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THE COURTS AND FAMILY LAW

A. INTRODUCTION

1. Purpose of Project

There is increased interest in family law by judges, lawyers, doctors, sociologists and criminologists. The traditional social institutions are becoming less effective machinery to govern and control the actions of men. Family problems are increasing rapidly in terms of homeless children, juvenile delinquents, welfare mothers, marital problems and family breakdowns. The legal system has found itself with a greater and greater role in domestic discipline and family rehabilitation. These problems can only be resolved with the best legal and social machinery of the 20th century.

It is the purpose of this paper to examine the present organization, jurisdiction and operation of the court system in Alberta in the field of family law and to place before the Institute for its consideration suggestions for improved legal machinery. It must be emphasized that this paper is not concerned with the substance of family law or the wholesale reform of law; rather it is an examination of the structure of the system with a view to providing the best administration of the existing law and the most effective use of existing services. Its aim is to enable the Institute to recommend a court system which will resolve family matters with the maximum of expedition and understanding and a minimum of expense and confusion, make the best use of

professional guidance, counselling and social services as they now exist and as they may exist in the future and be readily adaptable to meet the changing needs of society. In evaluating the various alternatives, emphasis will be placed on making the recommendations as complementary as possible to the present court system and making proposals which can be put into effect with as little practical and legal difficulty as possible.

2. History of Project

The Family Court system has been under study in Alberta for some time. In 1966 the Law Society of Alberta established a committee under the chairmanship of Stuart S. Purvis, Q.C., to examine the possibility of a civil legal aid plan. Because the committee discovered that the majority of cases where civil legal aid was required were family law matters, a sub-committee was appointed to investigate the jurisdiction and operation of courts administering family law in the Province of Alberta. As a result of their report the Law Society of Alberta approved in principle three structural changes:

(1) the creation of a Family Law Section of the Trial Division of the Supreme Court of Alberta,

(2) the creation of a Department of Court Services which could provide assistance to the court from other professions in the field of the behavioural sciences,

(3) the establishment of an Advisory Committee of citizens to assist, advise and co-ordinate the new court division and particularly to assist in achieving acceptance and support from the community.

In 1968, the Law Society presented this plan for a Family Court to the Attorney-General for Alberta, who in turn requested the Institute of Law Research and Reform to prepare a comprehensive study of the Family Court system in Alberta with a view to making specific recommendations to the government. In the following year, Datamation Centres Ltd. undertook a study of possible computer applications to the Family Court plan of the Law Society, primarily in the enforcement of alimony and maintenance orders. Although this project follows upon many inquiries, studies and reports, it is not based on their conclusions or proposals; rather, it attempts to be a fresh look at the whole area of the Family Court system.

3. Method of Treatment

The concept of a Family Court is an outgrowth of the philosophy which led to the Juvenile Court movement in the first half of the 20th century. The first Juvenile Court was established in 1899 in Chicago, Illinois, by the combined efforts of social workers, civic leaders, organizations and a committee of the Chicago Bar Association. Their objective was to remove the "child in trouble" from the regular adult criminal courts, to conduct hearings in a less formal court setting and make a disposition in the best interest of the particular child all to the end that the child be treated as a "delinquent" to be guided and corrected and not as a criminal to be punished. It was the opinion of the late Roscoe Pound that the establishment of the Juvenile Court movement was the greatest single event in Anglo-American jurisprudence since the Magna Carta. While this may be overstating the case somewhat, it was an event of major importance for the legal system. Not only did the movement result in a new attitude towards child

offenders, but, as it became clear that the Juvenile Court was handicapped without general family jurisdiction, it led to the development of the Family Court with extensive jurisdiction to deal with the "family in trouble".

Alberta has been in the forefront of the Juvenile and Family Court movements in Canada. The Alberta Family Court Act of 1952[1] was one of the first of its kind in Canada and has been considered a progressive model for other jurisdictions. The present Family Court in Edmonton evolved under the direction of Judge Bissett in the late 1950's and Judges Hewitt and Kankewitt in the early 1960's. Since the late 1950's the Family Court has continued to grow along side of its counterpart, the Juvenile Court, which was set up first half of the 20th century, adopting its techniques and procedures. In 1968 the Juvenile and Family Court of Edmonton handled over 5300 cases, 1800 of these being juvenile cases, 800 child neglect and 2700 Family Court cases; this represents a 70% increase in volume over 1963.[2] Both courts have an important and increasing role in securing the well-being of the family unit.

In this project, every effort has been made to engage the attitudes, knowledge and experience of lawyers and judges, especially those who are involved in administering family law. In 1969 Judge Norman Hewitt prepared for the Institute a study of the existing administration family law and W. H. Hurlburt undertook to draft a preliminary working-paper of this project which was then circulated among interested persons. In reply to Mr. Hurlburt's working-paper, Judge Marjorie Bowker prepared a thorough commentary with recommendations based on her experiences as Juvenile and Family Court judge. Messrs. Trevor Anderson and William Stevenson, Professors of Law at the University

of Alberta, have also contributed their helpful criticisms and suggestions to this project. In preparing this paper many of their observations and recommendations have been incorporated into its pages.

B. JURISDICTION IN FAMILY LAW MATTERS

1. Definition of Family Law

The field of study should be defined and limited. Family law, however, defies any precise definition or limitation.

The word "family" is a flexible expression which has had various meanings throughout history, ranging from a house, to a race or a group of people. In earlier times, the family consisted of all persons living in the household including the servants; in later times, those nearly connected by blood or affinity were the only persons included within the family, whether living in the same household or not. Finally, the word has come to mean a collective body of persons who live in one household and under one head or management, but when used in reference to a will, the meaning of family is restricted to children and does not include a spouse.[3] It is impossible to offer a comprehensive definition and the best one can suggest is that the family is the basic social unit which the state recognizes through certain laws.

With this understanding of the word "family", the term "family law" refers to that body of law that relates in whole or in part to the basic social unit of husband, wife and children. The test to be applied to distinguish

family law from other branches of law, is whether the legal controversy arises out of one's status as a child or as a member of the family unit. This clearly includes the formation and dissolution or annulment of marriage and the respective rights and obligations of husband and wife, judicial separation, alimony, maintenance and the devolution of marital property, child custody, access and support; it also includes criminal charges which arise from family disputes, such as husband-wife assaults, threats, non-support and liquor complaints, as well as neglected children, guardianship and wardship of children, adoption and paternity proceedings, juvenile delinquency and all other cases involving the relationship between members of a family unit. Daigaram 1 on pages 20 and 22 shows the legal matters which will be taken to be included in family law.

Family law matters involve serious manifestations of family deterioration or breakdown. Neglected or delinquent children indicate a failure of family controls; custody disputes indicate a collapse of the family's protective function; adoption proceedings are designed to secure ratification of a new family relationship that will protect the child; and assaults and other disorderly behaviour within the immediate family usually connote a serious deterioration of the marriage relationship. These underlying factors are the real issues in family law and they cannot be justly settled without reference to the total family interrelation. Interpersonal relationships are the province not only of family law, but also of social professions and fields of study--sociology, criminology and psychology. If the law is to attempt to remedy or prevent the ultimate problem of family breakdown, as well as to punish or compensate the parties affected with family problems, it must utilize the objectives and techniques of the social disciplines. This process is individualized or social justice.

2. Present Situation

It is important that the existing Family Court structure and jurisdiction be thoroughly explained and understood. Five courts administer family law in Alberta as defined in this paper: the Supreme Court of Alberta, District Court, Family Court, Juvenile Court and Magistrates' Court. The jurisdiction of each court is fairly clearly designated in federal or provincial legislation, although there are some serious questions of jurisdiction, duplication, overlapping and undesirable confusion.

The reasons for the division of jurisdiction between Parliament and the provincial legislature are historical and constitutional. Historically, there has been no organized consideration of family law. In England the Judicature Act of 1873 marked the fusion of courts of equity and common law into one court system, as described in the judgment of Lord Esher, M.R., in Byrne v. Brown (1889), 22 Q.B.D. 657 at page 666:

> One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding.

After 1873, new judicial needs developed that were outside the scope of the existing court system. As a result, new courts and tribunals were created often with no clear definition of jursidiction between them. The existing Family Court and the Juvenile Court are such creations.

Under the British North America Act, 1867,[4] there is a division in the administration and jurisdiction of family law between Parliament and the provincial legislature. According to section 96 of the B.N.A. Act, Parliament alone appoints judges to exercise the jurisdiction of the Supreme Court and District Court, ofter referred to as superior courts.

> s.96. The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

At the same time, the provincial legislature has the exclusive power to make laws in many matters relating to provincial courts,

> s.92(14). The Administration of Justice in the Province, including the Constitution Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

This means that all Provincial courts, both criminal and civil, are administered by the Province. However, the procedure in criminal courts and in some civil proceedings is under the jurisdiction of the federal government and further, the judges in the District and Supreme Courts are federally-appointed, while the magistrates, juvenile judges and Family Court judges are provincially-appointed. At the present time these courts have the jurisdiction to hear all matters, even those within the exclusive jurisdiction of Parliament; however, under section 101 of the B.N.A. Act, Parliament is empowered to establish additional courts "for the better Administration of the Laws of Canada"

and it is not inconceivable that in the future Parliament may establish its own courts to administer federal matters. (See, for example, the current Federal Court Bill.) It goes without further discussion that a provincially-appointed judge does not have the power to adjudicate on matters in the exclusive jurisdiction of federally-appointed judges.

There is also a division of jurisdiction in family law. Under section 91(26) Parliament has exclusive jurisdiction in matters relating to "Marriage and Divorce". At the same time, under section 92(13) the provincial legislature has exclusive power to make laws in matters relating to "Property & Civil Rights in the Province". "Property & Civil Rights in the Province" include matters of custody, access, alimony and maintenance, but these same matters may also be ancillary to "Marriage and Divorce".

Until recently, with minor exceptions, the federal government had done little in the field of Marriage and Divorce. The new federal Divorce Act[5] changes this, and in legislating for divorce, it also provides for corollary relief by way of alimony, maintenance, custody and access. As the corollary relief is only ancillary to a divorce action, it is not clear whether if the petition is unsuccessful, such relief may be granted;[6] nor is it clear whether, if the petitioner fails to make application for such relief at the trial of the divorce petition, he or she is out of court for good so far as relief under the Divorce Act is concerned.[7] The constitutional situation in matters of alimony, maintenance and custody, is not in all cases entirely clear so far as the jurisdiction of the Family Court is concerned. It is arguable that these matters, particularly alimony and custody, relate only to "Property and Civil Rights in the Province" and that the federal legislation is ultra vires. The Appellate Division of the Supreme Court of

Alberta has held the corollary relief provisions intra vires in Heikel v. Heikel (1970) 12 D.L.R. (3d) 311, agreeing with the Manitoba Court of Appeal in Whyte v. Whyte (1969) 7 D.L.R. (3d) 7. On the other hand, to the extent that they may relate to "Marriage and Divorce" and the federal legislation has occupied the field, then the provincial legislation cannot stand in case of conflict. The new Divorce Act does not include judicial separation of the devolution of marital property and to obtain such relief from the court (at least while the Divorce Rules remain unchanged), an action separate from the divorce action must be commenced. It is also arguable that judicial separation, as an alteration or modification of the marital status, may be within the field of federal legislation under section 91(26) of the B.N.A. Act.

There are twilight zones where the federal and provincial legislation overlap and where the exact delineation of the areas of jurisdiction remains to be carried out. In any event, where the subject matter of legislation falls within section 91 of the B.N.A. Act, it appears that Parliament has the power to designate, as it has done in the Divorce Act, the court which will administer the legislation; and if Parliament so provides in such a case, or if the jurisdiction would normally be exercised by a Superior, District or County Court, the Governor General in Council would have the sole authority to appoint the judges of the court by virtue of section 96.

The present jurisdiction in family law of the courts appointed by the province and the courts appointed by the Governor General in Council can be outlined as follows:

(a) Courts appointed by the Province

There are three courts appointed by the Province:

(1) Magistrate's Court has jurisdiction in many criminal matters under the Canadian Criminal Code. This jurisdiction includes offenses which pertain to family law matters, such as section 186(2)(a), being non-support charges; section 231(b) where a husband assaults a wife, a wife assaults a husband or a parent assaults a child. and section 717 where a person fears a member of his family will cause injury to him or his wife or child or will damage his property. Magistrates also have jurisdiction to hear complaints under section 100 of the Liquor Control Act, 1958,[8] protection orders under section 27 of the Domestic Relations Act and to try juveniles over fourteen years who have been transferred by an order of the Juvenile Court.[9] Upon the proclamation of the 1970 amendment to the Magistrates and Justices of Peace Act,[10] magistrates will be known as "provincial judges".

(2) The Juvenile Court. Each judge of the Supreme Court of the province, each judge of the District Court of the province and each magistrate in the province is ex officio a judge of the Juvenile Court, but "is not required to act in such a capacity unless willing to do so." The powers of a Juvenile Court judge are set out in the Juvenile Delinquents Act (Canada).[11]

> 6(1) Every Judge of a Juvenile Court in the exercise of his jurisdiction as such, has all the powers of a magistrate.

Proceedings in this court may be as informal as the circumstances will permit. Emphasis is placed not on punishing

the offender, but providing the delinquent child with "help and guidance and proper supervision".

The two major areas of jurisdiction of this court are juvenile offenders and neglected children. Under the Juvenile Delinquency Act (Canada), a juvenile delinquent is defined as

> s.2(h) . . . any child who violates any provision of the Criminal Code or of any large Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any dominion or provincial statute.

In Alberta, the maximum age for juvenile offenders is sixteen for boys and eighteen for girls. Alberta is the only province without a uniform age and the general trend is to set eighteen as the age for all juvenile offenders.

The Juvenile Court has jurisdiction in temporary wardship cases and all matters relating to neglected children under Part 2 of the Child Welfare Act.[12] This jurisdiction is shared by the District Court. Permanent wardship matters are the exclusive jurisdiction of the District Court.

In each town or city there is connected with the Juvenile Court probation officers who are officers of the court, appointed under Part 4 of the Child Welfare Act. They have all the powers of a peace officer for the purpose of performing and discharging their duties as probation officers and are designated by the court to supervise juveniles placed on probation. Under the terms of the Juvenile Delinquents Act (Canada) each Juvenile Court may have a

Juvenile Court Committee. The probation officers are to meet with and receive advice from the Juvenile Court Committee. In the urban areas, children's aid societies are to be ex officio committees, while in other areas, the court may appoint the committee upon petition. These committees are to act without remuneration and are given limited rights to attend the proceedings of the Juvenile Court. It would appear, however, that the advisory capacity of the Juvenile Court Committee is directed more to individual cases before the court, rather than to its general operation. So far as Alberta is concerned these provisions are a dead letter. At the present time, there is no active committee in any of the areas of the province.

(3) The Family Court of Alberta which is a court of record, has the widest jurisdiction of any Family Court in Canada. Under the Family Court Act,[13] a provincially-appointed judge of the Family Court has jurisdiction with respect to:

(i) maintenance orders for deserted wives and families under section 27 of the Domestic Relations Act;

(ii) maintenance orders under the Reciprocal Enforcement of Maintenance Orders Act;

(iii) certain charges against adults under The School Act, 1970;

(iv) certain charges against adult persons under the Child Welfare Act;

(v) charges triable on summary conviction under section 186(2)(a) of the Criminal Code (non-support charges);

(vi) common assault charges under section 231 (1)(b) of the Criminal Code where a husband assaults a wife, a wife assaults a husband, or a parent assaults a child;

(vii) charges, triable on summary conviction under any other act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them;

(viii) enforcement of Supreme Court alimony or maintenance orders, but without the jurisdiction to vary the Supreme Court orders;

(ix) custody of children whose parents are living apart from one another;

(x) right of access to such children.

