THE INSTITUTE OF LAW RESEARCH AND REFORM

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January 24, 1977

MEMORANDUM TO MEMBERS OF BENCH AND BAR

Re: Courts Administering Family Law

The attached memorandum invites the views of the Judges and of the legal profession on a subject of great concern to the people of the province, the structure of the courts administering Family Law.

Attached to the memorandum is a report prepared by the Committee on the Administration of Family Law of which I am the nominal chairman. Having arrived at the point of preparing that report, the Committee decided that before a final decision is made as to what should be recommended, there should be further consultation with the Bench and the bar. The memorandum is therefore sent out at the instance of the Committee, but it is also in accordance with the Institute's view that there should be the greatest possible consultation on the subject.

One copy of the memorandum is going to each member of the Appellate Division, the Trial Division, the District Court and the Family Court. One copy is going to each firm or individual practitioner and, in the case of a firm, should be passed to the person most interested in the subject. More copies are available upon request.

Comments should be made to me or to a member of the Committee. It would be appreciated if anyone who proposes to make an extensive comment would let me know so that further steps will not be taken in ignorance that it is coming.

W.H. Hurlburt

UNIFIED FAMILY COURT

MEMORANDUM

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M E M O R A N D U M

I

PURPOSE OF MEMORANDUM

The purpose of this memorandum is to solicit the considered views of bench and bar on proposals for a single court to have jurisdiction in matters of family law, including the following:

(1) Divorce, nullity, judicial separation and restitution of conjugal rights.

(2) Alimony and maintenance between spouses.

(3) Guardianship of the person, maintenance and custody of children.

(4) Affiliation proceedings.

(5) Neglected children, including temporary and permanent wardships.

(6) Adoptions.

(7) Variation and enforcement of orders.

(8) Criminal matters within the family. (The present view is that "family law" should include criminal matters so long as the family element exceeds the criminal element. Clearly murder belongs in the criminal courts and common assault between husband and wife belongs in the proposed Family Court, but it is not clear just where the line should be

drawn.)

(9) Juvenile matters.

(10) Injunctions and restraining orders in family matters.

(11) Questions of property between husband and wife.

II
HISTORY

There has been much study in Alberta and elsewhere in Canada of the structure of courts exercising jurisdiction in family law matters. The studies have all suggested a Unified Family Court and the establishment of social services within the family court setting. The studies include the following:

Institute of Law Research and Reform--Working Paper, Family Court 1972 (various alternatives for establishment as part of Supreme Court or, if that is not possible, as a separate superior court)

Response of the Calgary Bar--Family Law Subsection of the Canadian Bar Association in Alberta, 1972 (Family Court at Provincial Court level with speedy appeal by trial de novo to Trial Division)

The Law Reform Commission of Canada, Report on Family Law, 1976 (Supreme Court level)

The Ontario Law Reform Commission, Reform of Family Law, Part V, 1974 (Supreme Court level)

The First Report of the Royal Commission on Family and Children's Law, British Columbia, 1974 (Combined administrative and social services; supreme, county and Provincial Courts in same courthouses; see alternative 6, p. 10)

The Honourable Emmett Hall's report in Saskatchewan, 1974 (maximum provincial jurisdiction in Provincial Court)

The Quebec Civil Code Revision Office, Report of the Family Court, 1975 (Superior Court)

The Prince Edward Island Unified Family Court 1975 (Part of Provincial Supreme Court; now functioning)

It was in this climate that in early 1976 the Institute of Law Research and Reform invited the Committee on Administration of Family Law to examine the structure of the courts administering family law and to make proposals for providing the most effective administration of justice in the family law field. Members of the Committee were nominated by the Attorney General, the Chief Justices and Chief Judges of the Courts, the Law Society of Alberta and the Institute. A copy of the report made by the Committee in July is attached.

III
ALTERNATIVE PROPOSALS

Before the Committee makes it report final, and before the Institute considers the report, it has been thought desirable to circulate this memorandum to the bench and bar to get considered views on those alternative proposals which appear to be within the range of practicability for Alberta. The ones chosen are those which have been or are being implemented in other provinces or which have received substantial support in our discussions and which therefore appear to be within the range of practicability. We will now describe those alternatives.

(1) Committee Recommendation

In its attached report the Committee made a proposal which may be summarized:

(i) That one court, known as the Family Court of Alberta, have original exclusive jurisdiction in Family Law matters.

