a person who is supporting a mother or child. We think that the role of the Director should be continued, but that the Director's assistance in bringing a claim should be available on the basis of financial need rather than the birth of a child within or outside marriage.

RECOMMENDATION No. 26.3

The Alberta government should continue to assist

(a) a parent or other person having the care and control of a child, or
(b) a person who is supporting a mother or child

to apply for child support or the recovery of the mother's expenses where that parent or other person is receiving, or has received, public financial assistance in order to support the

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[285] *P&MA*, ss 3-6.

child or mother, whether or not that assistance was provided directly (as in the case of social assistance) or indirectly (as in the case of a day care subsidy).

CHAPTER 9 CHILD SUPPORT ORDER

A. Court Powers in General

As in the case of spousal support, we take the view that Alberta should statutorily confer wide powers on the courts with respect to the disposition of child support claims. In the following pages, we describe the existing child support law before making recommendations that correspond closely to the recommendations we make with respect to spousal support. We think it apparent from our General Premise 4 that the court should have the same power to make a child support order against a parent whether the child was born within or outside marriage.

B. Existing Law

1. Alberta

In Alberta, the power of the court to order child support is generally limited to the payment of periodic support, although Parts 2 and 3 of the *DRA* confer some powers to settle property or alter settlements for the benefit of children.

a. *MOA*

The *MOA* authorizes the court to "prescribe the period or periods during which the [support] ... is to be paid" and "fix the instalments in which the [support] is to be paid and the amounts of the instalments." The language is confusing but appears to anticipate periodic payments rather than instalments on a lump sum amount.

b. *DRA*

i. Part 7

Part 7 of the *DRA* contains the main provision. It permits the court to order the payment of child support "by the father or by the mother, or out of an estate to which the minor is entitled, of such sum from time to time as the court deems reasonable."[286] The court may also order the parent or other

[286] *DRA*, s. 56(5).

responsible person to reimburse a person, school or institution for the costs incurred in bringing up a child.[287]

ii. Part 4

Part 4 provides a summary procedure for obtaining child support. The provincial judge hearing the application may order the liable parent to pay "a weekly, semi-monthly or monthly sum" for child support.[288] The procedure is available to:

(1) the children of a married couple where the spouse seeking support is deserted by the other spouse or is living apart from the other spouse on account of that spouse's cruelty or refusal or neglect "without sufficient cause to supply ... food and other necessaries when able to do so"[289]—the standard of support is "reasonable maintenance,"

(2) the children of a married couple in the care of a spouse who has not been deserted or where desertion is not found,[290]

(3) the children, within the meaning of the *Divorce Act*, of a divorced couple in the care or custody of one parent where no support order exists.[291]

By a 1997 amendment to the *DRA*, which is yet to be proclaimed, section 39 will authorize the Lieutenant Governor in Council , in making regulations establishing child support guidelines, to 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" and 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."[292] These provisions would apply to the *DRA*, Part 4, which jurisdiction includes the Provincial Court.

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[287] *DRA*, s. 58.

[288] *DRA*, s. 27(4).

[289] *DRA*, s. 27(1)-(3).

[290] *DRA*, s. 27(5) and (6).

[291] *DRA*, s. 27(7).

[292] *Justice Statutes Amendment Act*, S.A. 1997, c. 13, s. 1, enacted June 18, 1997 but not yet proclaimed.

iii. Parts 2 and 3

On a judgment for restitution of conjugal rights, Part 3 permits the court to order "that part of the profit of trade or earnings be periodically paid" to the wronged spouse or another person "for the benefit of the children of the marriage ... or any of them."[293]

Part 2 deals with judicial separation, while Part 3 deals with alimony and maintenance. Both Parts are concerned primarily with the relationship between the spouses and liability for spousal support.[294] However, Part 2 also gives the court power to direct that the whole or part of the damages awarded on judicial separation against a parent who has committed adultery be settled for the benefit of the child.[295] Part 3 gives the court power to:

- order such settlement as the Court thinks reasonable of any property to which a spouse against whom a judgment of judicial separation or a decree of divorce for adultery has been obtained "is entitled in possession or reversion for the benefit ... of the children of the marriage, ... or any of them."[296]
- on divorce or nullity, "make any order that to the Court seems fit with regard to the property comprised in an ante-nuptial or post-nuptial settlement" made on the spouses "and with regard to the application of the property ... for the benefit of the children of the marriage."[297]

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[293] *DRA*, s. 24(b).

[294] As stated in RFD No. 18.2 on *Spousal Support*, in *Taylor* v. *Rossu*, [1998] A.J. No. 648 (Alta. C.A.), the Alberta Court of Appeal declared Parts 2 and 3 of the *DRA* invalid because they deprive common law partners of the benefit of a legislated right to apply for spousal support, in contravention of the *Charter*, s. 15. The Court suspended the declaration of invalidity for twelve months "to allow the Alberta government time to draft its own legislation in this complex area." The trial judge would have expanded the definition of "spouse" by reading in s. 29 of the Ontario *Family Law Act* which the Supreme Court of Canada adopted in *Miron* v. *Trudel*: *Taylor* v. *Rossu* (1996), 140 D.L.R. (4th) 562 (Alta. Q.B.). That 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.

[295] *DRA*, s. 13.

[296] *DRA*, s. 21.

[297] *DRA*, s. 23.

• on restitution of conjugal rights, order that a settlement of property to which the defendant is entitled "be made ... for the benefit of the ... children of the marriage or any of them."[298]

c. *P&MA*

The *P&MA* provides a summary procedure for obtaining support for children born outside marriage. Under the *P&MA*, the court has power to direct the person from whom support is claimed "to pay any or all of the expenses" enumerated with respect to child support; the mother's prenatal, birth and post-natal expenses; burial of the child or mother; and costs of the proceedings.[299] The child support expenses include "reasonable expenses for the maintenance of the child before the date of the order" and "monthly or periodic payments for the maintenance of the child until the child reaches the age of 18 years."[300] (The backdating of support is discussed in Chapter 12 under the heading "Commencement of the Support Order.")