Upon his appointment the Family Court judge is also appointed to the office of magistrate and acting in this capacity, hears matters under sections 231(b) and 717 of the C.C.C. and section 100 of the Liquor Control Act, 1958.

The procedure in this court is simplified. An applicant commences a proceeding by swearing an affidavit and serving all interested parties with written notice to appear at the hearing of the application. Most of the matters are heard without legal representation, although legal aid is usually available if required. In matters of custody, access, maintenance and enforcement, an application is necessary for each and every issue to be heard by the court and each application is heard separately, although often on the same day. At the discretion of the judge, any matter may be heard in camera.

The organization of the Family Court includes more than the judicial machinery. By virtue of section 5 of the Family Court Act, probation officers, clerks of the Juvenile Court and other officers and employees appointed pursuant to the Juvenile Court Act,[14] act as far as possible in the same capacity and have the same powers and duties in relation to the Family Court as they have in relation to the

Juvenile Court. The probation officers are under the direction of the judges of the Family Court and perform such duties as are assigned to them by the judges. The term "probation officer" in the Family Court has been amended in practice to "court counsellor".

In Edmonton the Family Court is composed of several sections each with specific duties and responsibilities and under the direction of the chief court counsellor:[15]

(a) The court reporter section has the duties of transcribing in court, preparing transcripts, court orders, summonses and warrants;

(b) The court services section, which consists of a stenographer, the receptionist and a filing clerk is primarily responsible for arranging the court calendars for the judges, preparing informations and complaints and attending to correspondence;

(c) The accounts and offices service section is responsible for the receipt and payment out of monies under the court's maintenance orders. As a general rule, the maintenance orders contain provisions that monies are paid directly to the Family Court. This section records fines, departmental financial returns, statistics, as well as takes care of the court dockets and the telephone switchboard operations;

(d) The enforcement section consists of one senior court counsellor and 4 court counsellors. This section is responsible for the collection of maintenance arrears once the court has ordered a payment of maintenance. In the event payment is not made, the enforcement counsellor contacts and seeks an explanation from the party which is to make the payment. If a reasonable explanation is not made, the enforcement counsellor takes the necessary steps for an enforcement action. In the event that the circumstances of either party to the order change, the enforcement counsellor advises the party as to his or her right to

vary the original order and may assist the party in preparing the application to vary;

(e) The intake section which consists of 3 court counsellors has two functions:

i) To advise persons with marital or family problems as to the remedies available to them or to refer them to professional agencies. In the event that court action is to be taken, the counsellor prepares the affidavit or complaint and arranges to have the parties appear in court;

ii) To investigate the circumstances of the parties seeking custody of children and to appear at the hearing to give evidence as to the findings;

(f) The solicitor of the Family Court acts as a legal advisor to the court counsellors as well as to those persons who are referred to the solicitor for legal advice in family matters. He also prosecutes charges being processed in court and prepares cases for presentation under the Reciprocal Enforcement of Orders Act.

Calgary also has a highly developed organization. It is this administration and organization that makes the existing Family Court a unique court.

The Family Court may exercise its jurisdiction throughout Alberta. There are Family Courts established in the five major cities--Edmonton, Calgary, Red Deer with Lethbridge and Medicine Hat combined--and smaller operations in Fort McMurray and Peace River. Under the Family Court Act, the jurisdiction of the judges is not restricted to particular districts and at the present time, there is the beginning of circuit court systems operating out of the five urban centres. In 1968 the Edmonton court visited Vegreville, Vermilion and Camrose; the Calgary court covered Drumheller and the Red Deer court extended to Rocky Mountain House and Ponoka. The court in Lethbridge and Medicine Hat also included Blairmore and Fort McLeod.

Although the Juvenile and Family Courts are set up as two separate courts of law, in practice, where there are Family Courts the two courts tend to operate as one. In Alberta all judges with Family Court appointments are also appointed Juvenile Court judges, so that in the five major cities all Juvenile and Family Court matters are heard by the same judges, acting either as Juvenile or Family Court judges. In the rural areas where there are no Family Court judges, the magistrates act in their capacity as Juvenile Court judges along with their other duties.

(b) Courts appointed by Canada

There are two superior courts which administer family law in Alberta: District Court and Supreme Court.

(1) The District Court exercises original jurisdiction in only a few family law matters: guardianship and custody, wardship, adoption and paternity proceedings. Under Part 8 of the Domestic Relations Act, the Surrogate Court sitting in chambers and the Supreme Court have jurisdiction in guardianship, custody and access matters. In all matters or applications touching or relating to the appointment, control or removal of guardians, the security to be given, the custody, control of or right of access to an infant and otherwise, the Surrogate Court has the same powers, jurisdiction and authority as are given by the Judicature Act to the Supreme Court, although this provision does not deprive the Supreme Court of jurisdiction in such cases. The District Court also has exclusive jurisdiction to hear permanent wardship applications and it shares jurisdiction in temporary wardship and neglected children applications with the Juvenile Court, pursuant to Part 2 of the Child Welfare Act. Under Part 3 of the same Act, the District Court has sole jurisdiction to hear applications for adoption and all paternity proceedings are

within the exclusive jurisdiction of the District Court by a 1970 amendment to Part 2 of the Maintenance & Recovery Act.[16] In hearing these matters emphasis is placed not so much upon an adjudication of conflicting claims in an adversary system as upon determining the best interests of the particular persons involved.

The most important part of this court's jurisdiction in family law is in wardships and adoptions. These involve the consideration of reports provided by the social services of the Department of Child Welfare. The court does not have any social services of its own, but it can avail itself of the services of the Director of Child Welfare and the Family Court. More often than any other court that hears family law matters, the District Court visits a substantial number of centres throughout the province in its circuits.

(2) The Trial Division of the Supreme Court of Alberta is the highest court of general trial jurisdiction in the province. It is presently composed of the Chief Justice of the court and eleven other judges. Under the new Divorce Act, this court is designated as the tribunal to exercise original jurisdiction in divorce and, as corollary relief only, to grant alimony, maintenance, custody and access orders, interim or otherwise, which may be varied or rescinded by the court as the circumstances of the parties change. Apart from the Divorce Act this court has jurisdiction in custody under the Judicature Act,[17] as derived from the old Court of Chancery. This court also has wide family law jurisdiction under the Domestic Relations Act: judicial separation, devolution of marital property, injunctions preventing disposition of personal property by a spouse, nullity of marriage, loss of consortium, restitution of conjugal rights, jactitation of marriage, alimony, maintenance, orders, interim

or otherwise or variation of these orders, in addition, guardianship and custody and access of children, either on independent application or on pronouncing a judgment for judicial separation or decree nisi.

The jurisdiction of the Supreme Court in loss of consortium, restitution of conjugal rights and nullity proceedings, as well as judicial separation and alimony actions, predates the Domestic Relations Act to the Northwest Territories Act, 1886, and the Supreme Court Act, 1907 (Alta.), c. 3, as pre-confederation English law recognized under provincial legislation[18] and in some of these matters, the pre-confederation English law still in effect is broader than the provisions of the Domestic Relations Act.

Finally, the Alimony Orders Enforcement Act[19] gives power to the Supreme Court and District Court to hold an inquiry and to use committal powers to enforce alimony or maintenance orders.

The proceedings of the superior courts are governed by formal traditions, rules of law and rules of court. The courts are founded on the adversary system which ensures a forum where both sides are given an equal opportunity to adduce and hear all the evidence on which the decision is to be made. At common law, no court has the power to conduct a trial in camera, unless it is strictly necessary for the attainment of justice to do so and no argument can be listened to except in the presence of all parties with an opportunity to reply. What evidence is admissible is strictly determined by the laws of evidence which exclude, with some exceptions, opinion evidence, hearsay evidence, similar facts, privileged communications and irrelevant material, to name but a few. The rules of pleadings and practice are codified in the Alberta Rules of Court and strictly observed in an atmosphere of tradition decorum and formality.

DIAGRAM I

SHOWING THE PRINCIPAL TYPES OF FAMILY PROBLEMS AND THE VARIOUS COURTS WITH JURISDICTION TO HANDLE THEM

	Superior Courts		Inferior Courts		
	Supreme Court Trial Division	District Court (including the Surrogate Court	Family Court	Juvenile Court	Magistrates' Court
Divorce	X(8)				
Corollary Relief	X(8)				
Nullity of Marriage	X(1)				
Judicial Separation	X(1)				
Restitution of Conjugal Rights	X(1)				
Loss of Consortium	X(1)				
Injunction Re: Marital Property	X(1)				
Jactitation of Marriage	X(1)				
Action for Alimony or Maintenance (not corollary to Divorce)	X(2)	X(14)	X(5)		X(4)
Charges under C.C.C.			X(5)		(X)
Enforcement of Alimony or Maintenance Orders	X(12)	X(12)	X(6)		(X)

(c) Digram of the Courts and their Jurisdiction

DIAGRAM I (Continued)

	Superior Courts			Inferior Courts	
	Supreme Court Trial Division	District Court (including the Surrogate Court)	Family Court	Juvenile Court	Magistrates' Court
Reciprocal Enforcement of Maintenance Orders	X(12)	X(12)	X(5)		(X)
Committal Powers	X(12)	X(12)	X(6)		X(4)
Charges of Neglecting or Ill-treating children		X(9)	X(5)	X(9)	(X)
Neglected Children		X(9)		X(9)	(X)
Custody & Access (not corollary to Divorce)	X(3)	X(3)	X(7)		
Temporary Wardship		X(9)		X(9)	(X)
Permanent Wardship		X(9)			
Guardianship	X(3)	(Surrogate) X(3)			
Adoption		X(10)			
Paternity Proceedings		X(11)			
Juvenile Offences				X(13)	(X)

Statutes - re Diagram

1. Domestic Relations Act
2. Domestic Relations Act, s. 16
3. Domestic Relations Act, Part 8
4. Domestic Relations Act, s. 27
5. Family Court Act, s. 4
6. Family Court Act, s. 6
7. Family Court Act, s. 10
8. Divorce Act
9. Child Welfare Act, Part 2
10. Child Welfare Act, Part 3
11. Maintenance and Recovery Act
12. Alimony Orders Enforcement Act
13. Juvenile Court Act
14. Maintenance Order Act

(X) By virtue of section 7 of the Juvenile Court Act, Magistrates have jurisdiction in juvenile matters.

3. Problems and Defects

There are many serious problems and defects in the existing structure of courts dealing with family law. The most obvious of these is the overlapping and competing jurisdiction of the five courts which administer family law. Aside from the constitutional uncertainties at the present time, an applicant for custody and access can proceed in the Family Court or Magistrates' Court where there is no Family Court, in the District Court, or in the Supreme Court. Similarly, a maintenance order may be granted by the Family Court, Magistrates' Court, District Court or Supreme Court. Of course, any subsequent order of a higher court takes precedence over a lower court and accordingly nullifies its effect. This occurs perhaps most frequently when maintenance and custody orders are granted as corollary relief to divorce, thus vacating any earlier orders of the Family Court. All the courts have jurisdiction to enforce their own orders and to vary them if the circumstances warrant it; however, under the Alimony Orders Enforcement Act, where a person has not made payments required under an alimony or maintenance order, the District Court or Supreme Court may hold an inquiry and use committal powers to enforce their orders. A Family Court judge has similar powers with respect to enforcing orders made under section 27 of the Domestic Relations Act and alimony and maintenance orders of the Supreme Court, but may not vary the latter. Similarly, guardianship is a matter in the jurisdiction of the Surrogate Court or the Supreme Court. Such competing jurisdiction of the courts encourages forum-shopping by litigants or by parties who have been unsuccessful or absent in earlier proceedings. These examples are not exhaustive, but serve to illustrate that there is a multiplicity of matters which a number of courts may administer and that sometimes their jurisdiction is exercised consecutively or concurrently.

The second serious problem and defect is the fragmented jurisdiction of the courts. Under the present system there are many cases in which no one court can do all that is needed and the litigants must move from court to court to obtain complete relief. Custody and maintenance may be dealt with by the Family Court until divorce is sought, when the whole proceeding must be moved to another court; but the maintenance order will often go back to the Family Court for more effective enforcement. There, however, is no jursidiction to vary the order so that it may have to go back to the Trial Division. Wardship may start as a temporary wardship in the Family Court and move to the District Court for permanent wardship.

It is possible to take a broader view than one which looks only to part of the family relationship, such as custody or maintenance. So considered, the problems are illustrated by Roscoe Pound in his article: The Place of the Family Court in the Judicial System:[20]

> It has been pointed out more than once of late that a juvenile court passing on delinquency of children; a court of divorce jurisdiction entering a suit for divorce, alimony, and custody of children; a court of common-law jurisdiction entering an action for necessaries furnished to an abandoned wife by a grocer; and a criminal court or domestic relations court in prosecution for desertion of a wife and child - that all of these courts might be dealing piecemeal at the same time with the difficulties of the same family. Indeed the affection of the wife, actions about receipt of a child's earnings, habeas corpus proceedings to try the immediate custody of the child, a proceeding in a juvenile court for contributing to the delinquency of a child, and another in a juvenile court to determine what to do about certain specific delinquencies of the child.

The end result is a lack of system. Different courts in piecemeal proceedings may be trying unsystematically and often at cross-purposes to adjust the relations and order the conduct of a family which has ceased to function as such.

The third serious problem and defect of the present court system is the conflict in philosophy and approach to the same problems among the courts. The Family Court on the one hand and the Supreme Court on the other are not similar in background or jurisprudence. The basic philosophy of the Supreme Court is that of the adversary system, under which it is the entire responsibility of the parties to place justiciable points before dispassionate and non-specialized judges who do not have social services at hand as a matter of course. The Family and Juvenile Courts are set up with the intention that, while they continue to be courts and try issues, there is a somewhat less formal process and somewhat greater emphasis on the investigatory and conciliatory processes. The Family Court judges have a specialized but limited jurisdiction with social and legal services attached to the court. The administration of family law is the sole reason for existence of the Family Court, while those aspects of family law which are dealt with in the Supreme Court tend to be the less attractive parts of the business of Bench and Bar in that court. Because of these basic differences, it is not unrealistic to imagine the same issue before the Supreme Court and the Family Court with conflicting results.

The end result of these problems and defects is inefficiency and ineffective treatment. It is a waste of time, energy and money to the litigants, lawyers and the courts to move from one court to another and it may be at the expense of the merits of the cases. The existing

social services attached to the Juvenile and Family Courts are not readily available to the superior courts, who often deal with the same issues, or to the parties who appear before the courts with the same problems--this cannot be justified on rational legal or social grounds. An atmosphere of uncertainty and suspicion of the court system arises when similar issues are treated differently. In short the courts are handicapped by the inadequacies of the system. The opinion here advanced is that reform of the system is necessary.

4. Alternatives

Assuming that it is agreed that reform is necessary, there are different forms which it can take.

Alternative 1

The first alternative would be to try to improve the situation while substantially retaining the division of jurisdiction among the existing court structures. Jurisdictions could be re-arranged and in some cases extended. Procedures could be improved. Social services could be attached to courts which do not now have them.

No doubt, improvements could be effected. However, the constitutional division of legislative powers between Parliament and the legislature, and the constitutional requirement that judges exercising the powers of Superior District or County Court judges must be appointed by the Governor-General, limit the effectiveness of a re-arrangement of jurisdictions. The problems of competing and overlapping jurisdictions, and of fragmented jurisdictions, cannot be completely solved while provincially-appointed

judicial officers comprise some courts and federally appointed judges comprise others. Nor is it likely that the basic differences in philosophy can be overcome.

Alternative 2

All matters under provincial legislative jurisdiction could be put under the jurisdiction of the existing Family Court. There are very severe constitutional limitations upon this alternative, which is a special case of alternative No. 1. Little could be effected in view of the constitutional limitations referred to.