(ii) That the court be based upon the existing Family Court and consist of provincially appointed judges.

(iii) That an action in the Family Court, or some one or more of the issues therein, may by leave of a judge of the Supreme Court be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason such action or issues may be more conveniently tried in the Supreme Court; and that the Supreme Court should have power to transfer the action or one or more of the issues back to the Family Court.

(iv) That judges of the Supreme and District Courts be empowered ex officio to sit in the Family Court, and that Provincial Judges should be empowered ex officio to sit in the Juvenile Court. The intention of this recommendation is to maintain the level of service available to people living outside the larger population centres.

(v) That the proposed Family Court have a chief judge whose function relates to that court alone.

(vi) That judges of the present Family Court who are not lawyers or do not have the qualifications required by the Judges' Act continue, to the extent possible, to exercise their present powers and perform their present duties, either as judges of the Family Court or as judges of the Juvenile Court.

(vii) That provision be made in the proposed Family Court for procedures such as examinations for discovery and production of documents which may be required of the more complex matters which would come within the jurisdiction of the proposed Family Court. In order to ensure that these procedures are not used to impede litigants in matters which should be dealt ~~with in~~ in a summary way, however, the Committee recommends that they be available only by leave of a judge.

(viii) That Rules of Court should be prepared which would not complicate those matters which should be dealt with by a summary procedure but should deal with interlocutory proceedings and such things as service ex juris and garnishment.

(ix) That a litigant who wishes to appeal from the proposed Family Court have a choice between an appeal to the Appellate Division and an appeal to a panel of three judges drawn from the Family Court. If the appeal is taken to the panel of three judges there should be a further right of appeal to the Appellate Division, but only by leave of a judge of the Appellate Division.

(x) That social services be available through the Family Court to the judges and to the litigants. These should include in-take and information services, legal representation, conciliation services, investigative services in relation to custody matters, and follow-through services including collection services and conciliation of access disputes.

(2) Proposal by Some Edmonton Members of the Trial Division

An alternative proposal has been suggested by some members of the Trial Division. It is transcribed almost verbatim from their letter.

(i) All family law matters would be brought into a Family Law Division of the Trial Division of the Supreme Court of Alberta. That Family Law Division would be the Unified Family Court. Judges of the Trial Division of the Supreme Court of Alberta, sitting in Family Law Division either permanently or temporarily (we would prefer the latter), would actually preside over the more serious matters involving family law such as those matters involving the division of property on divorce.

(ii) The Trial Division of the Supreme Court of Alberta would be assigned all the support facilities, such as counselling and investigative services, now possessed by the provincial Family Court. Those services, and the administration of the court in general, would be under the direction of a judge of the Supreme Court. Whether he is styled an Associate Chief Justice, or a Chief Justice of the Family Division or a President of the Family Division, is of no particular significance.

(iii) Those matters of a family law nature which are now handled by judges of the District Court could be handled by the same judges as a second tier of the Family Division. The District Court judges would retain their identity as such, but for administrative purposes their function in what are regarded as family law matters (e.g. C.U.P., adoptions and permanent wardships) would be subsumed under the presiding judge of the Family Division.

(iv) The present judges of the provincial Family Court would then form a third tier of judges in the Trial Division of the Supreme Court. They would not be members of the Trial Division of the Supreme Court. They would be judges of the Family Division with powers limited by the warrants which would be issued to them by the federal government. They would continue to look after many kinds of matters which they now in fact deal with. However, because they would be part of a single unified Family Division, there would not be the problems of forum shopping which now exist, and which the Committee has so clearly analyzed.

(v) The precise delineation of responsibilities between the first tier and the third tier could be in part spelled out by statute, and in part left to administrative direction by the administering judge. However, we do not contemplate any significant shift away from the Supreme Court of jurisdiction over matters involving contested divorces or property. Perhaps the one field in which the present provincial court judges should have principal or exclusive responsibility is the enforcement of maintenance awards. However, this area may not be quantitatively significant in terms of judicial time if, as in British Columbia, 95% of the money collected is through the efforts of counsellors and not through the adjudicative process.

(3) Variation of Proposal (2) suggested by some members of the Committee

If proposal (2) is considered for adoption, some members of the Committee have suggested that it might be varied somewhat, and be as follows:

(i) The province would establish The Family Court of Alberta.