The court also has power to:

• provide that the liability of a parent for expenses other than child support "shall be satisfied by the payment of an amount specified in the order;"[301]

• "after inquiring into the financial resources of the person who is directed by the order to make a payment, require the person to provide security as directed by the Court for the payments to be made under the order."[302]

2. Federal *Divorce Act*

Section 15.1(3) stipulates that the Federal Child Support Guidelines apply. Section 11 of the Guidelines give the court discretion to require that child support "be paid in periodic payments, in a lump sum or in a lump sum and periodic payments." Section 12 authorizes the court to require that the

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[298] *DRA*, s. 24(a).

[299] *P&MA*, s. 16(1) and (2); see also ss 6(2) which includes the "costs of any or all Court proceedings taken under this Act" in the list of reasonable child support expenses a parent may be required to pay.

[300] *P&MA*, s. 16(2)(b) and (c).

[301] *P&MA*, s. 16(5).

[302] *P&MA*, s. 20.

amount payable under the child support order "be paid or secured, or paid and secured, in the manner specified in the order." These powers are available for interim as well as permanent support orders.[303]

3. Other provinces and territories

The wide powers that other Canadian provinces and territories have statutorily conferred on the courts in proceedings for spousal support generally encompass child support as well.[304]

C. Powers Comparable to Spousal Support

In our view, Alberta should follow the example of other Canadian jurisdictions and statutorily confer wide powers on the courts with respect to the disposition of child, as well as spousal, support claims. We envisage that the powers of the court in proceedings for child support, including the types of order that may be granted, will broadly correspond to the powers exercisable with respect to spousal support. Those powers should include the power to order:

- periodic payments (including, where the court awards child support in an amount different from that set out in the Federal Child Support Guidelines, cost-of-living indexation if it is introduced for spousal support)

    —the arguments in favour of cost-of-living indexation may be stronger for child support than for spousal support because, in practice, the financial circumstances and needs of a dependent child are often more predictable than those of a dependent spouse[305]

- lump sum payments

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[303] *Divorce Act*, ss 15.1(1) and (2); see also Federal Child Support Guidelines, s. 2(4).

[304] *Family Relations Act*, R.S.B.C. 1996, c. 128, ss 6 and 93(3); *Family Maintenance Act*, R.S.M. 1987, c. F20, ss 1 and 10(1); *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 1 and 116; *Family Law Act*, R.S. Nfld. 1990, c. F-2, ss 2(b) and 40; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 2(f), 7, 33 and 36; *Family Law Act*, R.S.O. 1990, c. F.3, ss 1 and 34; *Family Maintenance Act*, S.S. 1990, c. F-6.1, ss 2 and 7; *Family Property and Support Act*, R.S.Y. 1986, c. 63, ss 30 and 36.

[305] We note that, in Newfoundland and Quebec, the provisions for cost-of-living indexation include child support orders: *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 40(8); *Civil Code of Québec*, Article 638.

—the power should not be limited to children of the marriage, as it is in the *Divorce Act*; the court should have power to order lump sum support whenever the child support obligation is imposed

- security for payment

—as it does now under the *Divorce Act* and section 20 of the *P&MA*, the court should have power to make an order requiring a parent to provide security for the payments to be made under a child support order

- interests in property

  - transfer and settlement

—as in the case of spousal support, most provinces have conferred jurisdiction on courts presided over by federally appointed judges to order a transfer or settlement of property where child support is sought pursuant to provincial statute[306]

  - possession of matrimonial home and use of household goods

—on application, in conjunction with proceedings for child support, and on notice to all persons who may be entitled to be added as parties to the proceeding, we think that the court should have power, for the benefit of the child, to grant a parent an order for exclusive use of all or part of the family home and exclusive use of any or all household goods

- life insurance policies, pension plans or other benefit plans

—as in the case of spousal support, the court should be able to make an order requiring a parent to continue to pay the premiums on a life insurance policy, pension plan or other benefit plan and designate the

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[306] *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 116(1); *Family Law Act*, S. Nfld. 1988, c. 60; *Family Law Act*, S.O. 1986, c. 4, ss 34(1); *Family Law Reform Act*, R.S.P.E.I. 1988, c. F-3, ss 19(1); *Family Property and Support Act*, R.S.Y. 1986, c. 63, ss 36(1). Compare *DRA*, R.S.A. 1980, c. D-37, s. 21, which provides:

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

child as beneficiary, or to assign the life insurance policy to the child, and, in aid of the designation of the child as a beneficiary or assignment of the policy to the child, to revoke an irrevocable designation of any other beneficiary

- gifts or transfers for inadequate consideration

  —as in the case of spousal support, the court should be able to grant remedies that protect against gifts or the transfer of property by a parent for inadequate consideration to the detriment of that parent's ability to pay child support

- registration of order charging real property

  —as we have recommended for spousal support, the court order for security or the instrument giving effect to it should be registrable; the child support order to pay periodic or lump sum support is already registrable under the *MEA*

RECOMMENDATION No. 27.3
Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order

(a) periodic payments
[RFD No. 18.2, Recommendation No. 18.2 at 137]

(b) lump sum payments,
[RFD No. 18.2, Recommendation No. 19.2 at 144]

(c) security for payment,
[RFD No. 18.2, Recommendation No. 20.2 at 147]

(d) the transfer or settlement of property.
[RFD No. 18.2, Recommendation No. 21.2 at 150]

(e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary or the assignment of a life insurance policy to the child,
[RFD No. 18.2, Recommendation No. 23.2 at 152]

(f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan,

[RFD No. 18.2, Recommendation No. 24.2 at 152]

(g) remedies that protect against gifts or transfers of property for inadequate consideration, or

[RFD No. 18.2, Recommendation No. 25.2 at 154]

(h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child.

[RFD No. 18.2, Recommendation No. 22.2 at 151]

RECOMMENDATION No. 28.3

Alberta legislation should provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is registrable.

[RFD No. 18.2, Recommendation No. 27.2 at 156]

D. Connection with Child Support Objectives

In RFD No. 18.2, we discussed the question whether a court order ought expressly to identify the objective or objectives that are intended to be accommodated by it. We concluded that the decision should be left to the court in the exercise of its discretion based on the circumstances of the particular case. The same conclusion applies to child support.