Alternative 3

The alternative favoured in this paper is the creation of one court with exclusive jurisdiction in matters of family law. The problems caused by overlapping and fragmented jurisdictions would be eliminated. There would be a uniformity in philosophy and approach and the court could make the most efficient and effective use of its social services and facilities in the administration of justice. The judicial officers would spend all or most of their time in family matters and tend to become specialists in matters which differ from ordinary litigible issues.

Eminent scholars, authorities and commission studies have endorsed the concept of a unified Family Court. The late Judge P. W. Alexander who for many years presided over a unified Family Court in Toledo, Ohio, U.S.A., sets out his reasons in What is a Family Court Anyway?[21] as follows:

1. Avoids conflicts of philosophy.
2. Avoids conflicts of jurisdiction.

3. Avoids multiplicity of litigation.
4. It is more economical for the family.
5. It saves lawyers time and effort.
6. It saves courts time and effort.
7. It provides a common repository for family records.
8. It encourages social agency co-operations.
9. It tends to develop specialist judges.
10. It develops more effective staff work.
11. It is the cheapest way to render the necessary service.
12. It makes for greater certainty.
13. It helps the judge avoid mistakes.
14. Results produced.

The Governor of California commissioned a study in the administration of family law and the Report of the Governor's Commission on the Family (1966) contained the following conclusion at page 58:

> We have concluded . . . that the most pressing need is to formulate a system of judicial procedures which lends itself to a full and realistic handling of family breakdown, and this we have sought to achieve by recommending the creation of a Family Court as part of the superior court, whose jurisdiction extends to the full scope of family problems and which operates under a law free from hindrance of a determinate doctrine of technical fault and an adversary process.

and continuing at page 71:

> The conclusion seems inevitable that under the existing system for handling domestic relation matters, this kind of comprehensive treatment is virtually impossible. Family law cases are likely to be fragmented among several different division and departments of the same court,

> and there can be no unified approach to them . . . as the late Dean Roscoe Pound said,
>
> > The several parts are likely to be distorted considering them apart from the whole and the whole may be left undetermined in a series of adjudications of the part.

Therefore, it is recommended that a unified Family Court with exclusive jurisdiction in family law matters be established in Alberta and that all facilities for dealing with family problems be placed under its control.

The rest of this paper is based upon the assumption that this recommendation is accepted.

C. UNIFIED FAMILY COURT CONSIDERED

1. Selection of Courts

The first step in creating a unified Family Court is the selection of the court and the determination of its place in the judicial system.

There appear to be three alternatives any of which could be adopted in order to obtain the advantages of a unified Family Court. The first alternative would be to create a Family Court that is separate from the existing Court system. The second alternative would be to create a Family Court which is a division of the District Court of northern Alberta and another which is a division of the District Court of southern Alberta. The third alternative would be to create a court which is a division or section of the Trial Division of the Supreme Court of Alberta.

The last alternative gives rise to a problem in nomenclature. A part of a "Division" could itself be called a "Division", or it could be called a "subdivision" or a "Section". The term "Section" will be used here. Since this alternative is favoured here, it will be contrasted with the others.

Section of Trial Division v. Separate Court

1. A family court which is a section of the Trial Division would have a recognized place in the structure of the traditional courts, looking to the Chief Justice of the Trial Division as its head, though it would not be expected that he would be actively engaged in the internal administration of the Section. A multiplicity of courts is characteristic of the beginnings of judicial organizations. In the latter half of the nineteenth century English lawyers began to realize that the best arrangement was not a special tribunal for every special legal situation, but rather a system of specialist judges in a unified court. The creation of new courts produces a cumbersome and irrational structure where judicial co-operation and flexibility is difficult.

2. The creation of a Family Court Section in either the Supreme Court or the District Court would allow the greatest possible flexibility in the use of judicial personnel within the Family Court. In cases of desirability or need, such as in sickness or on circuit, assistance would always be available to the Family Court judge from the judges of the court with general jurisdiction. Similarly, the Family Court judges could obtain general trial experience from time to time by occasionally exercising general jurisdiction in the court and in this way, remain in touch with the main stream of legal thought and development.

3. Jurisdiction under the Divorce Act could be exercised by the Family Court Section of the Trial Division without an amendment to the Divorce Act, and it is desirable to avoid the need of such amendment since it might not be possible to obtain and in any event is likely to take time to obtain. Amendments to provincial legislation, or new legislation, will be necessary; but transferring jurisdictions to the Trial Division would not involve the additional legislation by Parliament. The Divorce Rules could, assuming that the judges of the court agree, be amended to provide that matters arising under the Divorce Act would be carried on in the Family Court Section.

4. If family law and its administration are regarded as being of the highest importance, it is desirable that it be administered by the highest court of original jurisdiction in the province in order to give it the greatest prestige and therefore the greatest ability to attract judicial personnel of the highest available qualification.

Trial Division v. District Court

1. Jurisdiction, again, could only be conferred upon the District Court by an amendment to the Divorce Act, which should be avoided if possible.

2. The Trial Division of the Supreme Court has jurisdiction throughout the province. Each District Court has jurisdiction in only part of the province. It is desirable to keep open the option of having one Family Court structure to serve the province, whether or not the initial plan is for one structure or for more than one structure, and this cannot be done through the District Court. It is desirable to maintain close contacts even if there are separate structures, and this can best be done by a single court. It

seems likely, also that a more unified philosophy is likely if all Family Court structures are part of the same court than if they are part of two different courts.

3. It is again pointed out that if family law and its administration are of the highest importance, family law should be administered by the highest court in the province for reasons of prestige and salary so that judicial personnel of the highest available qualifications can be attracted.

The remainder of this paper is written on the assumption that the Institute will recommend a unified Family Court and that the Institute will recommend that the unified court will be a section of the Trial Division of the Supreme Court of Alberta. The remainder of the paper would therefore have to be reviewed carefully if the Institute's recommendations are not in accordance with these assumptions.

2. Jurisdiction

On the basis of the assumptions made, a Family Court Section of the Trial Division will have jurisdiction in all family law matters. Where practicable, the jurisdiction would be exclusive.

In discussing jurisdiction in the court system, the primary consideration is the constitutional situation. Under the B.N.A. Act the division of jurisdiction in family law matters between Parliament and the provincial legislature is clear and defined in some matters, but not in others. Except for the criminal law, the procedure in criminal matters and the appointment of superior judges, "Marriage and Divorce" is the only family law matter within the

exclusive competence of Parliament. However, because there is room for constitutional argument over the extent to which that competence extends to other matters which may directly or indirectly be included, such as custody and access, alimony and maintenance, there is always some doubt as to the precise delimitation of authority conferred upon judicial personnel by provincial appointment. Consider, for example, whether the Divorce Act has so occupied the area of maintenance and alimony orders granted as corollary relief to divorce, as to make inoperative and provisions for the enforcing of order under the Reciprocal Enforcement of Maintenance Orders[22] by the Family Court. It is not the purpose of this paper to attempt to resolve these vexing constitutional problems; it is enough to be aware that they exist, and to avoid them. It is essential that the powers and jurisdiction of the new Family Court and of its judicial officers be validly conferred.

The questions relating to the jurisdiction and relationship of the judicial officers of the court raise problems which are among the most difficult problems in establishing a unified Family Court. There appear to be four alternative arrangements which would allow for the concentration of jurisdiction over family law in a Family Court Section of the Trial Division. These alternatives will be discussed below but will have to be considered in relation to the arrangements for appeals which will be discussed later in this paper.

Alternative No. 1

The first alternative is to have all the judicial officers appointed by the same authority and exercise substantially the same powers, with provision for a presiding judge. This is the form of organization of the traditional courts and of some successful American unified Family Courts.

Arguments in Favour of Alternative No. 1

1. Such a structure would have the virtue of simplicity and clarity of organization.

2. No difficult questions of differing jurisdictions and complicated relationships would arise.

3. There would be no invidious distinctions among judicial personnel.

Arguments Against Alternative No. 1

1. Certain of the functions of the court will require judges appointed under section 96 of the B.N.A. Act and all appointments would therefore have to be made by the Governor General. All appointments would have to be made pursuant to the Judges Act unless other legislation was enacted by Parliament. There would be a significant loss of control by the province which is the government of greatest interest in the administration of the Family Court; and there would be a significant shift of cost from the provincial government to the federal government which pays judges appointed by it. These are all problems which could be overcome by negotiation between the federal and provincial governments and by amendments to legislation at both levels, but the need for such additional negotiation and legislation is likely to erect barriers which the project can ill afford to have raised before it.

2. The traditional courts control themselves by the continuing stream of judicial decisions, the rule of stare decisis, the adversary system, and a common feeling for due process. The philosophy of the Family Court, while

preserving the rule of law, will require the court to take and maintain initiatives not likely to evolve from the view of the traditional courts that each judge is independent of his brethren and subject only to control by the higher courts on appeals launched by adversary litigants.

It is recommended that this Alternative not be adopted.

Alternative No. 2

It would be possible to have federally appointed judges perform those functions which have to be performed by judges appointed by the Governor General and to have provincially appointed judges perform the functions now performed by provincially appointed judges and magistrates. Functions now assigned to federally appointed judges but which constitutionally do not have to be (e.g., long-term wardships and adoptions) could be assigned to one group or the other. The matters which could be dealt with by provincially appointed judicial officers are dealt with later in this paper.

Arguments in Favour of Alternative No. 2

1. This Alternative would do the least violence to existing arrangements. Federally appointed judges would continue to perform the functions now performed by federally appointed judges. Likewise with provincially appointed judicial officers. There would be no shifting of cost or responsibility.

2. Problems of inter-relationship would be inconsiderable. Appeals within the court could be easily worked out for decisions by provincial judges, and they could do the interlocutory work as masters. Appeals from federal judges

could go to the Appellate Division as they now do.

Arguments Against Alternative No. 2

1. The two tiers of judges would be doing different work. There would be little reason to expect them to develop a common philosophy and approach to the whole field or to communicate with each other to any great degree.

2. Neither tier would have a grasp of the whole field of family law. While judges specializing in family law are wanted, it is suggested that it is undesirable that judges should specialize in one aspect of it. The purpose of the establishment of the court is to create a tribunal which can consider the family and its problems as a whole; and alternative No. 2 would perpetuate division.

3. There would be problems of fragmented jurisdiction (though less than those that now exist). Either judges sitting in Divorce would not deal with the related matters of custody and maintenance (thereby making necessary another hearing before a different judge) or they would deal with these matters, probably with a different touch than that of the provincially appointed judges dealing with the same subject matter in non-divorce matters.

4. It would be to be expected that the control of the court would generally be with the federally appointed judges to the exclusion of the provincial judges and that loss of independence by provincially appointed judges would increase rather than diminish the difficulty of attracting the most qualified people to serve as provincial judges.

5. The federally appointed judge or judges would have a judicial diet largely restricted to divorce, judicial separation, and such other things as might be decided upon, such as adoptions. Such a diet is unlikely to attract either lawyers interested in law generally, or lawyers who wish to make a contribution in family law; in other words it is unlikely to attract the most qualified people to the federally appointed tier.

Alternative No. 3

The proposal made by Mr. Purvis and presented by the Law Society to the Attorney General involved the appointment of "referees". These would be provincially appointed officers who would conduct hearings relating to "maintenance orders, custody, visitation, etc." and make recommendations to the federally appointed Family Court judge, who would normally act upon them. The referees would also be magistrates and judges of the Juvenile Court in order that they might handle juvenile delinquency cases and summary proceedings under the Criminal Code. The effect would be that in the great bulk of family law matters (not including juvenile matters) the control would be highly centralized in the hands of the federally appointed judge who would be the only one with the power to make final decisions.

Arguments in Favour of Alternative No. 3

1. The control of the court would be highly centralized as its work in most areas would require the signature of the one federally appointed judge, or one of the very small number of federally appointed judges. This would tend to strengthen the common philosophy and approach which are considered desirable.

2. All matters would be disposed of by the federal judge or judges, and if care was taken to secure federal judges of great capacity, all cases would receive the attention of such a person.

3. The federally appointed judge or judges by this means would be able to deal with many more cases than what would otherwise be possible, thereby obtaining the most results from the appointment of persons of great capacity.

Arguments Against Alternative No. 3

1. The decision, in theory at least, would not be made by the person hearing the evidence.

2. It might be difficult to attract highly qualified persons to act as referees if they do not have the decision-making powers; and the less qualified people appointed would inevitably have considerable influence on the result in most cases.

3. Litigants may very well prefer to appear before an officer with decision-making power, particularly since in most instances the decision can be pronounced from the Bench, and they may reasonably be disturbed when they are told that some other unseen officer must make the decision.

4. Some delay will necessarily be involved in having the matter go through the hands of a second judicial officer, particularly if he gives attention to each file.

5. There may be a strong tendency for the federally appointed judge merely to rubber stamp what is given to him by the referee, particularly when the referee will have a much more complete knowledge of the matter by reason for

having heard the evidence, and the benefits from the extra attention to the matter of the federally appointed judge are therefore likely to be illusory.

6. The provisions of section 9(1) of the Divorce Act, providing for a trial before a judge without a jury, which are discussed at more length under Alternative No. 4, also apply here, though the same solutions would be available.

Adoption of this alternative is not recommended.

Alternative No. 4

This alternative would be as follows:

1. The court would consist of one or more federally appointed judges (who will be referred to as "federal judges") and one or more provincially appointed judicial officers (who will be referred to as "provincial judges"), the number of provincial judges being greater.

2. The federal judges would have unlimited original jurisdiction in all matters before the Family Court Section including the matters in which the provincial judges would have jurisdiction.

3. The provincial judges would have original jurisdiction in all matters in which they now have jurisdiction. They would hold appointments as magistrates and juvenile court judges (as would the federal judges). They would also be masters in Chambers of the Family Court Section so as to be able to deal with interlocutory matters.

4. The federal government would be asked to amend the Divorce Act so as to allow uncontested divorces to be heard with the consent of the petitioner by the provincial judges sitting as masters or referees, with the application for the decree nisi to be granted or refused by the federal judge on the recommendation and report of the provincial judge; until such an amendment is obtained, the Trial Division could be asked to continue to supply judges to hear divorce petitions, as one judge should not be expected to take all the divorce applications in the province, or even all the divorce applications at one of the major centres.

5. Each federal judge would also have the powers of a judge of the Trial Division and would therefore be a judge of general trial jurisdiction, though generally dealing with family law matters. Other judges of the Trial Division would be ex officio judges of the Family Court Section so as to be available to take isolated cases where the balance of convenience so dictated or to supply temporary assistance in case of vacations or illness.

6. Other provincially appointed judicial officers holding appointments as magistrates could, either by designation for a specific case or a specific period or by general provision, be empowered to hear matters which can be heard by provincial judges of the Family Court Section when the balance of convenience so dictates or when additional judicial man power is needed.

Under this arrangement, a matter coming into the Family Court Section, if within the jurisdiction of a provincial judge, would be assigned to a list which might be presided over either by a provincial judge or by a federal judge. An uncontested divorce with the consent of the petitioner could be assigned to a list taken by a provincial judge as referee or master, with subsequent reference to a federal

judge for decision; all other divorces would be assigned to a list presided over by a federal judge.

Arguments in Favour of Alternative No. 4

1. This arrangement would do little violence to existing structures and jurisdictions. Existing Family Court structures could be brought into the Family Court Section, and existing provincial officers could carry out similar duties in the Family Court Section. It would not be necessary to make any immediate change in the number of provincial judges, who would take on some additional work if uncontested divorces are heard by them, and who might be asked to play a part in internal appeals as later suggested but who would in general be performing much the same functions. There should be no net increase in the number of federal judges though some work would be moved to the Family Court Section. Some additional work would be done by federal judges exercising the jurisdiction of provincial judges, but there seems to be no reason to expect a great increase of work for federal judges, and the work would be somewhat decreased if uncontested divorces can be heard by provincial judges. Divorce and Domestic Relations work would be removed from the main body of the Trial Division, and adoption, wardship and paternity would be detached from the District Court.