(ii) The Chief Justice of the Court would be permanently and exclusively a member of it and would be a Superior Court Judge in rank, federally-appointed.

(iii) All the Judges of the Trial Division of the Supreme Court and District Court Judges as local Judges of the Supreme Court would be Judges of the Family Court. This would be the so-called first-tier of the Court.

(iv) There would be a second-tier of the Court consisting of provincially-appointed judges permanently assigned to the Court.

(v) All domestic matters would be in the Family Court. The precise detail of what judge would handle what matter would require considerable study, definition, and some change of provincial and federal statutes. In general, however, it would be contemplated that those matters that must be handled by federally-appointed judges would be handled by the Trial Division and District Court judges. All other matters would be handled by the provincially-appointed judges. They would, however, be handled in the physical facility of the Family Court. All matters which affected a family would be in one central file.

(vi) The continuity of this Court would be provided by its Chief Justice and by the fact that the provincially-appointed judges would be permanently appointed to it. The assignment of Trial Judges and local Judges of the Supreme Court to the Family Court should be on a rotation basis, and would be a matter of co-operation between the Chief Justice of the Trial Division of the Supreme Court, the Chief Judge of the District Court and the Chief Justice of the Family Court.

The principal differences between this alternative (3)

and alternative (2) are as follows:

(i) The matters now in District Court jurisdiction would be dealt with by the Family Court judges, where constitutionally possible and otherwise by the Trial Division and local judges of the Supreme Court. Adoptions, C.U.P.'s and Permanent Wardships can constitutionally be handled by provincially appointed judges and are so handled in most provinces: Re: Adoptions Act, etc. (1938) SCR 398).

(ii) The social services would not be under the direction of a judge (though a judge would be entitled to call upon the social services for assistance).

(iii) It would be made clear that the administration of the court would be unified.

(4) The Unified Family Court as part of the District or Supreme Court

Proposals (2) and (3) provide for a Family Law Division of the Supreme Court in which there would be 2 or 3 tiers of judges with different jurisdictions. As an alternative, jurisdiction in Family Law could be conferred upon a division of the Supreme Court (or, for that matter, of the District Court) in which all judges are appointed under section 96 and are of equal jurisdiction. That would involve section 96 judges doing the work now done by Family Court judges.

Manitoba is setting up a pilot project on these lines. In the St. Boniface District there will be a Family Law

Division of the Court of Queen's Bench. Members of the Court of Queen's Bench, and County Court Judges sitting as local judges, will deal with all family law matters including those things now dealt with by the Court of Queen's Bench and matters such as applications under the Wives and Children's Maintenance Act, but not including juvenile delinquency matters, an omission which may be thought to detract from the court as a unified family court. It appears that all judges of the two courts will sit by assignment. The necessary legislation has been passed but not yet proclaimed and there is a tentative start up date of spring 1977.

(5) Separate Family Court

A separate family court could be established which would have exclusive jurisdiction in all family law matters and to which the Governor General would appoint all of the judges. Ontario is establishing one variant of this proposal. A pilot project in Hamilton, Ontario will call for the appointment of three county Court judges. They will sit exclusively in the Unified Family Court and provincial legislation will make them ex officio judges of the Family Court. The Unified Family Court is not given exclusive jurisdiction in family law matters and litigants will continue to have resort to family, county and superior courts. The judges for a separate Family Court could come from the present Family Court or elsewhere.

(6) British Columbia Plan

Judges of the provincial Family Court and judges of the Supreme Court (including County Court judges sitting as local judges) will continue to exercise their respective jurisdictions, but Family Court judges are able to make reports on custody and maintenance which the Supreme Court

may receive as evidence in divorce matters. The administrative and social services are unified and available to both Family Court and Supreme Court judges, and the two courts sit in the same court houses. A pilot project has been in existence for more than two years.

IV
SPECIFIC PROBLEMS

We now turn to a number of questions which should be borne in mind in deciding what alternative proposal or proposals would be workable.

(1) Specialized Judiciary

One question which should be considered is whether the judges sitting in a unified family court should be partly or wholly specialized. The Committee proposal involves specialization, and any proposal involving a lower tier will also include specialization unless its members can transfer into other courts.