E. Legislating the Powers

Although the criteria for child support should be kept distinct from the criteria regulating spousal support, no obvious need arises to differentiate the powers exercisable by a court in ordering spousal and child support. Certain types of orders, such as lump sum support or property transfers, will ordinarily be more appropriate in cases involving spousal support than in cases involving child support, whereas other orders, such as payments to third parties (*see* Chapter 13), may be more appropriate for child support than spousal support. Some slight modifications will have to be made in the wording of the provisions conferring the powers. In the main, however, we

can see no reason why judicial discretion over the powers to be exercised should be fettered according to whether spousal support or child support is being sought.

F. Consent Orders

As stated in RFD No. 18.2 on *Spousal Support*, 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. This section includes an application to enforce a support order made by the Court of Queen's Bench, the Provincial Court, and 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:[307]

> 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.

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[307] R.S.B.C. 1996, c. 128.

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 child support agreement previously made by the parties.

RECOMMENDATION No. 29.3

(1) Where the parties consent to a child support order and the court is satisfied that the order is in the child's best interests, 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.

(2) A court granting a child 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

A. Existing Law

1. Alberta

a. *MOA*

Section 7 of the *MOA* provides that a support order made under that Act "is valid unless rescinded by the Court."[308]

b. *DRA*

Part 7 of the *DRA* does not explicitly authorize the court to vary a child support order. Section 56(5) enables the court to make a support order "of such sum from time to time as the Court deems reasonable." The words "from time to time" may refer either to the frequency of the support payments or to ability to vary an existing order from time to time, but we think the former interpretation was more likely intended.

Under the summary procedure provided in Part 4, section 28(5) permits a judge "from time to time" to vary a support order made under that Part. The applicant "husband" or "wife" must meet the threshold test of proving "that the means of the husband or the wife have altered in amount since the making of the original order or a subsequent order varying it."[309] Section 36(2) authorizes the judge to rehear an application at the instance of the person ordered to pay and, on the rehearing, "confirm, rescind or vary an order" as the judge "considers just." On default, where the person with the support obligation has been served but fails to appear, justify a non-appearance or show cause for nonpayment, section 38(4)(c) permits a judge to vary either or both the amount of arrears of support or the amount of support "payable under an order that is not an order of the Court."

As we noted in RFD No. 18.2 on *Spousal Support*,

> 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

[308] *MOA*, s. 7.

[309] *DRA*, s. 28(5).

> Court of Queen's Bench."[310] 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.[311] As a result, the Provincial Court loses jurisdiction to vary its own order.[312] 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 E., we recommend that the Provincial Court should continue to have jurisdiction to vary its own orders.)

We note that section 29(1) of the *Provincial Court Act* allows a Court of Queen's Bench order to be filed in the Provincial Court for enforcement purposes. However, by section 29(3), the Provincial Court may not vary the amount of the order filed. Apparently, this restriction does not extend to the variation of arrears under section 38(4)(c) of the *DRA*.

c. *P&MA*

Section 18(2) of the *P&MA*, authorizes the court, on application, to "vary or terminate an order or a filed agreement." Before doing so, the court must be satisfied that:

> ... there has been a substantial change in
>
> (a) the ability of a parent to pay the expenses specified in the order, or filed agreement,
>
> (b) the needs of the child, or
>
> (c) the care and control of the child.

As well, section 10(3) authorizes the court to direct a rehearing on an order made in the absence of the person against whom the order was made. That person must apply for a rehearing within 30 days of the date of the order. On

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[310] *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."

[311] *MEA*, s. 12(2).

[312] *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.

the rehearing, the court may "confirm, vary or reverse the order but no costs shall be awarded to the applicant."

2. Federal *Divorce Act*

Section 17(1) of the *Divorce Act* empowers a court to make an order:

> ... varying, rescinding or suspending, prospectively or retroactively,
> (a) a support order or any provision thereof on application by either or both former spouses.

The jurisdiction arises when a change of circumstances has occurred. The *Divorce Act*, s. 17(4), states:

> 17(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

The variation order may either reduce or increase the support award.[313]

The Federal Child Support Guidelines govern what constitutes a "change of circumstances" under the *Divorce Act*. Section 14 of the Guidelines provides:

> 14. For the purposes of subsection 17(4) of the Act, a change of circumstances is,
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

Section 15.1 of the *Divorce Act* governs child support orders. Section 17(6.1) clarifies that the applicable child support guidelines also govern a variation order, although the court can award a different amount in

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[313] *Dahl* v. *Dahl* (1995), 178 A.R. 119 (Alta. C.A.).

circumstances similar to the exceptions that apply in the case of a child support order.[314]

3. Other provinces

Statutes in several provinces define general criteria to regulate the variation, suspension or rescission of child support orders.[315] Often, these criteria are incorporated in the same statutory provisions that regulate the variation, suspension or rescission of spousal support orders.[316]

B. Grounds for Variation

1. Prospective variation

a. Assumption that support order fair when granted

Like spousal support, 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.

b. Material change in circumstances

Under the *Divorce Act*, section 17(4), a child support order may be varied where the court is satisfied that "a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order." The Federal Child Support Guidelines define "a change of circumstances" to mean:[317]

> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

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[314] *Divorce Act*, ss 17(6.2) and (6.4).

[315] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 96; *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 46; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 118 and 137; *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 47; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss 37, 39 and 40; *Family Law Act*, R.S.O. 1990, c. F.3, s. 37; *Family Law Act*, S.P.E.I. 1995, c. 12, s. 21; *Québec Civil Code*, art. 642 (right of review) and art. 644 (arrears); *Family Maintenance Act*, S.S. 1990, c. F-6.1, s. 8; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 42.

[316] *Ibid.*

[317] Federal Child Support Guidelines, *supra*, note 143, s. 14.

> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

The second paragraph of the provision in the Guidelines embodies case law decided prior to their implementation:[318]

> Taken together, other sections of the Act and certain of the case law in the area suggest that variation of child support orders would logically flow from either a change in the child's circumstances or a change in the circumstances of one or both of the former spouses. In this way, the child is sheltered as much as possible from the consequences of the marriage breakdown.