2. This arrangement would give the federal judge a considerable influence over the policy, approach and philosophy of the court by virtue of the prestige of his position, his administrative capacity (if this is decided upon; see infra) and his appellate position (if this is decided upon; see infra).

3. The arrangement, however, would leave provincial judges as deciding officers in most cases which they hear, and would leave them a responsible and challenging role. They would also have an opportunity to exert influence upon the course and direction of the court. While their pay and prestige would not be as great as those of the federal judge, it should, in conjunction with the challenge and the obvious social value of the work, allow the Family Court Section to attract as provincial judges people of high qualification and devotion to the work.

4. The federal judge also would have a variety of work ranging through the whole family law; and this work, together with the prestige of the office, should give the Family Court Section the greatest possible chance of attracting judges of the highest ability and commitment to duty to serve as federal judges.

5. The arrangement should give all of the judicial officers the greatest possible satisfaction in their work, except possibly for Alternative No. 1 above.

6. The arrangement would also provide the greatest flexibility and interchangeability and will allow each judge to have experience in, and form a coherent view of, the whole field of family law.

7. The complexity of the relationship and structure is more apparent than real.

Arguments Against Alternative No. 4

1. The internal relationship in the court is complex, with difficulties in administration caused by different channelling of cases and with the necessity of complex appeal provisions which will be discussed later.

2. An amendment to the Divorce Act would be required to allow provincial judges to hear and to report on undefended divorces.

The matters relating to family law which are in the jurisdiction of the provincial legislature and now administered by the Magistrates' Courts, the Juvenile Courts, the Family Courts and the District Court and which could be transferred to the jurisdiction of the provincial judges of the Family Court Section would include all matters under the Family Court Act, the few offences under the Liquor Control Act, 1958, and the Criminal Code, all juvenile offences, as well as temporary and permanent wardships, adoptions and neglected children under Parts 2 and 3 of the Child Welfare Act, guardianship and custody, either as corollary or independent relief under Part 8 of the Domestic Relations Act, paternity proceedings under the Maintenance and Recovery Act, and enquiry and committal powers under the Alimony Enforcement Act. At the present time the existing Juvenile and Family Courts exercise concurrent jurisdiction in all these matters with the exception of guardianship and custody under the Domestic Relations Act, the enquiry and committal powers, adoption, permanent wardship and paternity proceedings.

The family law matters in the exclusive jurisdiction of the federal judge would include all divorces and corollary relief, variation and enforcement under the federal Divorce Act. Added to these would be judicial separation, nullity of marriage, loss of consortium, jactitation of marriage, restitution of conjugal rights, devolution of marital property and injunctions preventing disposition of personal property by a spouse under the provincial Domestic Relations Act and pre-confederation English law.

Assuming a Family Court Section including a relatively small number of federal judges and a relatively large number of provincial judges, three proposals have been advanced: that provincial judges be able to hear, if not to determine, undefended divorces; that assistance might be provided by the Trial Division; and that provincial judges be appointed Masters in Chambers. Some further mention should be made of the last two.

If all judges of the Trial Division retained jurisdiction in family law matters, it would be possible to have them sit in the Family Court at Edmonton and Calgary to hear uncontested divorces, to the extent necessary which would presumably be somewhat less than at present. Judges of the Trial Division on circuit could also continue to hear divorces at the smaller centres for people who do not wish to come into Edmonton or Calgary. Contested divorces at the two major centres could be heard by the federal judges of the Family Court. The result would be that there would still be family law work to be done by other members of the Trial Division, but this would be reduced, and there would be a manageable volume to be dealt with by the federal judges of the Family Court Section.

Provincial judges of the Family Court Section could be appointed Masters in Chambers pursuant to section 42 of the Judicature Act, which reads as follows:

> s.42(1) The Lieutenant Governor in Council from time to time may appoint a master or masters in chambers.
>
> (2) Subject to order of the Lieutenant Governor in Council, the master in chambers is an officer of the Supreme Court and attached thereto.

> (3) The master in chambers has such jursidiction, power and authority as may be assigned to him by the Rules of Court. . . .

It was decided by the Ontario Court of Appeal in Papp v. Papp (1970), 8 D.L.R. (3d) 391, that a master in chambers may have jurisdiction to grant interim custody orders under section 10(b) of the Divorce Act. The reasoning of Mr. Justice Laskin is summarized as follows:

1. It has long been the law, declared and reiterated by the Supreme Court of Canada, that Parliament may repose jurisdiction, in respect of any matter within its competence, in provincially-appointed officers (Re Vancini (1904), 34 S.C.R. 621).

2. Under section 19(1) of the Divorce Act the court is permitted to make rules "applicable to any proceedings under this Act within the jurisdiction of that court including . . .

> s. 19(1)(e) prescribing and regulating the duties of officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act.

3. This section is sufficiently wide to permit delegation to the master of authority in respect of interim orders under section 10 of the Divorce Act.

4. Thus where a court makes a rule delegating this role to the master, the master's authority comes from the federal legislation and is therefore valid.

The appropriate amendments to the Rules of Court and the Alberta Divorce Rules, promulgated by the judges of the

Supreme Court, would allow jurisdiction in the masters in chambers to make interim orders for corollary relief under section 10 of the Divorce Act, including varying such interim orders.[23] This would provide a convenient forum where the often difficult issues of custody, maintenance and alimony could be more thoroughly evaluated pending trial, especially in cases where the grounds for divorce are not contested. It would also provide the judge hearing the divorce petition with a good foundation on which to determine the corollary relief.

A diagram follows showing the distribution of jurisdiction between federal judges and provincial judges in a Family Court Section composed of both. This diagram would apply to Alternative No. 2 and also to Alternative No. 4. In the latter Alternative federal judges would also have all the jurisdiction of provincial judges although the diagram, for convenience, does not so indicate. Some of the allocations may well be open for question.

(Diagram on following pages)

DIAGRAM II

SHOWING THE PRINCIPAL TYPES OF FAMILY PROBLEMS AND THE PROPOSED DIVISION AMONG JUDICIAL OFFICERS OF THE FAMILY COURT SECTION

	Family Court Section		Magistrates' Court (or Provincial Judge) for areas where no court is sitting with general family law jurisdiction (to be phased out)
	Federal Judge(s)	Provincial Judges	
Divorce	X		
Corollary Relief	X		
Nullity of Marriage	X		
Judicial Separation	X		
Restitution of Conjugal Rights	X		
Loss of Consortium	X		
Injunction re Matrimonial Property	X		
Jacitation of Marriage	X		
Action for Alimony or Maintenance		X (Master)	X
Charges under CCC		X	X
Enforcement of Alimony or Maintenance Orders		X	X
Reciprocal Enforcement of Mainteance Orders		X	X
Committal Powers	X	X	X
Charges of Neglecting or Ill-treating Children		X	X
Neglected Children		X	X
Custody & Access	X	X	X
Temporary Wardship		X	X
Permanent Wardship	X[1]	X	
Guardianship	X		

DIAGRAM II (Continued)

	Family Court Section		Magistrates' Court (or Provincial Judg for areas where no court is sitting w general family law jurisdiction (to be phased out)
	Federal Judge(s)	Provincial Judges	
Adoption	X[2]	X	
Paternity Proceedings	X[3]		
Juvenile Offences		X	X
Interim Corollary Relief		X (Master)	

[1]Permanent Wardship could be allocated either to the federal judge or the provincial judge.

[2]Adoption could be allocated either to the federal judge or the provincial judge.

[3]Paternity Proceedings involve questions of fact and should probably be tried by the federal judge, but assessing amounts and enforcement could be left to provincial judges.

3. Qualification and Training of Judicial Officers

The concept of a unified court is founded on specialization. In 1954 the Special Committee of the Association of the Bar of the City of New York on family problems recommended the following:

> 1. Cases which are the subject of this report (family problems) differ in important respects from the purely adversary proceedings ordinarily litigated in a court of law. The issues involved are various aspects of family deterioration which call for the judicial determination of the root cause and for the application of therapeutic and preventive measures.
>
> 2. A specialized judiciary equipped by training and disposition of the proper approach and skill in handling matters involved is required for such cases.

A person selected judge of a family court requires special qualifications and personal attributes. Apart from legal training and an interest in family law, these include broadmindedness, executive ability, tact, knowledge of principles governing social work and a knowledge and understanding of people. The term of office should be sufficiently long to make specialization possible. Preferably the appointment should be for an indefinite term, but it is possible that a fixed term may be stipulated, and if so, it should not be for less that 6 years though any figure is arbitrary. A method of rotation by Supreme Court judges into and out of the Family Court Section is not recommended because it would not encourage special training or long-term specialization in family law.

It is necessary to create a Family Court that will attract highly-qualified personnel. The pay and prestige of the Juvenile and Family Courts are not as great as those of the District and Supreme Courts, and steps should be taken to make the appointments of provincial judges as attractive as possible, assuming that there are to be provincial judges. Juvenile and Family Court judges with full legal training in 1968 received salaries of $18,000 per year, which was $2,000 less than that of magistrates with similar training, while judges without legal training received salaries of $12,500 per year. The District Court and Supreme Court salaries were $24,000 and $27,000 respectively. It is strongly recommended that the salaries of the provincial judges of the Family Court Section be at least greater than that of the magistrates and that the salaries of the federal judges be at least equivalent to that of the other Supreme Court judges.

In order to attract the best-qualified judicial personnel, the salaries must be increased and the court must have all the prestige associated with the highest court of original jurisdiction in the province.

The greatest care and deliberation is required in the appointment of the judicial personnel to the Family Court Section. It is recommended that the minimum legal qualifications for a provincial judge be five years experience in the practice of law with the exception of the present Juvenile and Family Court judges. These judges have demonstrated that they are eminently qualified and to incorporate them into the new court would provide it with an excellent foundation.

It is also desirable that there be a program for the orientation and training of newly-appointed judicial

personnel. The Recommendations of the Special Committee of the Association of the Bar of the City of New York in March of 1954 suggest some general guidelines:

> 10. A new judge should go through a period of conscious preparation before he himself presides over the courtroom and gives leadership to the court's staff. He should, as a minimum, sit with an experienced judge for a considerable length of time, discussing rather than deciding the cases that are presented. He should also know some of the professional thinking and literature that bear on the court's work. He should see the places to which children may be remanded or committed, and should become aware of the objectives, problems, successes, and failures of all those who are the court's collaborators in dealing with children and parents.

For both the newly-appointed and the experienced judicial personnel, a generous use of study groups, seminars, sabbaticals and university courses in psychology, criminology and sociology will provide an up-to-date acquaintance with the developments in the numerous fields related to family law.

4. Appeals

(1) Principles

Appeal procedures in the traditional courts usually involve periods of time running into months. They involve also fairly substantial expense arising from the need for counsel, the need to provide transcripts of evidence and reproduction of pleadings, judgments and exhibits. Much family law work (e.g., custody and maintenance) do not lend themselves to these procedures. Speedy determination in such matters is necessary and the expense, however justified

in other matters, in very many cases is a bar to an appeal in family law matters.

It is therefore possible to argue that litigants in family law matters should, if possible, have a quick and easy appeal within the Family Court Section. There is a strong feeling in our legal system that a litigant who is dissatisfied with the decision of the single judge of the first instance should have access to a court composed of more than one judicial officer in order to obtain their decision as to whether the judge of the first instance was right; and there is a great deal to be said for making it possible to have a decision considered dispassionately under somewhat less pressure by a different appeal panel. The observations made above as to the undesirability of delaying and as to the effect of expense tend to confirm such an argument.

There is on the other hand, a feeling that to make an appeal too easy is to encourage unnecessary appeals, and a feeling generated by the adversary system that if a litigant wishes to obtain a different result, it is for him to take all necessary steps to persuade the appellate tribunal, including the purchase of transcripts and the retaining of counsel.

The tendency of this paper will be to suggest an easy and cheap appeal where this is reasonably practicable.

The choice of alternative structures of the Family Court Section will influence the appeal provisions. Therefore appeal procedures will be discussed with regard to each of the alternative proposals.

(2) Proposed Appeal Procedures

Alternative No. 1

If Alternative No. 1 (all judges appointed by the Governor General) is adopted there simply could be an appeal from each Family Court judge to the Appellate Division, in the same way as there is now an appeal from every Trial Division judge to the Appellate Division. If there should be a master appointed, appeals could go from him to a judge with further appeal to the Appellate Division (except in the case of proceedings under the Divorce Act, where the appeal is required to be to the Appellate Division).

The only alternative would be to provide an internal appeal to more than one judge of the Family Court Section, probably three in number. It seems unlikely that such an appeal would be seriously considered.

Alternative No. 2

If Alternative No. 2 (federal judges and provincial judges performing entirely separate functions) is adopted appeals from federal judges will most certainly have to go to the Appellate Division unless an internal appeal to three or more Family Court judges is provided for.

There would be two possibilities as to appeals from provincial judges.

The first possibility would be an appeal to a federal judge with further appeal to the Appellate Division. The advantages to this proposal would be that there would be a comparatively quick and inexpensive appeal within the court, and that such a system of appeals would have some influence

toward unifying the philosophy of the court. The disadvantages would be that the first appeal would be to another single judge (a practice which lends itself to the appearance of decision by individual idiosyncrasy); and that the appeal would interpose an additional step between the determined litigant and the Appellate Division (though provision could, if thought desirable, be made for an appeal per saltum).

The second possibility would be to provide for appeals from provincial judges directly to the Appellate Division. Such a provision would mean that appeals in these matters would be subject to the problems of expense and delay mentioned earlier in this paper.

Alternative No. 3

If Alternative No. 3 as to court structure (a system of federal judges with referees as hearing officers) is adopted, the appeal would normally be from the Family Court judge to the Appellate Division unless an internal appeal to three judges of the Family Court Section is thought practical.

Alternative No. 4

If Alternative No. 4 as to court structure (provincial judges to exercise jurisdictions in matters under provincial control; federal judges to exercise all jurisdictions) there are various alternatives. With regard to provincial judges, the alternatives would be as follows:

(i) Direct appeal to the Appellate Division. Such an arrangement would be simple; but it would be a mechanism tending to emphasize control from outside the Family Court

Section rather than unity within it, and would be subject to the remarks concerning delay and expense which have been made earlier.

(ii) An appeal to the federal judge. This would emphasize control in the court and would help to preserve a unified philosophy and approach. It would, however, suffer from the disadvantages attendant upon an appeal from one individual to another; and it would tend to exclude provincial judges from sharing in the control and direction of the court.

(iii) An appeal to a federal judge, sitting with provincial judges. The exercise of appellate jurisdiction by provincial judges would likely be attacked under section 96 of the B.N.A. Act; and it is probably undesirable to allow the federal judge to be outvoted by the provincial judges. However, the appeal could be to a federal judge sitting with two provincial judges as non-voting members or as amici curiae. While this leaves the ultimate control of the appeal in the hands of the federal judge alone, it does provide some advantages. The first is that there would be an obvious difference from the tribunal appealed from in that it would involve the presence and attention of three judicial officers rather than one. The second is that it would afford an opportunity for the provincial judges to participate in the appellate function which involves the direction of the court (even if that participation is without vote), which opportunity could be made of more value by a provision in the rules that the federal judge should consult with the provincial judges and that they should make an oral or written report which would be part of the record in the event of a further appeal and which would be available for consideration by the Appellate Division.

With regard to provincial judges acting in interlocutory matters as masters, the appeal could go to a federal judge of the Family Court Section as is now done in the Trial Division, except with regard to matters under the Divorce Act where the appeal is required to go to the Appellate Division.

Although the proposal for an Appellate panel containing non-voting members is somewhat unusual, it is suggested that it makes possible an appeal which can be quick and inexpensive and it makes possible the playing of an influential part by provincial judges.