The issues surrounding a specialized judiciary are easily divided into advantages and disadvantages and include:

A. Advantages

1. Continuity in particular cases.

2. Special interest, training and experience in dealing with family law matters.

3. Opportunity to assess the strengths and limitations of the social services.

4. Opportunity to develop methods of using the supporting services effectively.

B. Disadvantages

1. Cases in family law are based on similar facts and there is a possibility of pre-judging individual cases.

2. Possibility of becoming too closely involved with social services resulting in a loss of objectivity.

3. Difficulty of securing judges prepared to devote their lives to a specialized field.

4. No discernible trend to a specialized judiciary in other areas of the law, though most of the Provincial Courts engage in criminal law exclusively, or family law exclusively.

5. Family law should not be developed separately from the rest of the civil law in the province.

(2) Fragmented Jurisdiction

A major concern of the Committee has been the problems of fragmented jurisdiction described at pages 3-5 of the attached report. In a one-tiered court, stays of proceedings cannot be imposed by threat of proceedings in a higher court or a higher tier, proceedings need not be moved to another court or another tier in order to get a complete remedy, and a maintenance order could be amended without going back to another tier or another court which originally

made the order. Plans for a court with two or more tiers should include solutions for these problems.

Consideration should also be given to the ability of the proposed court to attract judicial officers to a lower tier which will have the same specialized jurisdiction as the present Family Court without the separate identity and organization of that court.

(3) Procedure

The Committee's opinion is that a judge of Family Court should act judicially upon evidence placed before him in open court with legal rights being ascertained and enforced. Having said this the Committee recognizes that many family law problems are better dealt with by a summary procedure and this should continue to be the practice. However, some matters coming before the family court will require more elaborate procedure, e.g., some contested divorce and nullity matters and some property matters. There must therefore be provision for more elaborate procedures where they are required. The Rules of the Family Court must necessarily provide both for Summary procedures and for the more elaborate procedures and must provide a means of determining when in fact the latter may be invoked.

(4) The Mainstream

A concern of the Committee has been that Family Law not develop outside of the mainstream of law within the province. The question raised is why should the province's Supreme Court be excluded from jurisdiction in family law? For example, the Murdoch case involved questions of trusts, contracts, partnership, matrimonial property and family

strife. Should these litigants have been denied resort to the Supreme Court?

On the other hand, to put all family law matters in the Supreme Court would produce too great a workload on the existing court. There would necessarily have to be an immediate appointment of 15 additional judges. An alternative would be for the province to appoint referees or masters to assume certain jurisdictions.

Further, many family law matters are not within the traditional work of the Supreme Court. A recruiting problem could well arise if the caseload of the Court was heavily weighted to family law.

Desiring a unified family court the Committee attempted to deal with this issue by means of the appeal and transfer provisions. Accordingly the Committee recommended that an action, or some one or more of the issues therein, may by leave of a judge of the Supreme Court, be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason an action or issue may be more conveniently tried in the Supreme Court. The Committee thought that the availability of an appeal to the Appellate Division, either directly, or, with leave, from the Family Court Bench en banc, will build in the important questions of law and policy being appealed to the Appellate Division, thus assuring adherence to general legal principles.

With regard to appeals the Committee proposed giving litigants two alternatives:

(i) an appeal to a panel of three family court judges. This appeal route has two advantages,

1) it is more expeditious for most family law problems--being quick and less costly,

2) supervision by the Family Court Bench en banc will tend to ensure uniformity of approach by family court judges.

(ii) an appeal directly to the Appellate Division or, with leave of the Appellate Division from the appeal to the Family Court Bench en banc. It is expected that important questions of law and policy will be appealed to the Appellate Division, thus assuring adherence to general legal principles.

(5) Judicial Services to Smaller Centres and Rural Areas

At present, family and juvenile matters receive judicial service from:

a) the Family and Juvenile Courts which have 8 originating courts and 28 circuit locations, and

b) the Provincial, District and Supreme Courts of the province. Judges of these courts are also available on circuit to deal with many family law matters while they are performing their general judicial duties throughout the province.

The maintenance of service throughout the province is a problem. Ideally there should be judicial services available to deal with legal problems as they arise; this is particularly true in matters of family law. So that services outside the main urban centres will not suffer, the Committee made its recommendations that Supreme Court Judges, including Local Judges, be empowered to sit in the Family

Court and that Provincial Judges be empowered to sit as judges of the Juvenile Court.

(6) Constitutional Problems

Any proposal for a unified family court raises constitutional problems, which must be taken into consideration in deciding what proposals are practicable.