The courts apply the same criteria to child support amounts fixed by order or minutes of settlement agreed to by the spouses and incorporated in the divorce judgment. Unlike spousal support orders which require a material and unforseen change, "the threshold test" for the variation of child support "is engaged when a material change in circumstances is demonstrated notwithstanding the existence of a relatively recent agreement between the parties with respect to child maintenance."[319]

In our view, child support orders, like spousal support orders, should be subject to variation, suspension or discharge in light of a material change in the circumstances of the child or one or more of the persons obligated to support the child.

c. Evidence not previously before the court

In RFD No. 18.2 on *Spousal Support*, we stated that statutes in New Brunswick, Ontario, Prince Edward Island and the Yukon, add as a ground for variation, suspension, or discharge the fact that "evidence has become available that was not available on the previous hearing."[320] In these jurisdictions, 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

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[318] *Willick* v. *Willick*, *supra*, note 17 at 178 *per* Sopinka J.

[319] *Green* v. *Green* (1995), 11 R.F.L. (4th) 207 (Alta. Q.B.) at 209.

[320] ALRI RFD No. 18.2 at 163.

on the part of the person seeking variation.[321] Earlier, in ALRI Report No. 27, we recommended that the court be allowed to hear an application to vary that is based on material evidence that was not previously before the court.[322] 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.[323]

As we did for spousal support, we recommend that the court should be able to vary a child support order where evidence of a substantial nature that was not available at the previous hearing has become available.[324]

d. Other statutory limitations

No other limitations should be statutorily imposed on the court's jurisdiction to vary a child support order.[325]

2. Retroactive variation: suspension or remission of arrears

We described past approaches to the variation of arrears in RFD No. 18.2 on *Spousal Support*.[326] We also described changes brought about by recent case law. In Alberta, the judgment of the Court of Appeal in the case of *Haisman* v. *Haisman* states categorically that "the one-year rule does not apply to arrears of maintenance for children."[327] To quote from the judgment:

> ... 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

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[321] Davies, *supra*, note 33 at 229-30.

[322] ALRI Report No. 27 at 99-100; see also Rec. 23 at 104.

[323] *Ibid.* at 100.

[324] ALRI RFD No. 18.2, Rec. No. 30.2(b).

[325] See *ibid.* at 165.

[326] *Ibid.* commencing at 165.

[327] *Haisman* v. *Haisman*, (1994), 7 R.F.L. (4th) 1 (Alta. C.A.) at 13 (leave to appeal to SCC 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.).

> 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.

Other statements in the case are similarly strong:[328]

> ... on an application to vary a child support order the rule against hoarding should not be applied. It is not in the public interest, and it is inconsistent with the *Divorce Act*.

The case establishes that for child support, at least, "A *present* inability to pay *arrears* ... does not by itself justify a variation order:[329]

> I repeat that 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.

The judgment gives a narrow meaning to the words "special circumstance." They might encompass the "*past* inability to make child support payments *as they came due*" where that inability has lasted for more than a short period of time. Nevertheless, a judge "should view with considerable skepticism any claim that a reduction in the support payments, temporary or indefinite, would have been proper" had a timely application to vary been made.[330]

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[328] *Ibid.* at 15.

[329] *Ibid.*

[330] In *Brooks* v. *Brooks* (1997), A.R. 390 (Alta. Q.B.), the court held that "the reluctance of the husband to pay and his lifestyle of liquor, gambling and frequent marriages do not constitute 'special circumstances' justifying the reduction or elimination of arrears." It ordered that the collection of arrears be stayed while child support payments were being made and that the husband should make monthly payments to the wife on arrears after child support payments cease.

We agree with the court that "A present inability to pay arrears ... [should] not by itself justify a variation order"[331] that forgives them altogether where the person liable for support has future prospects of being able to make up the arrears. In this situation the court may choose to make an order temporarily suspending, in whole or in part, the obligation to make up the arrears. Such an order could facilitate the payment of current support.

3. Recommendation

We recommend that child support orders should be subject to variation or discharge in the circumstances described in the Federal Child Support Guidelines. In addition, we would allow the court to made a variation order where evidence of a substantial nature not available on the previous hearing has become available. As we stated in RFD No. 18.2 on *Spousal Support*, we do not think it necessary to legislate expressly the discretionary power of the court to relieve against the payment of arrears of support.

RECOMMENDATION No. 30.3

(1) Alberta legislation should empower the court to make an order varying, suspending or discharging, prospectively or retroactively, a child support order or any provision thereof if the court is satisfied that

> **(a) a change of circumstances has occurred since the making of the child 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.

(2) For the purposes of subsection (1), a change of circumstances is

> **(a) in the case where the amount of child support includes a determination made in accordance with the applicable**

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[331] *Ibid.* at 11.

table in the child support guidelines, a change in circumstances that would result in a different child support order or any provision thereof,

(b) in the case where the amount of child support does not include a determination made in accordance with a table in the child support guidelines, a change in the condition, means, needs or other circumstances of either parent or of any child who is entitled to support, or

(c) in the case of an order made before the child support guidelines come into force, the date of the coming into force of those guidelines.

C. Relationship to Purpose of Support Order

As we did for spousal support, we recommend that the criteria that govern the quantification of support on an application to vary, suspend or rescind a support order should be the same as those that apply to the original order.

RECOMMENDATION No. 31.3

The court should consider the same factors and pursue the same objectives in an application to vary a child support order as it would in an application for a child support order.

D. Variation Award

We recommend that the types of orders 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 terms or conditions that may be included should be the same as those available on the original application.[332]

RECOMMENDATION No. 32.3

The court should have the same discretion and powers of disposition in an application to vary a child support order as it has with respect to an application for a child support order.

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[332] See *supra* Chapter 9.

E. Court Enforcement and the *MEA*

It is beyond the scope of this report to specifically address the enforcement mechanisms in place with respect to child support orders. As we did in RFD No. 18.2 on Spousal Support, 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.[333]

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.[334] Those powers include the power to:

- issue a summons, *DRA*, section 28

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[333] *Supra*, heading A.

[334] *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.

- 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.

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. 33.3

(1) Any court having jurisdiction over child 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 child support to the fullest extent constitutionally allowable.

CHAPTER 11 INTERIM SUPPORT ORDER

A. Existing Law

Where a person who has been ordered to pay spousal support applies to have a hearing adjourned, section 30 of the *PCA* permits the court to order that person "to pay his spouse a sum that Court considers proper for the support of the spouse and the children, if any, during the period of adjournment." The marginal note calls this section "Interim Maintenance."