With regard to a federal judge exercising the jurisdiction of a provincial judge, there is a further problem (unless appeals from provincial judges should go directly to the Appellate Division, in which case the same procedure could be followed where a federal judge exercises the jurisdiction of the provincial judge).

An appeal from one federal judge to another federal judge of the Family Court Section, or to a judge of the Trial Division, would be inappropriate as going to another judge of coordinate jurisdiction (though it should be noted that in the Northwest Territories, an appeal can lie from the Territorial Judge sitting as a magistrate to another single judge of Supreme Court rank). If an appeal from the provincial judge is to a federal judge alone, probably the most appropriate appeal from the federal judge would be to the Appellate Division. However, if the appeal from the provincial judge is to a federal judge sitting with provincial judges, it might be appropriate to provide a comparable appeal from a federal judge sitting as a provincial judge in order to allow an "internal" appeal to litigants who

chance to come before a federal judge rather than a provincial judge. This could be done by allowing a single judge of either the Trial Division of the Appellate Division to sit with two provincial judges under the same arrangement as suggested above in connection with appeals from provincial judges.

With regard to federal judges exercising jurisdiction exercisable only by federal judges, the appropriate appeal appears to be to the Appellate Division.

(3) Appeals from Juvenile Court Judges

The discussion concerning appeals from provincial judges, and from federal judges exercising the jurisdiction of provincial judges, is applicable in principle to appeals in Juvenile Court matters. There is however an existing practical problem which arises from the Juvenile Delinquents Act (Canada), section 37(1) which reads as follows:

> s.37(1) A Supreme Court judge may, in his discretion, on special grounds, grant special leave to appeal from any decision of the Juvenile Court or a magistrate; in any case where such leave is granted the procedure upon appeal shall be such as is provided in the case of a conviction on indictment, and the provisions of the Criminal Code relating to appeals from conviction on indictment mutatis mutandis apply to such appeal, save that the appeal shall be to a Supreme Court judge instead of to the Court of Appeal, with a further right of appeal to the Court of Appeal by special leave of that Court.

Juvenile offenders should have all the rights and protection of the due process of law and should have an unqualified right of appeal. The provision of such a right

is within the competence only of the federal Parliament.

It is recommended that under the present provision, applications for leave to appeal should be heard, and any such appeal pursuant to such leave should be heard, by a federal judge of the Family Court Section and not by a judge sitting in the Trial Division.

It is further recommended however that Parliament be asked to amend the Juvenile Delinquents Act so as to remove the requirement of special leave and to make possible whatever form of appeal is ultimately recommended for adoption. Bill C 192, section 51, would provide for appeal to the Appellate Division, but would require leave of the Appellate Division or the Juvenile Court on a question of fact or mixed law and fact.

(4) Appeals to District Courts

There are two small areas which do not fit into any of the patterns previously suggested. These relate to appeals under sections 186, 231(b) and 717 of the Criminal Code and section 100 of the Liquor Control Act, 1958, to which the provisions of Part XXIV of the Criminal Code apply. These appeals are to a District Court judge, and it is suggested that if other appeals in family law matters are to be heard by federal judges of the Family Court Section, it would be anomalous to have these few appeals heard by the District Court. For the time being uniformity could be obtained by providing that the federal judges of the Family Court Section are ex officio judges of the District Court for the purpose of hearing these appeals. In the long run if the difficulties are not too great, it would be desirable to ask the Parliament of Canada to amend the

Criminal Code to permit such appeals to go to Supreme Court judges generally or in the case of Alberta to federal judges of the Family Court Section.

(5) Appeals in Matters under the Divorce Act

References have been made to appeals in matters under the Divorce Act. It appears desirable to amplify the description of the present situation.

In divorce matters an unqualified right of appeal lies from all judgments or orders whether final or interlocutory.

> s. 17(1) Subject to subsection (3), an appeal lies to the court of appeal from a judgment or order, whether final or interlocutory, other than a decree absolute, pronounced by a court under this Act.

The Act defines "court of appeal" in section 2(f)(i) to mean "with respect to an appeal from a court other than the Divorce Division of the Exchequer Court, the court exercising general appellate jurisdiction with respect to appeals from that court"; and "court" is defined in section 2(e)(i) to mean for the Province of Alberta, "the trial division or branch of the Supreme Court". Thus an appeal from a decree nisi or interim corollary relief granted by a master in chambers must be made to the Appellate Division of the Supreme Court. In Papp v. Papp, supra, the Ontario Court of Appeal also held that the reference in section 17(1) of the Divorce Act to the Court of Appeal, as having jurisdiction to hear appeals from judgments or orders under the Act, is an institutional reference only and that, under the Ontario rules, an appeal to the Court of Appeal from an interlocutory order under the Divorce Act may be heard without leave before

one judge of Appeal sitting alone. It appears that if the Rules of Court, and preferably the Judicature Act, are amended accordingly appeals could be taken in this manner in Alberta and in view of the provisions of the Divorce Act, it is suggested that this is the best available appeal system for interlocutory orders, whether granted by masters in chambers or by federal judges of the Family Court. While such an appeal is from one individual to another, it would avoid the necessity of proceeding before the full Appellate Division.

A further appeal lies on a question of law only to the Supreme Court of Canada, with leave of that court.

(6) Procedural Matters Relating to Appeals

Assuming that appeals will be taken from the provincial judges, or from federal judges exercising the jurisdiction of provincial judges, to Appellate tribunals within the Family Court Section, one or two important procedural questions arise, if it is accepted as policy that the appeal should be quick and inexpensive.

The first is the question of transcripts. These are expensive and their provision may be time consuming unless there is fully adequate reporting staff. The practical question as to what should constitute the record on appeal can become almost fundamental to the right of appeal, particularly bearing in mind the lack of means of many parties, and the need for expedition in dealing with what are often emergent matters.

A possible solution would be to provide in the rules that the federal judge shall give directions as to whether a transcript is to be required in a given case, or whether

the appellate tribunal should use as its record the notes of the judge of first instance, or a report from that judge, supplemented or not by statements of the evidence as supplied by the litigants. It should be noted that there is no suggestion that the appeals should be in the nature of a trial de novo.

The second important question is as to the time for appeal. In matters relating to such things as custody and maintenance, the appeal period should be very short and the procedure simple. Provision might well be made for an appellate tribunal to sit each week and the appeal might well be by notice returnable within a relatively short time, a few days' notice being sufficient. The time for appeal in such matters should be quite short, e.g., seven or ten days, all with a view to providing quick and inexpensive service so long as the matter remains within the Family Court Section.

These remarks of course do not apply to matters where appeal goes outside the Family Court Section, or where criminal procedure governs.

(7) Appeals from Final Decisions of the Family Court Section

Nothing in what has been said is intended to suggest that there should not in every case be an appeal to the Appellate Division from each decision of the Family Court Section, as in other cases.

5. Necessary Amendments

(1) Legislation

It is not proposed at this stage to consider in detail

the amendments which would have to be made to provincial legislation. When the decisions called for in this paper have been made, the required amendments can be determined. It is clear that amendments to the Judicature Act would be required and that amendments to the jurisdictional provisions of other Statutes would also be required, including

Juvenile Court Act, R.S.A., 1955, c. 166
Child Welfare Act, S.A., 1966, c. 13
Family Court Act, R.S.A., 1955, c. 108
Domestic Relations Act, R.S.A., 1955, c. 89
Reciprocal Enforcement of Maintenance Orders Act, S.A., 1958, c. 42
Maintenance and Recovery Act, S.A., 1969, c. 67
Alimony Orders Enforcement Act, R.S.A., 1955, c. 12
District Courts Act

Provincial legislation will not affect jurisdiction conferred by federal Statutes in matters within the exclusive legislative competence of Parliament. No amendment to federal legislation is absolutely required, but the following, as previous indicated, would be desirable:

(a) An amendment to the Divorce Act which would make it possible for provincial judges sitting as masters to hear undefended divorce trials, leaving the final disposition to be effected by a federal judge. Such an amendment would be needed only if the Family Court Section is to include both federal and provincial judicial officers.

(b) An amendment to the Divorce Act providing that the rules may provide for the hearing of matters under the Divorce Act by a section of the designated court. Such amendment does not appear to be essential, but would give recognition to the Family Court Section and if so phrased

would also permit other provinces to make provision for a unified Family Court within the Trial Court.

(c) Amendments to the Criminal Code providing that appeals which now have to go to the District Court, and which fall within the family law field, should (or at least could) be heard in Alberta by the Trial Division or a section thereof. This amendment is not essential but would make it unnecessary to have federal judges of the Family Court made ex officio judges of the District Court and thereby dispell a certain appearance of artificiality.

(d) An amendment to the Juvenile Delinquents Act permitting an automatic appeal to a judge of the Family Court Section of the Trial Division. Probably the amendment would have to be in more general terms so as to be applicable elsewhere in Alberta. This amendment is not essential to the working of the system but has been previously suggested in this paper.

(2) Procedural Matters

Some mention should be made of the procedural matters.

The Alberta Rules of Court govern procedures in the Trial Division. Other than the Alberta Divorce rules the only Rules of Court peculiar to matrimonial matters are Rules 578 to 580, relating to matrimonial causes, and Rule 396, the Interim Alimony Rule. So far as family law matters other than divorce proceedings presently dealt with by the Trial Division are concerned, it will probably not be necessary to make any substantial changes at the beginning.

With regard to matters such as maintenance and custody, elaborate rules seem to be unnecessary, but the somewhat

more complicated structure of the Family Court Section would call for rules to direct various matters in the appropriate channels, and (under some alternatives outlined above) to provide for appeal procedures.

With regard family law matters governed by the Criminal Code, the procedures can continue to be determined by the Code.

With regard to divorce the rule-making power is vested in the judges of the court, and if the Family Court is to be a section of the Trial Division, it would follow that all the judges of the Supreme Court would participate in the rule-making power.

It is suggested that the situation should be as follows:

(a) In divorce matters, the divorce rules should apply, including the rule-making powers.

(b) In other matters now dealt with by the Trial Division and in civil matters now dealt with by the District Court and the Family Court, the rule-making authority should be the Lieutenant Governor in Council. It would be desirable to have a rules committee representative of the Family Court Section, the Bar and the Attorney General's Department to make recommendations.

(c) In criminal matters the Criminal Code should continue to apply.

D. STRUCTURE OF UNIFIED FAMILY COURT

1. The Function of Family Court

A true family court may be said to be a "court with jurisdiction enabling it to deal with all problems relating to matrimonial and familial disputes, containing as an integral part an expanded diagnostic and therapeutic service and fortified by well-paid, qualified and respected judges."[24]

A Family Court is a court of law and as such, its primary function is judicial. Contentious issues must be determined and enforced within the framework of legal rights and the law. However, family law is distinct from all other areas of law. A proper disposition of most family matters demands a much greater attention to the particular person and less importance to the objective rules of law than do most other legal matters. For example, it is clear that the dissolution of a commercial contract or the lawful seizure of a motor vehicle is primarily a legal matter, but the dissolution of a marriage or the custody of a child has not only legal significance, but social significance as well, because it alters the basic relations between the parties--that is to say, it is a socio-legal matter.

The economic significance of family law matters is not obvious. Persons affected with family problems are often socially and economically underprivileged and are not capable of providing themselves with the professional services they require. Seldom do their problems directly involve large sums of money. In a court hierarchy where jurisdiction tends to be determined either by the amount of money involved in the action or by the means of the parties, they pass by in the lower echelons of the court system. A closer consideration, however, will lead one to the conclusion

that the economic results of child neglect, broken homes and juvenile delinquency are likely to be enormous in terms of social welfare, state guardianship, detention homes and penal institutions. It is clear that there is a paramount public interest in resolving family disputes and preserving families over and above the interests of the persons involved. The function of the court then, should also be therapeutic, and to some extent, preventive.

These observations lead one to the conclusion that a Family Court must be more than a highly-qualified judiciary. In addition to the court itself, social and other services are required to assist the persons seeking legal remedies. This is not to suggest that the court be transformed into a social agency, but rather that the court rely on other disciplines to adequately discharge its function.

2. Family Court Services

At the present time, there are no social or related services available to the superior courts administering family law. Such facilities, however, are attached to the Juvenile and Family Courts. It is one of the main purposes of the unified Family Court to provide a judicial and administrative structure through which the best use can be made of existing services in the interests of persons with family law problems. It is evident that transferring the existing facilities to the Family Court Section of the Supreme Court would mean a unity of intake, records and services and result in the most efficient and effective use of the present facilities.

The existing Juvenile and Family Courts' services are highly developed. Apart from the clerical, accounting and related services, they include the intake section, the

enforcement section and the legal section. It is proposed that the staff of these existing services be organized into Family Court services consisting of a social arm and a legal arm to be attached to the Family Court Section of the Trial Division. The proposal for a unified Family Court does not of itself involve extension of these services, in the court structure as recommended should prove adequate to deal either with the existing services or with extended services if the latter should be found to be necessary.

(1) Social Services

(a) Control of Social Services

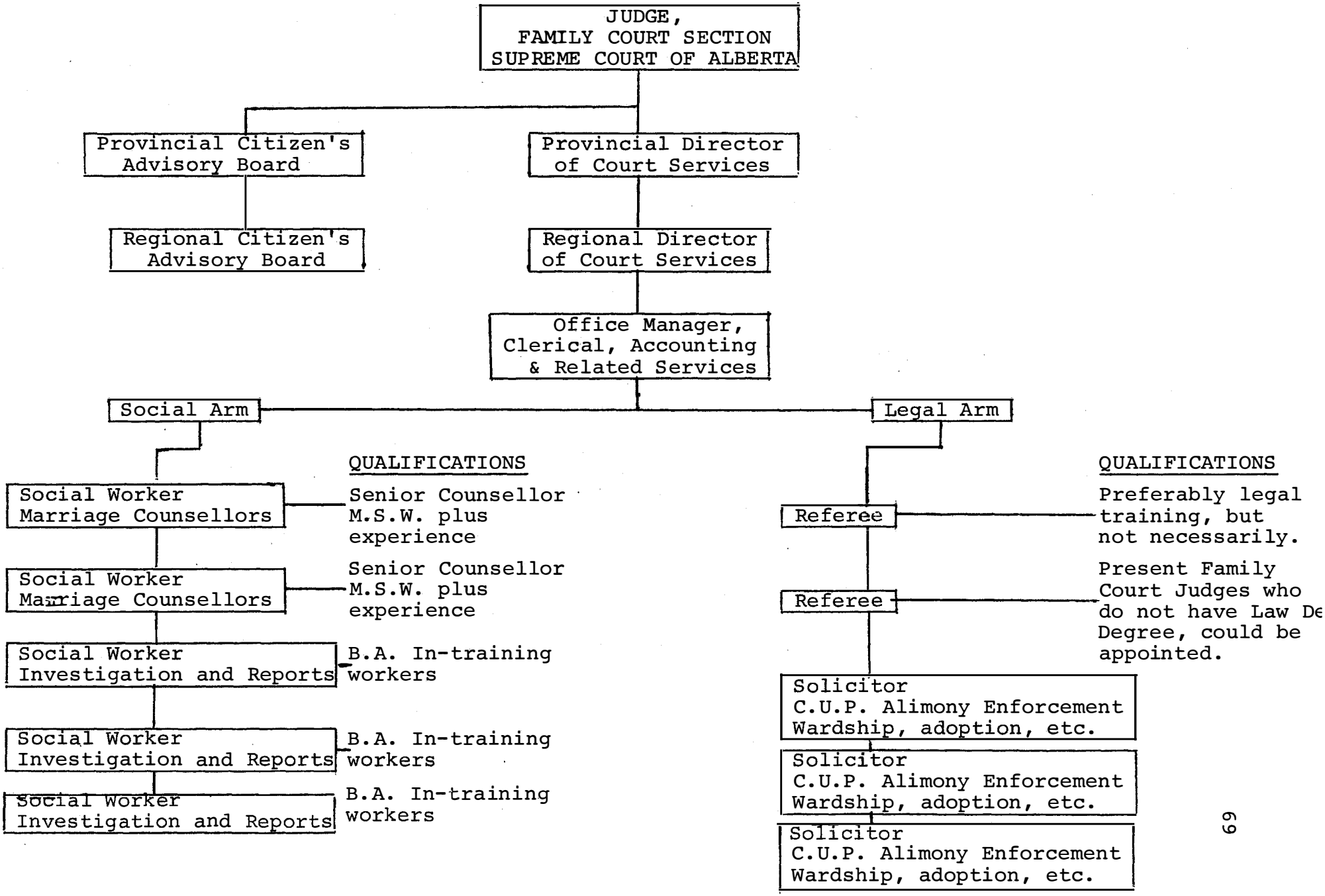
Social services functioning in the Family Court Section could be under the direct control of the appropriate government department or they can act under the direction of the court. If the social services are to function properly within the judicial process, they should be part of, and under the control of, the court. Experience under such a system appears to have been good in the more successful American integrated Family Courts, and the degree of control of the social services by the existing Family Court in Alberta seems to have been successful. It is therefore recommended that the principle should be that social services are part of and under the direction of the proposed Family Court Section.