The establishment of a unified family court can be accomplished only with the co-operation of Parliament, the Legislature, the Federal Executive and the Provincial Executive. That follows from the constitutional division of legislative power and from section 96 of the B.N.A. Act. If anything is to be done it is necessary to start with the assumption that the approval of both governments can be obtained. Statements made by the Minister of Justice, and the Attorney General indicate that they appreciate the importance of establishing such a court, though not necessarily that they agree on its place in the judicial system.

There remains a question as to whether a practicable arrangement can be made even if both governments agree on the same plan.

The British North America Act contains the following provisions:

> S. 96: that the Governor General is to appoint the judge of the superior, county and district courts in each province.
>
> S. 96: that the judges are to be selected from the Bars of the various provinces. (Note: that

the Judges Act provides that no one is eligible for appointment unless he is a barrister or advocate of at least 10 years' standing).

S.99: that judges of the Superior Courts are to hold office during good behaviour and are to be removable by the Governor General on address of the Senate and House of Commons.

S. 100: that salaries of the judges of the Superior, district and county courts are to be fixed and provided by the Parliament of Canada.

(i) Can the unified family court be provincially appointed?

The Institute asked Professor P.N. McDonald of the Faculty of Law, University of Alberta to consider the Committee's proposal which is described as (1) above and in the attached report. His opinion is as follows:

1. S. 96 inhibits only the provincial legislatures and not the Federal Parliament, from conferring the powers of a superior, district, or county court judge on a judge not appointed under the section.

2. It follows from the above that divorce and other matters within federal jurisdiction may be assigned by Parliament to provincially appointed judges.

3. Property rights during the subsistence of marriage and on termination, fall within the

jurisdiction of the provinces under S. 92(13). The moot point is whether parliament enjoys an ancillary power to deal with the disposition of matrimonial property as a matter of relief corollary to divorce, judicial separation and nullity.

4. An important remedy in family law matters is the injunction. However, the variety of grounds upon which the injunction is granted in matrimonial causes makes it difficult to pin down its constitutional place, federal or provincial.

5. Assuming that property matters and injunctions, in at least some aspects, are within provincial jurisdiction, there is a question as to whether or not the province can give jurisdiction over them to provincially appointed judges. In order to answer that question it is necessary to ask a further one: to what extent does the adjudicative power in relation thereto broadly conform to the type of jurisdiction exercised by the superior, district and county courts? We might safely conclude that property matters and injunctions are traditionally associated with superior courts.

6. There is no answer in the decided cases as to whether the Governor General may grant limited appointments to provincially appointed judges which would enable them to undertake matters which would otherwise have to be dealt with by a section 96 judge.

7. The Supreme Court of Canada decision in A.G. for British Columbia v. McKenzie (1965), S.C.R. 490 makes it clear that a judge may be given some section 96 functions without having all the powers of a section 96 court. However, it established the corollary that an adjudicator need not be appointed as a section 96 judge in order to exercise section 96 functions; he need only be federally appointed.

8. The Ontario Supreme Court in Wilson v. McGuire (1883), 2 O.R. 118 has sanctioned a mixture of functions in one person i.e., a person appointed federally to the county court and provincially to the Divisional Court.

9. Professor McDonald concludes:

"The Governor General may grant limited appointments to provincially appointed judges to enable them to undertake section 96 matters, but (1) the appointments must be to separate court, and (2) the Governor General must be free on the face of the legislation to appoint to that court persons other than the provincially appointed judges."

He continues:

"It is my opinion, unequivocally, that the limited appointments would necessarily carry with them the requirement that the appointees be selected from the Bar of the province (section 97), that the judges be removable only on address of both houses (section 99), and that Parliament provide for salary (section 100)."

(ii) Can a two-tiered court be created?

In an earlier opinion for the Institute Professor W.R. Lederman posed the question "May a province establish a single family court that includes judges appointed by the Governor General in Council and also judges appointed by the Lieutenant Governor in Council, as long as the functions of the latter judges are confined to those functions which a province may validly confer on provincially appointed judges?" His answer was: "My opinion is that there may be a single family court, but that this would have to be a court composed of two sections or divisions, for the two different types of judges."

(iii) Can the B.N.A. Act be amended by Parliament?