Federally, section 15.1(2) of the *Divorce Act* empowers a court to grant an interim order for the support of "any or all children of the marriage" pending the determination of an application for a child support order. The Federal Child Support Guidelines apply.[335] The principal factors which must be considered on an application for interim support are the applicant's needs and the respondent's ability to pay.[336] The Alberta Court of Appeal has strongly encouraged trial judges to deal with interim applications as though they were final.[337]

Statutory support provisions in several provinces or territories include references to interim support orders.[338]

B. Interim Support Award

In RFD No. 18.2 on Spousal Support, we discussed whether, because of its stop gap nature, the court's power to order the payment of support on an

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[335] *Divorce Act*, s. 15.1(3).

[336] *Willick* v. *Willick*, *supra*, note 17, 130 A.R. at 396, cited in *Jenkyns* v. *Jenkyns* (1997), 201 A.R. 231 (Alta. Q.B.).

[337] *MacMinn* v. *MacMinn* (1995), 174 A.R. 261; 27 R.F.L. (4th) 88 (Alta. C.A.), cited in *Jenkyns* v. *Jenkyns*, *ibid.* In *Jenkyns*, the court applied the Federal Child Support Guidelines to interim support, stating that "all the objectives are met and properly balanced" by doing so and that the Federal Child Support Guideline amount "realistically reflects the parties ability to pay and is an appropriate allocation of child care costs between the parties in this case."

[338] *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 Reform 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(5).

interim basis should be restricted to awards of periodic support. We pointed out that the power is not restricted under the *Divorce Act*. We concluded think that Alberta legislation should include a provision respecting interim support orders similar to the section in the *Divorce Act*, and that the Alberta provision should include the court power to make any order that it could make on an application for a support order.

We take the same position with respect to interim applications for child support.

RECOMMENDATION No. 34.3

The court should consider the same factors and pursue the same objectives in an application for an interim child support order that it would in an application for a child support order.

RECOMMENDATION No. 35.3

The court should have the same discretion and other powers of disposition in an application for an interim child support order that it has on an application for a child support order.

CHAPTER 12 DURATION OF ORDER

In this chapter, we consider issues relating to the duration of a child support order, variation order or interim support order granted in a proceeding brought under provincial legislation.

As we did in RFD No. 18.2 on *Spousal Support*, under heading A. we consider two major factors that may limit the duration of a child support order. 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 certain 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 on the death of the child or a parent, adoption of the child or parental cohabitation.

Under headings B. and C., we consider the extent to which the recommendations we make regarding the duration of child 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

In RFD No. 18.2 on *Spousal Support*, we asked whether the court should be empowered to backdate the commencement of a support order. We canvassed various possible start dates. Some choices for the commencement of a child support order include:

- any time at the discretion of the court
- date application filed
- date order granted
- if the child's parents were living together, date when they separated

• if the child's parents were or have not lived together, the date when the child became entitled to claim support

We concluded that the court should have discretion to order that support be paid with respect to any period before the date of the order. We make the same recommendation with respect to child support.

RECOMMENDATION No. 36.3

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.

b. Term certain or event specified

Alberta child support legislation does not specify the power of the court to grant support for a term certain or until the occurrence of a specified event. This power is probably implicit in the judicial discretion that judges exercise under the existing law.

Federally, section 15.1(4) of the *Divorce Act* specifically empowers the court to grant a child support order "for a definite or indefinite period or until the happening of a specified event"[339] and to "impose such other terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just."

A parent's obligation to pay child support endures until the child reaches the cut-off age and possibly longer. But the circumstances of the child or parents may change during the course of the obligation. Where these changes can be anticipated, the court may want to fashion an order that takes them into account.

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[339] 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).

In RFD No. 18.2 on *Spousal Support*, we concluded that it would be useful for Alberta to enact a statutory provision along the lines of the federal provision. We take the same position with respect to child support.

RECOMMENDATION No. 37.3

Alberta legislation should provide that a court may order the payment of child 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 declared

The *P&MA*, in sections 6(3) and 16(5), allows the liability of a parent under that Act to "be satisfied by the payment of an amount specified in an agreement or order." [340]An amount specified under one of these sections is protected from variation.[341] The *MOA* and *DRA* do not make similar provision.

The *P&MA* provisions are at odds with the principles that govern child support awards made under the *Divorce Act*. Cases decided under the *Divorce Act* establish that child support is the right of the child which a parent "cannot barter away ... in a settlement agreement."[342] The Federal Child Support Guidelines provide for monthly periodic payments throughout the child's minority; they do not allow finality. However, the *Divorce Act* permits the court to order a different amount in cases where special provisions have been made for the child's support and applying the guidelines would yield an inequitable result or the spouses have both consented to arrangements that satisfy the court as being reasonable.[343]

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[340] See *supra* Chapter 6, heading B.2.

[341] *P&MA*, s. 18(3). With respect to the power of the court to vary an order or agreement made under the predecessor *Maintenance and Recovery Act*, R.S.A. 1980, c. M-2, see Smith v. *Walker* (1996), 135 D.L.R. (4th) 163 (Alta. Q.B.). Section 22(3) of the *Maintenance and Recovery Act* permitted the court to vary specified sum payments.

[342] *Richardson* v. *Richardson*, *supra*, note 224 at 707; *Willick* v. *Willick*, *supra*, note 17.

[343] *Divorce Act*, ss 15.1(5) and (7).

Should the court have power to declare a final settlement of child support? As we said in RFD No. 18.2, a person might go to extraordinary lengths to raise a lump sum for support if they could be assured that it would be the last demand made. From the child's point of view, a lump sum might be more beneficial than an uncertain and possibly uncollectible claim for future periodic payments.

On the other hand, needs and circumstances change and an arrangement that appears reasonable at one time may become unreasonable at another. Moreover, provincial legislation cannot guarantee finality for "children of the marriage" where divorce proceedings ensue. A law that allows for declarations of finality would therefore have uneven application depending on the status of the child and this would offend the principle of equality among children. On balance, we think that the court should retain its power to review arrangements for child support.[344]

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 or adoption of the child or the death of a person having an obligation to support the child

a. On child attaining cut-off age

Ordinarily, a child support order will terminate when the child reaches the cut-off age. Unless the order states otherwise, under our recommendations this would be the age of majority. Automatic termination should not affect the child's right to apply for support beyond the cut-off age if the legislation extends the obligation beyond this age for reasons such as illness, disability or other cause.

b. On death

i. Death of person having support obligation

In Chapter 12 of RFD No. 18.2, we discussed the effect of the death of the spouse having a support obligation and asked whether the spousal support obligation should bind that person's estate. The same question arises with respect to the effect of the death of a parent having a child support obligation. Existing Alberta child support legislation is silent on this point.