There is then a question as to the administrative structure which should be adopted.

The plan suggested by Mr. S. S. Purvis, Q.C., which was presented by the Law Society to the Attorney General, involved the enactment of a Department of Court Services Act dealing with all the services of the court, legal,

administrative and social. There would be a director of court services who would have the responsibility for all these services. The director of Court Services would be under the Family Court judge contemplated by Mr. Purvis' plan, but would be required to report annually to the Lieutenant Governor in Council upon the affairs of the work of his department and to make recommendations for improvement. The resulting structure would be as follows:

(Chart on next page)


JUDGE,
FAMILY COURT SECTION
SUPREME COURT OF ALBERTA
Provincial Citizen's Advisory Board
Provincial Director of Court Services
Regional Citizen's Advisory Board
Regional Director of Court Services
Office Manager, Clerical, Accounting & Related Services
Social Arm
Legal Arm
QUALIFICATIONS
Social Worker Marriage Counsellors
Senior Counsellor M.S.W. plus experience
Social Worker Marriage Counsellors
Senior Counsellor M.S.W. plus experience
Social Worker Investigation and Reports
B.A. In-training workers
Social Worker Investigation and Reports
B.A. In-training workers
Social Worker Investigation and Reports
B.A. In-training workers
QUALIFICATIONS
Referee
Preferably legal training, but not necessarily.
Referee
Present Family Court Judges who do not have Law De Degree, could be appointed.
Solicitor C.U.P. Alimony Enforcement Wardship, adoption, etc.
Solicitor C.U.P. Alimony Enforcement Wardship, adoption, etc.
Solicitor C.U.P. Alimony Enforcement Wardship, adoption, etc.

Judge Bowker of the Family Court has expressed some reservations about this administrative structure. The likelihood of finding a person of the varied talents required for the position of Director of Court Services would not be too great. The structure would be too formalized and top-heavy. She suggests instead a structure involving three department heads, all reporting to the federal judge. These would be the Clerk of the Court, the Director of Legal Services, and the Director of Court Counselling Services.

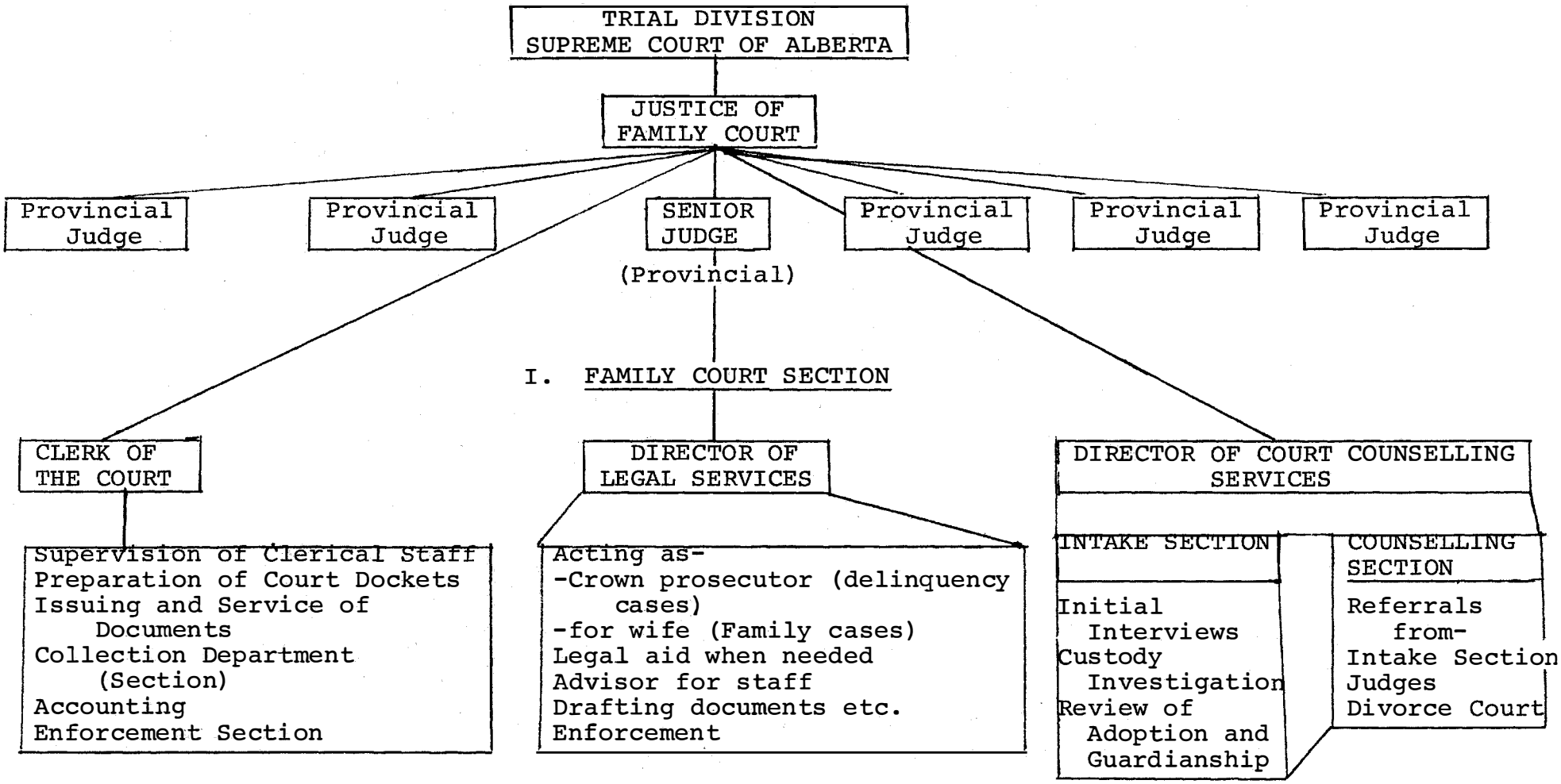
She would leave the Juvenile Court social services outside the structure. She gives her reasons for this as follows:

> I wish to comment now on the advisability or otherwise of the following services being provided by the court staff:
>
> (a) pre-sentence reports for juveniles (we call these "social histories" as we avoid criminal nomenclature in dealing with juveniles);
>
> (b) probation and supervision for juveniles (and sometimes adults in criminal matters like assault or threats).
>
> At the present time, all juvenile delinquency reports are prepared and furnished to the Court by THE CITY OF EDMONTON SOCIAL SERVICE DEPARTMENT (formerly called "The City Welfare Department") the offices of which are located in the CN Tower. Also, when a child is placed on probation, it is a probation worker in the same department who undertakes supervision. Indeed, we have an excellent liaison with these people (which is not so in Calgary) and get good service so far as social histories are concerned, though probation services are over-worked. In the case of adults (e.g., assault or CC 717 Threats), we rarely call for "pre-sentence reports", but if we need them, we use the regular ADULT PROBATION SERVICES (a branch of the Attorney General's Department) and similarly, probation for adults is to provincial probation workers.

The question now is: SHOULD THESE SERVICES BE TRANSFERRED TO THE COURT ITSELF? - as appears to be the intention. Eventually this might be desirable, but bearing in mind the magnitude of the changes already being proposed, we might be well advised to leave this part of the operation undisturbed. Besides this, there is one school of thought (with which I concur) that juveniles should be spared the "stigma" of coming into Juvenile Court offices with their parents for a so-called "pre-sentence interview". Having not yet been adjudged delinquent, he should not have to attend at the court building, with all which this implies, but rather it is much more desirable to have welfare workers conduct the interview in their offices elsewhere, make inquiries from the school, etc. without having to reveal an alleged delinquency. Indeed, the protection which the law affords juveniles against publicity might be violated if such inquiries came from a Juvenile Court. Then too, when the child is placed on probation and is required to report regularly to the office of his probation worker, he should not again return to the Juvenile Court building, but should, as now, go to the welfare department offices. The probation worker there is not so readily identified as being with the Juvenile Court when he or she makes calls to the home; she is merely "the lady (or man) from the welfare department", who might have many reasons other than delinquency for making the call. Many people feel that a child should be in the Court itself only for his hearing before the Judge; other than this he is not identified with the Court. It might be mentioned here that in Toronto (and Tokyo as well) probation services are right in the court building, but in so large a city, this arrangement is probably more convenient, rather than having City Welfare workers come great distances. So far this is not a problem in Edmonton.

Another point that comes to mind here is the financial element: under the present system, all these services described above, are paid for by THE CITY OF EDMONTON. If they were brought under the Court, they would be an added expenditure for the ATTORNEY GENERAL'S DEPARTMENT and the Provincial Government, and for this reason alone, the government would favor the present arrangement.

Her suggested structure is as follows:



II. JUVENILE COURT SECTION

Social Histories (pre-sentence) and probation services to remain outside court as at present

The great advantage of the suggestion made by Mr. Purvis is that the court would look to one official only for all matters of court administration and services. The disadvantage appears to be in the variety of functions to be supervised by this official and the insertion of a level of administration which does not appear to be strictly necessary for proper coordination.

It is difficult for the Institute to involve itself in the making of administrative decisions, but it is necessary to make recommendations as to what should be contained in legislation.

It is recommended that the legislation providing for the Family Court Section should provide:

1. For a Clerk of the Court, a Director of Legal Services and a Director of Court Counselling Services to be appointed by the Lieutenant Governor in Council after hearing the recommendation of the court, leaving open the possibility that two or more of these posts could be held by the same person.

2. That these officials be supplied with offices, staff, etc., in the usual way.

3. That these officials be under the administrative direction and control of the court.

Such a recommendation avoids a decision as between the two structures suggested above, and other possible structures. It is difficult to form in advance an opinion as to details, even important details, of administrative

structure and these should be worked out by those who will be responsible for its operation.

If the Institute should feel impelled to make a decision it is recommended that (subject to what will be said later about the exercise of the court's administrative jurisdiction) the structure suggested by Judge Bowker be recommended, subject to the qualification that the option of bringing the Juvenile Court Section under court jurisdiction should be kept available and that (whether or not such services are physically incorporated in the court premises) such services should be attached to and under the control of the court except where they are being performed satisfactorily by municipal bodies.

(b) Nature of Social Services to be Provided

The nature and extent of the social services to be provided by the court are not of the essence of the proposal for a unified Family Court, the proposal being directed rather towards the provision of the court structure which, among other things, can make the best use of such social services as are provided. It may however be useful to indicate the nature and use of the present services and possible extensions while emphasizing that the proposal does not stand or fall with these.

The present Family Court at Edmonton is the most convenient example. There is an intake service which is now performed in Edmonton by three social workers or "court counsellors", as they are called. Their present duties involve conducting the initial interviews, assisting persons to commence actions and making custody investigations when ordered by the court. A more extensive use of investigations

and social reports would be most useful as an aid to the court in making dispositions and it is proposed that the duties of these social workers be extended to provide all the services and reports required or requested by the judges of the court or, to be responsible for having the services or reports provided by voluntary or public agencies. This would include custody investigation reports, as well as guardianship and adoption reports, financial investigation reports for maintenance claims, follow-up procedures, pre-sentence reports, social histories and probation services. One can particularly see the value of these reports in assisting the court to grant equitable corollary relief in uncontested divorce actions. Often the parties themselves have not realistically considered the related questions of maintenance or alimony, but are reassured that, if inadequate, they may re-apply to the court at a later date. Much time and trouble could be avoided if more consideration were given to these matters in the first instance.

A possible extension of the social arm is suggested by section 7 and 8 of the Divorce Act which impose special duties upon lawyers and courts in divorce matters. The lawyer is under a duty except where clearly appropriate to draw to the attention of the client the provisions of the Act intended to effect reconciliation where possible, and to inform the client of the marriage guidance counselling facilities available and to discuss the possibility of reconciliation. The court is to inquire whether there is a possibility of reconciliation unless the inquiry is clearly inappropriate, and if it appears to the court that there is a possibility of reconciliation the court is to adjourn the proceedings to give the parties an opportunity to become reconciled and to nominate persons to endeavor to assist the

parties with a view to their possible reconciliation. At the present time there are no specific guidance facilities to which the parties may be directly referred either by order of the court, by the solicitor of one of the parties or at the request of both of the parties. A marriage counselling service attached to the court would tend to insure that these reconciliation provisions are not treated as mere technical requirements and that the parties capable of conciliating their problems will obtain the necessary counselling. Possibly only short-term assistance would be provided if such an extension was made.

Whatever services are rendered should be rendered by people adequately equipped by training and experience, lack of bias in study and report, and clear in understanding of the purpose, meaning and effect of reports, and able and ready to give evidence concerning their studies and reports.

The Institute could go on and make specific recommendations as to the number of people involved and as to whether or not new services should be provided. On the one hand, specific recommendations would no doubt be of assistance to those setting up the court. On the other, they may attract to the whole project criticism really directed towards these details and they may well at this stage suggest decisions which would better be left to those who will be responsible for operating under them. For these reasons no suggestion for major change in services or personnel is thought to be desirable in this paper, though the institution of a unified Family Court may well be the occasion for a re-examination of the services provided.

(2) Legal Arm

(a) Legal Service

With reference to the Edmonton Family Court, Judge Hewitt describes the function of the solicitor attached to the court as follows:

> The Solicitor acts as legal advisor not only to the Court Counsellors, but also to those persons who are referred to the Solicitor for legal advice in family matters. Where the person needs the services of a lawyer, but are unable to afford them, the Solicitor may act on behalf of that person. Too, the Solicitor prosecutes charges being processed in court as well as preparing cases for presentation under the Reciprocal Enforcement of Orders hearings.

Judge Bowker has this to say:

> Obviously each court should have one or more lawyers on the staff, one of whom could be designated "Director of Legal Services". Such persons would perform the following duties:
>
> (1) act as crown prosecutor in juvenile delinquency trials;
>
> (2) act for a wife in custody or maintenance trials, when the husband has a lawyer;
>
> (these are duties presently carried out by our court solicitor)
>
> (3) arrange for legal aid in contested matters, when from the nature of the case, this appears necesssary and advisable;
>
> (4) be available for staff to discuss legal matters;

(5) drafting of documents and new forms when necessary;

(6) in the event that the concept of "legal guardian" is adopted, to implement the system.

In response to the suggestion that the legal arm of the court should review each case to decide whether counsel is required by any party as though it were a criminal matter or by any child or would be otherwise unrepresented, Judge Bowker outlines the procedure of the court as follows:

> Whether parties appear in court on Child Welfare wardship applications, or Family Court matters (assault, maintenance, etc.), the judge, after explaining the nature of the action always asks if they wish an adjournment to consult a lawyer. This is something which they must decide themselves and all the court needs to do is to give them the opportunity. If the husband intends to have a lawyer, then we always tell the wife that she too should be represented; if she has a lawyer of her own, she is asked to consult him; otherwise it is explained to her that she is entitled to the services of our court solicitor, but that she must arrange an immediate appointment at the desk. . . .
>
> . . . . . .
>
> When it comes to the suggestion that juvenile delinquency cases require an assessment as to the need for legal representation, here again a glance at our present procedure might be in order: When the social worker (from the City Social Service Department) interviews the family and the child during the 3-week interval between the laying of the charge and the court hearing, the parents are told that they have the right to obtain a lawyer, and if necessary through legal aid. If they express a desire for this,

> then the social worker just prior to the hearing tells the judge this is their wish, in which case the judge is not handed the social history; a plea is taken and the matter adjourned until the lawyer can be present. The same procedure is followed in wardship hearings - if the person wants a lawyer, they are given this opportunity.

It would be open to the Institute to recommend that each case be looked at by the legal arm of the court with a view to seeing that representation is available when desirable, but, in view of the fact that the proposal to be made is largely one of court structure, the fact that opportunities for legal assistance are afforded, and the availability of both criminal and civil legal aid, it is not suggested in this paper that the Institute go on to recommend that the legal arm look at each case, though, again, a re-examination of the services provided would be a good thing.

One further consideration is whether children should have representation separate and apart from their parents in divorce and custody proceedings. Under the old English doctrine of parens patriae the courts have been known to appoint a legal representative to ensure that the best interests of the child may not be overlooked in the bitter conflict between the parents.[25] Under the Rules of Court, a next friend or guardian ad litem is appointed to appear for a child if he is a party to a civil suit; it may appear reasonable that the child should also have a spokesman when the matter being decided is his environment. Under the provisions of the Divorce Act, the court has a further duty to the children of the marriage where the grounds for divorce is a permanent breakdown of the marriage.

> s.9(1) On a petition for divorce it shall be the duty of the court
>
> . . . . . .
>
> (e) Where a decree is sought under section 4 (permanent breakdown), to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance;
>
> . . . . . .

These provisions would strengthen the case for a permanent legal representative. The role of a representative of a child should not be the role of an advocate in the usual sense, however. Perhaps provision could be made for an occasional representation to be provided either by the office of the Public Trustee or by the office of the Director of Child Welfare. Some form of representation should be available, at least when the judge thinks it desirable, but this paper does not suggest that the Institute's recommendations go farther at this time.

It is suggested however that the Institute recommend that where possible representation of an individual, whether a wife or child or anyone else, should not be by a lawyer on the staff of the court. It is better that there be some representation available in some cases and if this can be supplied only by the legal arm of the court, this is the way it will have to be. However, a lawyer, whether considered as advocate or guardian, should in general neither be nor appear to be a representative of an interest other than the interest of the client, while there is of necessity a

continuing relationship between the court and the solicitor attached to its legal arm which is outside the relationship between the lawyer and the person served.

The second facility of the legal arm of the court is an enforcement service. A systematic and effective system for the collection of support payments ordered by the Family Court Section is an obvious necessity if its orders are to be effective. Persons in whose favour such orders are made are often not in a position to take the usual legal remedies available to creditors and even if they were, these remedies are unrealistic for the collection of recurring small amounts. Regular and prompt payment of maintenance and alimony are necessary to furnish spouses and children with immediate living expenses and when these payments are delayed or stopped, social welfare must provide their living funds. In general, the usual legal remedies are too expensive, too cumbersome and often too late.

The existing Family Court has enforcement services attached to it in some areas. In 1968, for example, the Family Court of Edmonton collected over $630,000., with the collections in October and November being more than $60,000. per month.[26] In many American family courts, highly automated and computerized collection units are attached to the court. As a result greater amounts are collected and the social welfare funds are more fully reimbursed for their grants of assistance to deserted wives and children. For example, in the Family Court of Milwaukee County, the 1966 Annual Report of the court disclosed that the amount paid to the office on Family Court support orders was $11,334,132.07 and the amount reimbursed to welfare agencies was $724,155.54. In the proper cases,

effective collection procedures relieve the welfare funds of the responsibilities of errant spouses. In the 1969 study by Datamation Centres Ltd., on the possible computer applications to the Family Court in Alberta, it was estimated that the incurring cost factor for computerized collection facilities, after the initial installation charges, would be approximately $1,000. to $1,500. per month.[27] It would appear that the present volume of enforcement of support orders has reached the point where modern data processing methods could be economically realistic and a great assistance to the court and its litigants.

If the philosophy and policies of the unified Family Court are to be consistent, it is essential that the court services be attached to the court and under the direction of the court. Perhaps the importance of this relationship can best be understood in light of an article which analyzes the reasons for the failure of the Marriage Counselling Service in the State of Utah.[28]

> The reason for this mutual lack of understanding must be sought in part, at least, in the organizational setup of the Service. Although the law gave the courts the power to appoint the counselors and to direct their work, the Welfare Department actually selected the staff with the approval of the judges. The Department also assumed a large part of the supervisory responsibility for the Service, apparently without any objection from the courts. In fact, the counselors soon became for all practical purposes Welfare Department employees and asked to be relieved of their second loyalty - the loyalty to the courts. This development was aided, of course, by the fact that the counselors sensed some of the antagonism present in a few of the courts. They tended to gravitate, therefore, toward the Welfare Department whose staff had a background and spoke a language similar to their own and

> toward their psychiatrist-consultant whom they enthsiastically credit with a great deal of the progress they made in perfecting their counseling skills.
>
> What was lacking was some advice given to the counselors by a judge or attorney who would explain the world of the law, the meaning and purposes behind the rules of evidence and of procedure, the position of judges and attorneys as upholders of a long legal tradition, and the fact that they are bound by this tradition and these rules until they are modified or abolished; also the fact that many judges and lawyers fully realize the shortcomings of the adversary method in modern family cases and that they strive for a change by legislation or court rule. Without such general enlightenment and without the explanation of individual cases in their technical legal setting, it was only natural that some of the methods of judges in divorce cases seemed incomprehensible to a non-lawyer counselor.

It is essential for the success of the unified Family Court that the court have overall control of the court services so it can provide direction and implementation of policies, procedures and legal requirements. By their nature, autonomous social agencies cannot be part of this structure and therefore, they are likely to be less responsive to the policies and needs of the court. At the present time in Edmonton, all juvenile delinquency reports and probation services are furnished to the court by the City of Edmonton Social Service Department and this arrangement appears to be operating satisfactorily. However if the principle of a unified Family Court is acceptable, it seems desirable that even these services should, if and when this becomes practicable, be controlled by the Family Court, whether or not

they are physically located in its offices. Under the control and direction of the court, collection proceedings may be more vigorously pursued and the social workers, as officers of the Family Court Section, may expect greater acceptance and co-operation, especially by the legal profession.

3. Administration

The administrative structure of the unified Family Court is the whole non-judicial machinery connected to the court in the administration of family law and under the direction of the court itself. It is not possible in this paper to construct a workable administrative structure for the Family Court and its services. At the very most, it will propose guidelines and alternate recommendations to assist in setting up the unified Family Court.

While the court should control its services, the judges should not be engaged in daily administrative problems.

Two possible administrative arrangements have already been discussed.

Under the first there would be a senior administrative official called the Director of Court Services and that the services attached to the court would be organized into a Department of Court Services. The social and legal arms of the court services as well as the clerical and administrative services would report directly to the Director who would be responsible to the court. It is emphasized that the ultimate direction and control would rest with the court.

If there is to be such an official, the Director of Court Services should be carefully appointed. As a key figure in this administrative structure, he would require training in three disciplines - law, social work and administration. He would have to interpret law and its requirements to the social work staff and the community, and at the same time to be able to inspire confidence in and to convey the social workers' viewpoint to the judge and the legal profession. Because of the close liaison between the judges and the Director, his appointment should be made by the Lieutenant Governor in Council on the recommendation of the court.

Statutory recognition should be provided in the Family Court Act or a Department of Court Services Act for the Director of Court Services and the Department of Court Services. Further provisions should allow for such other services as the court may request and the Lieutenant Governor in Council may consider requisite, with power in the Lieutenant Governor in Council to prescribe the respective duties and remuneration of the Director of Court Services and other employees of the Department. Appointment of court officials would be made by the Lieutenant Governor in Council on the recommendations of the court. The Director would report annually to the Lieutenant Governor in Council upon the affairs and works of the Department and such reports could be laid before the Legislative Assembly.

The other proposal mentioned was that, instead of the Director managing the Department of Court Services, a three-man triumvirate, consisting of a Clerk of the Court, a Director of Court Counselling Services and a Director of Legal Services, may administer their respective services and report directly to the court.

There are alternatives as to how the administrative function of the court could be exercised. Under the proposal made by Mr. Purvis and presented to the Attorney General by the Law Society, the emphasis was upon one federally-appointed judge who would largely control the court and who would also exercise administrative control over the services attached to the court, acting through the Director of Court Services. This would be one administrative arrangement. It would be consistent with the philosophy of unified control upon which that proposal was based. It would, however, tend to exclude other judges from full participation in the work of the court.

An alternative would be to vest the administrative authority in the court as a whole. All the judicial personnel of the Family Court Section could be, in effect, a Board of Directors, with the chief justice of the Family Court Section as the presiding officer, and also as the executive officer. Decisions as to the policy under which court services would operate would be the result of debate and interchange of ideas and not the views of the one individual.

It is not suggested or expected that judges would be involved in day to day administration. The one Director, or the three department heads, would bear that responsibility, and it is not suggested that administration be a substantial charge on the time of the judges.

Regardless of the administrative structure of the unified Family Court, one of the important officers of the court will be the Clerk of the Court. As a court of record the Family Court Section would have its own separate records, court reporters and orderlies. The

Clerk of the Court would be responsible for the non-professional staff, including stenographers, clerical workers, receptionists, and court orderlies, as well as for ordering supplies, arranging court dockets, the issuing and serving of documents, and handling telephone inquiries. A second important function of the Clerk would be the administration of the accounting department of the court and the enforcement service of the legal arm.

The principle of judicial autonomy demands that no judge of the Family Court Section be under the control of administrative or governmental personnel. This principle also extends, in part, to the court services under the control and direction of the court, insofar as there must be a clear understanding or a budgetary allotment to allow the court independence to arrange its own staff needs, its facilities, its library expenses, its travelling expenses, as well as any special expenses that may arise in the course of its operation.

The Law Society proposal recommended that a Citizens' Advisory Committee be appointed by the court to ensure a harmonious relationship between the public and the court. This committee should consist of professional and non-professional members representative of the community at large. Its function would be to assist the court in becoming more effective in dealing with family problems, to obtain acceptance and support for the court and to co-ordinate the social resources of the community. The committee should be composed of representatives from volunteer, private social agencies, the government, educational institutions, the legal profession, the medical profession, church organizations, trade unions,

industrial organizations, Alcoholics Anonymous, Canada Manpower and others. In particular, pursuant to the terms of the Juvenile Delinquency Act, representatives from the children's aid societies could form a Juvenile Court Committee, as a sub-committee of the Citizen's Advisory Committee. During the period of organization of the Family Court Section such a committee would provide a source of advice about the inevitable problems of structure and organization and would provide a means of communication with the professions, institutions and organizations represented. Without the co-operation and understanding of the social agencies, the legal profession and the community at large, a unified Family Court cannot succeed, and every effort should therefore be made to obtain such co-operation and understanding by giving them a chance to take part in its organization. Once the Family Court Section is well established it will be time to assess the continuing function which the Committee may perform in order to decide whether it should continue.

Once the basic administrative structure is determined, it is necessary to consider whether there should be one such structure in the province or more than one, and if so, how many.

(1) <u>One Court</u>

The Family Court Section could be set up as one court structure for the province, presumably centralized at either Edmonton or Calgary. This arrangement would simplify administration. However, it would be open to the serious objection that it must inevitably be too remote from large areas of the province, and from one of the large population centres.

(2) Several Courts

It would be possible to set up several courts throughout the province. It seems unlikely, however, that it would be practicable to multiply these structures. Considerations of expense and administration suggest a minimum number. Full scale courts outside Edmonton and Calgary would not fit into the administration of the other parts of the Supreme Court, as judges of the other parts of the court are resident at Edmonton and Calgary and it is desirable to keep the Family Court Section as far as possible in the main stream of legal thought and in contact with the social work field as well.

(3) Two Courts

It is suggested that there should be two Family Court structures, one centered at Edmonton and one centered at Calgary. It is further suggested that (while every judicial officer should have jurisdiction throughout the province) the Edmonton Family Court should serve the area served by the District Court of the district of northern Alberta and that the Calgary Family Court should serve the area served by the District Court of the district of southern Alberta. To the extent that resident judges and resident social services are needed in smaller centres, these could be attached to and in close contact with the two structures.

It is suggested that such an arrangement would have the following advantages:

(a) There would be one such structure immediately available to each of the major population centres.

(b) There would be enough business to justify the type of administrative and judicial structure which we have been discussing.

(c) If provincial judges are to be resident in the outlying districts, they could still be part of the central court located in what is, at least in the judicial sense, the normal centre.

(d) The structures would be large enough to make available the advantages of association and contact to the various judicial officers and to avoid the problems of isolation; the court can progress only through continuing development of ideas by persons in continual contact with each other.

(e) This structure would fit into the structure of the Supreme Courts to the maximum extent.

(4) Services to Outlying Points

Creation of the new structures should not be allowed to detract from services now available to the people of the province, and should provide for the improvement of the service where possible.

Dealing firstly with services now given by judges of the Trial Division, there are three possibilities:

(a) to have enough federal judges in the Family Court Section to travel to the outlying points;

(b) to have the same services rendered by other Trial Division judges on circuit;

(c) in the case of undefended divorces, to have provincial judges act as hearing officers, with actual orders to be made by federal judges at the Family Court centres.

The second and (if and when the Divorce Act is amended) third are recommended for the time being. The possibility of the first should be borne in mind, to be instituted when the working patterns of the new Family Court Section have become clear and when it becomes apparent that its institution will be a reasonably efficient method of giving service.

The second group of services are those now provided by District Court judges, and these are not so easily dealt with. They include adoptions, long-term wardships and children of unmarried parents applications. It does not seem appropriate to ask District Court judges to continue to deal with these matters in the smaller centres. There would be two possibilities:

(a) To have enough federal judges to perform these services in the outlying points.

(b) To give jurisdiction to provincial judges to perform them.

Again the possibility of having enough federal judges should be kept in mind; but for the short term the second possibility appears to be the practicable one. If so, the discussion and proposals concerning appeals would apply to this jurisdiction.

There is no reason to think that there would be any additional difficulty in providing the services now provided by judges of the existing, Family, Juvenile and Magistrates' Courts.

This discussion has been based on the view that the institution of the new Family Court Section should not and need not be made dependent upon substantial increase in personnel and services. For this reason, interchangeability of judicial officers, federal and provincial, has been emphasized, whether these are appointed to the Family Court Section or not. However, use of other judicial officers detracts from the specialization which is one of the chief objectives of the proposal; and should therefore obtain only where provision of judicial officers of the Family Court Section would unduly tax the resources available for the Section. It is likely that the governments involved, subject as they are to competing financial demands, will be satisfied with a proposal which does not attempt to make the best use of resources which exist or which can largely be provided from the savings effected by reduction in demands on the Trial Division and the District Court.

(5) Relation Between the Family Court Structures

It is desirable that family law be administered in accordance with the same philosophy and practices throughout the province, subject only to any differences imposed by geography and concentration of population. The principle of uniformity may appear to conflict with the control of the court over its administration and methods. If a court controls its attached services, and if there are two separate courts, the policies adopted may be different; on the other hand, if there is one authority controlling both administrative structures then the individual court does not have that control.