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[344] See *supra* Chapter 6, heading D and Recommendation 17.3.

As we did for spousal support, we recommend that the obligation should survive death unless the court has ordered otherwise. The continuation of the obligation should be subject to any order made subsequently under the *Family Relief Act*.

RECOMMENDATION No. 38.3

Alberta legislation should provide that a child support order survive the death of a parent having a 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 child receiving support

The *P&MA* provides that a child support order or agreement "terminates on the death ... of the child."[345] The *MOA* and *DRA* are silent on this point.

In RFD No. 18.2, we also asked what should be the effect of the death of the spouse receiving support on the spousal support obligation. We suggested that the order should terminate with the death of this spouse except where a court expressly declares otherwise, for example, where the purpose of the award is compensatory or restitutionary. The estate would be able to collect any arrears owing. Although we think the power will be used rarely, we recommend that legislation should enable the court, in its discretion, to declare that a child support order shall survive the death of the child.

RECOMMENDATION No. 39.3

Alberta legislation should provide that a child support order terminate on the death of the child receiving support, except where a court expressly declares otherwise, but that arrears of support accumulated while the child was alive continue to be enforceable.

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[345] *P&MA*, s. 19(1).

c. On adoption of child

The *P&MA* provides that a child support order "terminates on ... adoption of child."[346] This is appropriate because an adoption severs prior relationships.[347] We recommend that this position be carried forward in child support legislation.

RECOMMENDATION No. 40.3

Alberta legislation should provide that a child support order terminates on the adoption of the child receiving support.

d. On divorce

In RFD No. 18.3 on *Spousal Support*, we asked whether an existing order of support should continue in effect or be automatically terminated by the commencement, or completion, of divorce or nullity proceedings. We concluded that an order made under provincial legislation should continue in effect until an order is made in divorce or nullity proceedings. Where the divorce decree is silent on the issue of support:

(1) a pre-existing order granted under provincial law should continue in effect, and

(2) it should be possible after divorce to bring an application under the *DRA* to seek an initial support order, or to vary, suspend or discharge a support order that was granted before the divorce.

We remarked that 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 and recommended that Alberta enact a similar provision, but modified to ensure that court jurisdiction under provincial legislation will continue until the divorce court makes an order. We recommend the adoption of the same policy for child support orders.

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[346] *Ibid.*

[347] *CWA*, s. 65(2). S. 63(3) makes an exception where "a person adopts the child of his spouse."

RECOMMENDATION No. 41.3
Alberta legislation should provide that:

(1) The jurisdiction of the court under Alberta law to award or vary child support continues in effect unless and until the court makes an order with respect to child 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 child 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 child 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.

e. Parental reconciliation

In RFD No. 18.2 on *Spousal Support*, we recommended that a spousal support order terminate where the parties have resumed cohabitation for a continuous period of more than ninety days. We reasoned that the support order will be based on the circumstances that attend separation and will not be appropriate to the circumstances that attend reconciliation.

We would apply similar reasoning to a decision by a child's parents to resume, or commence, cohabitation.

RECOMMENDATION No. 42.3

A child support order should terminate where a child's parents commence and continue, or resume and continue, to cohabit for a period of more than ninety days.

f. Establishment of new parental relationships

The child support obligation is based on the parent and child relationship, and not the status of the relationship that the child's parents form with each

other or third parties. Therefore, although the establishment of new parental relationships may provide grounds for variation of child support order, this should not lead to automatic termination of existing order.

B. Variation Order

As we stated in RFD No. 18.2 on *Spousal Support*, 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 replaces the support order, the recommendations we make with respect to the duration of child support orders should also apply to variation orders.

RECOMMENDATION No. 43.3

The provisions that govern the duration of child support orders should apply to the duration of variation orders.

C. Interim Support Order

As stated in RFD No. 18.2, by definition, an interim support order will be superseded when the proceedings for a spousal support order are disposed of. The interim support order will continue in effect as provided for by its terms until it is varied, a child support order is made or the application for a child support order is refused.

We think, as we did in RFD No. 18.2, that, on an application for an interim support order, 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.

As in RFD No. 18.2, the discussion about the operation of law on the death of a child or person having a support obligation to the child is relevant to interim support orders as well as to support orders. Where divorce proceedings are commenced after an interim support order has been made under provincial law, the provincial order should continue in force until the court hearing the divorce application determines the issue of support, interim or otherwise, in its proceedings.

We would also allow for the continuation of an interim support order where a support order is under appeal.

RECOMMENDATION No. 44.3

The same provisions that govern the duration of child support orders should apply to the duration of interim child support orders.

RECOMMENDATION No. 45.3

Subject to Recommendation 46.2, an interim support order should remain in effect in accordance with its terms until the order is varied or the application for a child 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 child support. Our recommendations are based on precedents found in existing Alberta legislation, federal legislation or legislation in other provinces.

A. Power to Add Another Person Having Support Obligation

In Chapter 7, we asked whether the law should impose a child support obligation on any persons standing in the place of a parent. If the law imposes support obligations on persons other than parents, those persons should be able to participate in child support proceedings. That is because, in order to make a sensible order for the support of the child, it is necessary to have before the court all persons who are liable for support. What is more, in the interests of fairness to all of the persons affected, no order should be made against a person who is not a party. The Ontario *Family Law Act* allows the court, on motion, to "add as a party another person who may have an obligation to provide support to the same dependant."[348] We recommend that Alberta legislation do the same.

Including a person as a party is less draconian than section 6(e) of the *MOA*. This section empowers the court to direct a person, "rendered liable" by that Act, to pay or contribute to support "whether or not they are named in the proceedings ... if it seems to the Court harsh or unfair that the person or persons primarily liable should bear the whole or any part of the burden thereof."