It is suggested that the prime concern is to have one court operate under a consistent approach, and that the concern of uniformity with another court structure in another part of the province, though important, is somewhat secondary and could be satisfied by a policy of frequent meetings of judges and administrative staff, temporary assignments of judges from one structure to the other, particularly when vacations or illness make assistance necessary, and occasional movement of administrative personnel from one structure to another, temporarily or permanently, as occasion arises. Further, it is probably desirable that one judge be accorded precedence over all the Family Court Section, although under the arrangements generally favoured by this paper, his predominance would not be enough to give him policy control.

If the proposal suggested above is adopted, the smaller cities of the province would be under the jurisdiction of the respective centre of their district. Where there are existing Family Courts, as in Red Deer, Lethbridge,

Medicine Hat, Fort McMurray and Peace River, the present judges would be appointed provincial judges of the Family Court Section. These provincial judges would be associated with the centre of their district and maintain a close relationship with that court and its services. Although they would issue their own pleadings, they would provide their centre with copies of all records and proceedings, use its facilities as much as is possible and maintain a close connection with its other judicial personnel. The present circuit systems of the Family Court would be continued by the provincial judges and expanded in time according to need.

It is obvious that the facilities of the Department of Court Services cannot be reproduced in every community in the province. However, it is feasible to establish Citizen's Advisory Committees in the smaller communities of Alberta to assist the court. It is proposed that one of the primary functions of these community committees would be to provide specialized services to persons with family problems. These services would be similar to those provided by the Department of Court Services in larger centres. These community committees would be under the Director of Court Services of either northern or southern Alberta, who would guide, direct and co-ordinate the community efforts. Such community organizations, called "community co-ordinating councils", have been particularly successful in California, where they have been employed since 1932 to improve community life and provide a means of delinquency prevention. In Los Angeles County alone, more than 90 such Councils have been established.

4. Facilities

The physical plant that will house the court and its services requires careful consideration and professional planning. If dignity and prestige are to be associated with the new court, these qualities must be reflected in its surroundings. The decor must also be warm and beautiful, and designed to put people at ease.

The unified Family Court will be an important section of the Supreme Court of Alberta and it should not be isolated from the other court facilities. The judicial personnel of the Family Court Section should have a close association with all the members of the judiciary and the legal profession should be encouraged to participate in family law matters before the court. This means that the facilities must be as centralized and as integrated as possible. However, both the new Court House in Calgary and the Court House under construction in Edmonton will be completely occupied. It is proposed that appropriate facilities for the court and its services be found as close as possible to the Court House, until such time as expansion plans provide the space in the Court House.

The facilities will have to be large enough to accommodate both the court and its services. Office space will be required for the Family Court judge(s) and the provincial judges, as well as the Director of Court Services (if appointed), the Clerk of the Court and his staff, the social workers, the marriage counsellors, the solicitors and the administrative personnel. It will also require large filing areas for legal and social records, a waiting room, and smaller, private interview rooms. The court rooms themselves should create a conference atmosphere,

with the dignity which inspires respect for the court. They should be small and informal. Though provision should also be made for a larger, more dignified court room for matters more closely resembling ordinary litigation, and for appeals if they are to be conducted within the Family Court Section.

Emphasis should be placed on privacy both in the court room and outside. Persons waiting for counsellors or for court hearing should be accommodated in separate waiting rooms. The court rooms should be furnished with only enough chairs for the parties to a single case, their witnesses and counsel. While a court room is usually public and anyone may enter as of right, the size of the room, the fact that the door is closed and seating is provided outside rather than inside, and the demeanour of the bailiff and the court room clerk, will result in hearings being attended only by those directly concerned with the matter before the court. Such human privacy is appropriate for the discussion of intimate family problems.

E. SUMMARY OF RECOMMENDATIONS

1. That reform of the present system of administration of family law is necessary (p. 26).

2. That one of the following alternatives be adopted:

<u>Alternative 1</u>

To rearrange and extend the jurisdictions of the existing court structures (pp. 26-27).

Alternative 2

To put all matters under provincial legislative jurisdiction under the jurisdiction of the existing Family Court (p. 27).

Alternative 3

To create one court with exclusive jurisdiction in matters of family law (p. 27).

(Alternative 3 being preferred.)

3. To select the unified Family Court from among the following alternatives:

Alternative 1

To create a new Family Court separate from the existing court system (p. 29).

Alternative 2

To create a Family Court which is a division of the District Court of northern Alberta and another Family Court which is a division of the District Court of southern Alberta (p. 29).

Alternative 3

To create a court which is a division or section of the Trial Division of the Supreme Court of Alberta (p. 29).

(Alternative 3 being preferred.)

4. To provide for the jurisdictions of the judicial officers of the Family Court Section of the Trial Division according to one of the following alternatives:

Alternative 1

To have all the judicial officers appointed by the same authority and exercise substantially the same powers, with provision for a presiding judge (p. 33).

Alternative 2

To have federally appointed judges perform those functions which have to be performed by judges appointed by the Governor General and to have provincially appointed judges perform the functions now performed by provincially appointed judges and magistrates (functions now assigned to federally appointed judges but which constitutionally do not have to be so assigned to be assigned to one group or the other) (p. 35).

Alternative 3

To have referees who would hear matters relating to maintenance orders, custody, visitation, etc. and make recommendations to the federally appointed Family Court judge who would normally act upon them, the referees to be also magistrates and judges of Juvenile Court (p. 37).

Alternative 4

The court to consist of one or more federally appointed judges and one or more provincially appointed judicial officers; the federal judges to have unlimited or original jurisdiction in all matters before the Family Court Section; provincial judges to have original jurisdiction in all matters in which they now have jurisdiction and to hold appointments as magistrates, Juvenile Court judges and the Masters in Chambers of the Family Court Section; with provision for the hearing of undefended divorces by provincial judges; each federal judge to have the powers of a judge of the Trial Division and to be a judge of general trial jurisdiction and other judges of the Trial Division to be ex officio judges of the Family Court Section; other provincially appointed judicial officers holding appointments as magistrates to be empowered to hear matters which can be heard by provincial judges of the Family Court (pp. 39-40).

(Alternative 4 being preferred.)

5. That the judicial officers of the Family Court should have special qualifications and be appointed to the Family Court Section for an indefinite term or a sufficiently long fixed term (pp. 49-51).

6. That appeals within the Family Court Section be easy and cheap where this is reasonably practicable (p. 52).

7. That appeal procedures be as follows, depending upon the alternative chosen for jurisdictions of

the various judicial officers as provided in No. 4:

Alternative 1

(All judges appointed by the Governor General): There would be an appeal from each Family Court judge to the Appellate Division; appeals from a Master, if appointed, to go to a judge with further appeal to the Appellate Division (except in the case of proceedings under the Divorce Act where the appeal is required to be to the Appellate Division) (p. 53).

Alternative 2

(Federal judges and provincial judges performing entirely separate functions):

(1) Appeals from federal judges to go to the Appellate Division.

(2) Appeals from provincial judges to go either to a federal judge with further appeal to the Appellate Division; or to go directly to the Appellate Division (pp. 53-54).

Alternative 3

(A system of federal judges with referees as hearing officers):
All appeals to the Appellate Division (p. 54).

Alternative 4

(1) Appeals from provincial judges directly to the Appellate Division; or to the federal judge; or to the federal judge sitting with

provincial judges as non-voting members or as amici curiae (p. 54).

(2) From provincial judges acting as Masters, to a federal judge of the Family Court Section except with regard to matters under the Divorce Act where the appeal is required to go to the Appellate Division (p. 56).

(3) From federal judges exercising the jurisdiction of provincial judges, appeals could go to a single judge of either the Trial Division or the Appellate Division sitting with two provincial judges as non-voting members or as amici curiae (p. 56).

(4) From federal judges exercising jurisdiction exercisable only by the federal judges to the Appellate Division (p. 57).

(5) From Juvenile Court judges, to a federal judge of the Family Court Section with leave, and if the requirement of leave is removed from the Juvenile Delinquents Act, then without leave (p. 58).

(6) From provincial judges dealing with matters now be subject to appeal to the District Court, appeals to federal judges of the Family Court Section who should for the time being be ex officio judges of the District Court for the purpose of hearing these appeals, but legislation should, if possible, be obtained to make the appeals to Supreme Court judges generally or in the case

of Alberta, to federal judges of the Family Court Section (pp. 58-59).

(7) In interlocutory matters under the Divorce Act, the Appellate Division to be able to sit with one member (pp. 59-60).

8. That the Rules should provide that upon an appeal the federal judge shall give directions as to whether a transcript is to be required in a given case or whether the appellate tribunal should use as its records the notes of the judge of the first instance or a report from that judge supplemented or not by statements of the evidence as supplied by the litigants (pp. 60-61).

9. That the time for appeal within the Family Court Section should be short (p. 61).

10. That appeals from final decisions of Family Court Section continue to go to the Appellate Division (p. 61).

11. That the following specific amendments to federal legislation be sought (the matter of amendments to provincial legislation being left pending decisions on the other recommendations contained in this paper):

(1) An amendment to the Divorce Act to make it possible for provincial judges sitting as masters to hear undefended divorce trials, leaving the final disposition to be effected by a federal judge (p. 62).

(2) An amendment to the Divorce Act providing the rules may provide for the hearing of matters under the Divorce Act by a section of the designated court (pp. 62-63).

(3) Amendments to the Criminal Code providing appeals which now have to go to the District Court, and which fall within the family law field, should (or at least could) be heard in Alberta by the Trial Division or a section thereof (p. 63).

(4) An amendment to the Juvenile Delinquents Act permitting an automatic appeal to a judge of the Family Court Section of the Trial Division (p. 63).

12. That the following provisions be made for procedural matters:

(1) In divorce matters, the divorce Rules should apply, including the rule making powers (p. 64).

(2) In other matters now dealt with by the Trial Division and in civil matters now dealt with by the District Court and the Family Court, the rule-making authority should be the Lieutenant Governor in Council, advised by a Rules Committee representative of the Family Court Section, the Bar, and the Attorney General's Department (p. 64).

(3) In criminal matters the Criminal Code should continue to apply (p. 64).

13. That social services should be a part of and under the direction of the Family Court Section (pp. 66, 81-84).

14. That the legislation providing for the Family Court Section should provide:

(1) For a Clerk of the Court, a Director of Legal Services and a Director of Court Counselling Services to be appointed by the Lieutenant Governor in Council after hearing the recommendation of the court, leaving open the possibility that two or more of these posts could be held by the same person (p. 73).

(2) That these officials be supplied with offices, staff, etc., in the usual way (p. 73).

(3) That these officials be under the administrative direction and control of the court (p. 73).

15. That the services provided by the unified Family Court should be re-examined, but that decisions as to major changes be left to those who will be responsible for the operation of the court (p. 76).

16. That a re-examination of legal services be made, but that the Institute do not make further recommendation (p. 79).

17. That some form of legal representation for children should be available when the judge thinks it desirable, but that the Institute's recommendations do not go further at this time (p. 80).

18. That where possible representation of an individual whether a wife or child or anyone else, should not be by a lawyer on the staff of the court (though it is better that some representation be available then none) (pp. 80.81).

19. Though specific recommendation does not appear in the text of the paper, it is recommended that effective enforcement services be attached to the Family Court and that the use of modern data Processing methods be thoroughly investigated (pp. 81-82).

20. While the court should control its services, the judges should not be engaged in the administrative problems (p. 84).

21. That if there is to be a Director of Court Services, he should be carefully appointed and should be trained in law, social work and administration (p. 85).

22. The court services should be provided for in the Family Court Act or in a department of the Family Court Act, with provision for allowance for such other services as the court may request and the Lieutenant Governor in Council may consider a requisite, with power in the Lieutenant

Governor in Council to prescribe duties and remuneration; appointment of court officials to be made by the Lieutenant Governor in Council on the recommendation of the court; and with an annual report to be made to the Lieutenant Governor in Council upon the affairs and works of the department, the reports to be laid before the legislative assembly (p. 85).

23. That the administrative function of the court be exercised by the federal judge or alternatively by all the judicial personnel sitting as a Board with the Chief Justice as the presiding officer and executive officer (p. 86).

24. That a Citizen's Advisery Committee be appointed by the court to insure a harmonious relationship between the public and the court, to take part in its organization, with the continuing function of the committee to be assessed when the Family Court Section is well established (p. 88).

25. That there be two Family Court structures, one centred at Edmonton and one centred at Calgary (p. 89).

26. That until there are enough federal judges in the Family Court Section to travel to the outlying points, to provide the services now given by the judges of the Trial Division, these same services should be rendered by other Trial Division judges on circuit and in the case of

undefended divorces, provincial judges should be authorized to act as hearing officers, with actual orders to be made by federal judges at the Family Court centres (pp. 90-91).

27. That adoptions, long term wardships and children of unmarried parents applications should be dealt with by provincial judges (p. 91).

28. Wherever provision of judicial officers of the Family Court Section would unduly tax the resources available for this section, judges of the other courts should be asked to provide services for the Family Court Section (p. 92).

29. That if more than one Family Court structure in the province, each court should have control over its own services with uniformity to be maintained by a policy of frequent meetings of judges and administrative staff, temporary assignments of judges and administrative personnel from one structure to another, with one judge to be accorded precedence over all the Family Court Section (p. 93).

30. Where there are outlying Family Courts, these would be under the jurisdiction of the respective centres of their districts (p. 93).

31. That the physical plant of the court should reflect dignity and prestige and should also provide for privacy and putting people at their ease (pp. 95-96).

FOOTNOTES

[1]S.A. 1952, c. 32.

[2]These figures are taken from Judge M. Bowker's paper to the Institute of Law Research and Reform, The Family Law Project, October 6, 1969, p. 4.

[3]Matheson v. Norman (1946), 3 W.W.R. 63.

[4]30 & 31 Victoria, c. 3.

[5]S.C. 1967-68, c. 24.

[6]Evans v. Evans and Robinson (1969), 70 W.W.R. 153.

[7]Todd v. Todd (1969), 68 W.W.R. 315.

[8]S.A. 1955, c. 37.

[9]R.S.C. 1952, c. 160, s. 9(1). Bill C-192, an Act respecting young offenders and to repeal the Juvenile Delinquents Act, was given first reading by the House of Commons on November 16th, 1970, and references throughout this paper to the Juvenile Delinquents Act will have to be reconsidered if the Bill becomes law.

[10]R.S.A. 1955, c. 186.

[11]R.S.C. 1952, c. 160.

[12]S.A. 1966, c. 17.

[13]R.S.A. 1955, c. 108.

[14]R.S.A. 1955, c. 166.

[15]This description is from Judge N. C. Hewitt's paper to the Institute of Law Research and Reform, the Courts and Family Law, April 1969, pp. 17-19.

[16]S.A. 1969, c. 67.

[17]R.S.A. 1955, c. 164.

[18]Board v. Board, [1919] 2 W.W.R. 940; Watts v. Watts, [1908] A.C. 573; Lee v. Lee, [19202 3 W.W.R. 530.

[19]R.S.A. 1955, c. 12.

[20](1959), 5 N.P.P.A.J. 161, pp. 167-8.

[21](1952), 26 Conn. Bar J. 246.

[22]S.A. 1958, c. 42.

[23]Carvell v. Carvell (1969), 6 D.L.R. (3d) 26.

[24]Murray Fraser, Family Courts in Nova Scotia (1968), 18 U.T.L.J. 164, p. 170.

[25]Woods v. Woods, unreported decision of the Supreme Court of Alberta, 1966, No. 41784.

[26]These figures are taken from Judge N. Hewitt's paper to the Institute of Law Research and Reform, supra, p. 41 and schedule XII.

[27]Study of Possible Computer Applications, Datamation Centres Ltd., (1969), p. 16.

[28]Bridget M. Bodenheimer, The Utah Marriage Counselling Experiment (1961), 7 Utah L.R. 443, pp. 458-459.