RECOMMENDATION No. 46.3

Alberta legislation should expressly empower the court to add as a party another person who may have an obligation to provide support to the same dependent child.

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[348] *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(5).

B. Payments to Court, Child Or Third Party

In Alberta, as elsewhere, several statutes empower a court to order that child support be paid into court or to another appropriate person or agency for the benefit of the child. Section 6(d) of the *MOA* permits the court to "prescribe the person or institution to whom or to which the [support] instalments are to be paid." Section 58 of the *DRA* authorizes the court to order the person liable for support to pay "the person, school or institution bringing up the minor" where it orders "the minor to be given up to the parent or other responsible person." Section 17 of the *P&MA* permits an order or agreement to provide that support be paid "to any person who assumes the care and control of the child, notwithstanding that the person is not a party to the order or agreement."

In RFD No. 18.2 on *Spousal Support*, we recommended that Alberta legislation empower the court to order the payment of support into court or to a third party for the benefit of the spouse receiving support. We make a similar recommendation for child support.

We also think that the legislation should allow the court to order that payment be made directly to the child in an appropriate case,[349] and we so recommend.

RECOMMENDATION No. 47.3

Alberta legislation should empower the court to order the payment of support directly to the child, or into court or to a third party for the benefit of the child receiving support.

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[349] In *Lisevich* v. *Lisevich* (1995), 178 A.R. 137 (Alta. C.A.), the court criticized the *Divorce Act* because it calls for support payments to be made to a spouse for children who are being educated but are too old for custody orders, stating, "We cannot remove all the awkwardness which Parliament has created." The court has power under A.R. 38(3) to order that the child be added as a party: *155569 Canada Ltd.* v. *248524 Alberta Ltd.* (1988), 93 A.R. 241 (Q.B.), cited in *T.L.W.* v. *D.C.*, *supra*, note 121 at 362.

C. Disclosure of Financial Means of Person Having Support Obligation

1. By person having support obligation

We discussed the disclosure of financial information in RFD No. 18.2 on *Spousal Support*. There, we described the provisions in the Federal Child Support Guidelines. We repeat that description here:

> 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
>
> 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.

We also referred to statutes in other provinces that provide for the disclosure of information concerning the means of the spouses. These statutes also apply to child support cases. Ontario and Manitoba are examples.

Turning to Alberta, we described Civil Practice Note "1" issued by the Court of Queen's Bench on April 1, 1995. This Practice Note, which is designed for use in family matters, also extends to child support cases. It provides two forms of "Notice to Disclose" which require the person served to provide relevant financial information. We also quoted section 12 of Civil Practice Note "6" on Special Chambers and Family Law Chambers Applications. Section 12 of Practice Note "6" requires strict enforcement of "the practice of the Court concerning the mandatory filing of information forms, including budgets, evidence and letters listing issues and authorities."

We concluded that legislation should mandate financial disclosure but that the Rules of Court Committee would be the appropriate body to recommend the precise content of the disclosure requirements. We thought that the legislation should include sanctions for the failure to disclose such as those contained in the Federal Child Support Guidelines and a penalty provision in order to give "teeth" to the obligation to disclose. We make the same recommendation for child support.

RECOMMENDATION No. 48.3

Alberta legislation should provide that:

(1) In an application for a child support order or on the written request of one of the parties not more than once a year after the making of a child support order, each party shall serve on the others 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 child support order, a party fails to comply with subsection (1), a court on application by another party, 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 party who failed to comply and

impute income to that party in such amount as it considers appropriate.

(4) Where a party fails to comply with an order that the documents be provided, the court may

(a) strike out any of the party's pleadings,

(b) make a contempt order against the party,

(c) proceed to a hearing, in the course of which it may draw an adverse inference against the party and impute income to that party in such amount as it considers appropriate, and

(d) award costs in favour of another party up to an amount that fully compensates the other party for all costs incurred in the proceedings.

(5) Where, after a child support order has been made, a party fails to comply with the written request of the other party not more than once a year after the making of a child support order to provide financial information, the court, on application, may

(a) consider the non-complying party 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 party to provide the required documents.

(6) The court may, on application by another party, in addition to or in substitution for any other penalty to which the non-complying party is liable, order that party to pay to the applicant an amount not exceeding $5,000.

2. By employers or other third parties

In RFD No. 18.2, we recommended that Alberta legislation empower the court to order a spouse's employer, partner or principal to provide financial information. Our recommendation was based on precedents in Ontario and Manitoba statutes. We recommend the enactment of a similar provision for child support cases.

RECOMMENDATION No. 49.3

Alberta legislation should provide that:

(1) In an application for a child support order, the court may order that the employer, partner or principal, as the case may be, of a parent or other person having a child support obligation, provide the child, other parent and any other party with any information, accountings or documents that a party is entitled to request under Recommendation 48.3.

(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

In RFD No. 18.2, we recommended that Alberta legislation should empower the court to ensure the confidentiality of financial information produced in an application for spousal support. Our recommendation was based on a Manitoba precedent. We recommend that a similar provision apply to child support.

RECOMMENDATION No. 50.3

Alberta legislation should provide that:

Upon an application for a child support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.3 or Recommendation No. 49.3, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.

D. Disclosure of the Whereabouts of Person With Support Obligation

In RFD No. 18.2, we recommended that Alberta legislation empower the court to make an order directing the disclosure of any information shown on a record that indicates the other spouse's place of employment, address or location. Our recommendation was based on an Ontario precedent. We

recommend that Alberta enact a similar provision with respect to a child's parent or person standing in the place of a parent.

RECOMMENDATION No. 51.3

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 child 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.

E. Binding Crown

We recommend, as we did in RFD No. 18.2, that a court order that requires an employer or other person to produce financial information or information about a parent's whereabouts should bind the Crown in right of the province, as it does under legislation in Manitoba and Ontario. We note, as we did in RFD No. 18.2, that in Alberta, section 5 of the *Freedom of Information and Protection of Privacy Act* permits another Act, or a provision of it, to prevail if the other legislation expressly so provides. We think that child support legislation should do so.

RECOMMENDATION No. 52.3

Alberta legislation should provide that:

The sections provided for by Recommendation No. 49.3 or Recommendation No. 51.3

(a) bind the Crown in right of Alberta, and

(b) in so doing, prevail over the *Freedom of Information and Privacy Act*.

F. Protection of Privacy

1. Hearing in private

Existing Alberta legislation gives the court discretion to hear some family applications in private. Section 36(1) of the *DRA* gives the court discretion to hear support applications brought under Part 4 of that Act in private. Section 11 of the *P&MA* permits the court to exclude a person from the hearing where the evidence to be presented would be prejudicial to "a person who is the subject of the hearing" or exclusion would "promote the proper administration of justice." The court cannot exclude the Director, the applicant or respondent or a lawyer representing any of the parties.[350]

Statutes in several other provinces also empower courts to hear child support applications in private.[351]

In RFD No. 18.2, we concluded that the court should have discretion to "direct some degree of privacy in family proceedings." This discretion necessarily will be subject to the limits imposed by the Canadian Charter of Rights and Freedoms. We reiterate that conclusion in relation to child support.

RECOMMENDATION No. 53.3

Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.

2. Publication ban

Likewise, we endorse the recommendation we made in RFD No. 18.2 with respect to publication bans.

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[350] *P&MA*, s. 11(2).

[351] *Family Law Act*, R.S. Nfld. 1990, c. F-2, s. 58; *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 69(2); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 9; *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 13; *Children's Law Act*, S.S. 1990, c. C-8.1, s. 13; *Family Maintenance Act*, S.S. 1997, c. F-6.2, s. 18; *Children's Act*, R.S.Y. 1986, c. 22, s. 172.

RECOMMENDATION No. 54.3

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 relating to applications in family proceedings.

G. Terms and Conditions

As we did in RFD No. 18.2, we recommend that the court should have power to make any provision in a support order subject to any terms and conditions it deems proper.

RECOMMENDATION No. 55.3

Alberta legislation should empower the court to make any provision in an order made in connection with an application for child support subject to such terms and conditions as the court deems proper.

H. Costs

1. In general

We endorse our commendation in RFD No. 18.2 that, in general, the court should have power to order costs in support proceedings.

RECOMMENDATION No. 56.3

Alberta legislation should empower the court to make an order with respect to the payment of costs.

2. Interim costs and disbursements

In proceedings for spousal support, section 16(4) of the *DRA* gives the court discretion to order the payment of interim disbursements. Statutory support provisions in several other provinces or territories also include references to

interim costs.[352] These provisions apply to both child support and spousal support.

We think that Alberta legislation should provide specific authority for the making of orders for interim costs and disbursements arising in relation to child support proceedings.

RECOMMENDATION No. 57.3

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 party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.

I. Application of Rules of Court

In RFD No. 18.2 on *Spousal Support*, we reproduced section 19.1 of the *PCA* which allows the Provincial Court to apply the Alberta Rules of Court, modified as needed, where the *PCA* or regulation does not provide a specific practice or procedure in order to ensure an expeditious and inexpensive resolution of the matter. We emphasized, by way of recommendation, that the Provincial Court should have discretion to apply the Alberta Rules of Court in family law matters where statute or regulation does not provide for a specific practice or procedure. We repeat that recommendation here.

RECOMMENDATION No. 58.3

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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[352] *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").

J. Retroactive Effect of Legislation

In Chapter 8, under heading A.2, we mentioned that several cases have challenged the application of the *P&MA* 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. 59.3
The legislation enacting the new child support law should expressly state that it operates retroactively.

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 26.3
The Alberta government should continue to assist
(a) a parent or other person having the care and control of a child, or
(b) a person who is supporting a mother or child
to apply for child support or the recovery of the mother's expenses where that parent or other person is receiving, or has received, public financial assistance in order to support the child or mother, whether or not that assistance was provided directly (as in the case of social assistance) or indirectly (as in the case of a day care subsidy). 127

RECOMMENDATION No. 27.3
Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order
(a) periodic payments
[RFD No. 18.2, Recommendation No. 18.2 at 137]
(b) lump sum payments,
[RFD No. 18.2, Recommendation No. 19.2 at 144]
(c) security for payment,
[RFD No. 18.2, Recommendation No. 20.2 at 147]
(d) the transfer or settlement of property.
[RFD No. 18.2, Recommendation No. 21.2 at 150]
(e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary or the assignment of a life insurance policy to the child,
[RFD No. 18.2, Recommendation No. 23.2 at 152]
(f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan,
[RFD No. 18.2, Recommendation No. 24.2 at 152]
(g) remedies that protect against gifts or transfers of property for inadequate consideration, or
[RFD No. 18.2, Recommendation No. 25.2 at 154]
(h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child.
[RFD No. 18.2, Recommendation No. 22.2 at 151] 136

RECOMMENDATION No. 28.3
Alberta legislation should provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is registrable.
[RFD No. 18.2, Recommendation No. 27.2 at 156] 136

RECOMMENDATION No. 29.3
(1) Where the parties consent to a child support order and the court is satisfied that the order is in the child's best interests, 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.

(4) Where a party fails to comply with an order that the documents be provided, the court may

(a) strike out any of the party's pleadings,

(b) make a contempt order against the party,

(c) proceed to a hearing, in the course of which it may draw an adverse inference against the party and impute income to that party in such amount as it considers appropriate, and

(d) award costs in favour of another party up to an amount that fully compensates the other party for all costs incurred in the proceedings.

(5) Where, after a child support order has been made, a party fails to comply with the written request of the other party not more than once a year after the making of a child support order to provide financial information, the court, on application, may

(a) consider the non-complying party 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 party to provide the required documents.

(6) The court may, on application by another party, in addition to or in substitution for any other penalty to which the non-complying party is liable, order that party to pay to the applicant an amount not exceeding $5,000. 167

RECOMMENDATION No. 49.3

Alberta legislation should provide that:

(1) In an application for a child support order, the court may order that the employer, partner or principal, as the case may be, of a parent or other person having a child support obligation, provide the child, other parent and any other party with any information, accountings or documents that a party is entitled to request under Recommendation 48.3.

(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. 168

RECOMMENDATION No. 50.3

Alberta legislation should provide that:

Upon an application for a child support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.3 or Recommendation No. 49.3, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court. 168

RECOMMENDATION No. 51.3

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 child support, the moving party needs to learn or confirm the proposed respondent's whereabouts.