Under the 1949 amendment to the British North America Act, Parliament has power to amend the Constitution of Canada subject to a number of exceptions of which the relevant one is "as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the government of a province." Professor McDonald's view was as follows:

> "There is sufficient doubt as to the power of Parliament to amend S. 96 to 100 of the B.N.A. Act to make it inadvisable to rely on amendment as a device for effecting a plan for a unified family court."

(iv) Will the Federal and Provincial Governments come to agreement?

We have said that, because of the constitutional division of powers and S. 96, the establishment of a unified family court requires federal-provincial co-operation.

One factor in deciding upon the proposal to be made is the likelihood or otherwise that the two governments can agree on it.

What degree of co-operation can be expected between Alberta and Ottawa? Will Ottawa be prepared to assume responsibility for appointing and paying the judges necessary to adjudicate in a unified family court? Will Alberta be willing to reliqnuish all or some of its appointing powers in family law matters to the federal government? Will Ottawa be prepared to amend the Judges Act to provide for appointees with less than 10 years standing? As we have said, a Unified Family Court cannot be established unless Ottawa and Alberta agree on the same plan.

V
CONCLUSION

Your views on the subject are solicited. They will be most helpful if you have considered the enclosed material carefully and if you indicate your reasons for them.

The areas to which you might address yourselves are as follows:

(1) Should the law be changed so that one court will have jurisdiction in all family law matters.

(2) If so, which of the alternative proposals do you agree with, and if none of them, how should the court be established?

Further information can be obtained by telephone (432-5291, Edmonton) or letter.

The views communicated to the Institute will receive the careful consideration of the Committee and of the Institute's Board of Directors, at whose request they are solicited.

January 24, 1977

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APPENDIX

COMMITTEE ON ADMINISTRATION OF FAMILY LAW

MEMORANDUM OF RECOMMENDATIONS

July 27, 1976.

I. INTRODUCTION

(1) Formation of Committee

The Committee assembled at the request of the Institute of Law Research and Reform. Its purpose is to examine the structure of courts administering family law and to make proposals for providing the most effective administration of justice in the family law field. Members were nominated by the Attorney General, the Chief Justices and Chief Judges of the Courts, the Law Society of Alberta, and the Institute.

(2) Members of Committee

The Honourable W.A. McGillivray	-	Chief Justice of Alberta
Mr. Justice J.H. Laycraft	-	Trial Division Supreme Court of Alberta
Judge John Bracco	-	District Court of Alberta
Judge Douglas Fitch	-	Family Court of Alberta
Margaret Donnelly (with Joanne Veit as alternate)	-	Department of Attorney General
V. W. Smith	-	Law Society of Alberta
Walter Coombs	-	Chairman of Institute's Committee on Social Services
S. S. Purvis, Q.C.	-	Nominated by Institute
W. R. Pepler	-	Institute of Law Research and Reform
W. H. Hurlburt, Q.C. (Chairman)	-	Institute of Law Research and Reform

James L. Lewis, Counsel for the Board of Review into Provincial Courts, sat with the Committee as liaison with the Board. He made valuable contributions to the discussions but bears no responsibility for the Committee's recommendations.

(3) Proceedings of Committee

The Committee met on March 26th and April 9th in the afternoon,on April 23rd, May 21st and June 11th, morning and afternoon, and on July 12th in the morning. As it proceeded minutes of its meetings were circulated to members of the Appellate Division, the Trial Division, the District Court and the Family Court and the developing proposals were the subject of valuable comment by members of those courts. In addition, Mr. Smith received or invited comment on the Committee's proposals from members of the bar in Calgary, Edmonton, Red Deer and Vegreville who are specially interested in the field.

2. PRINCIPAL RECOMMENDATIONS OF THE COMMITTEE

The Committee recommends:

(1) That one court, known as the Family Court of Alberta, have original exclusive jurisdiction in family law matters.

(2) That the court be based upon the existing Family Court and consist of provincially appointed judges.

3. LIMITATIONS OF PRESENT COURT STRUCTURES

Family law deals with the problems of husbands and wives arising from the breakdown of marriages. It deals with problems of the protection and support of children arising from the breakdown or lack of family relationships, and the problems arising from unlawful conduct of children and juveniles. These are among the most numerous and the most serious and important problems with which society must deal, and it is imperative that society provide strong courts and efficient social services in order to deal with them.

The Committee is concerned that the numerous and varied problems affecting families are not being satisfactorily dealt with under the present divided court structure. The fragmented jurisdiction makes improvement very difficult. The Committee is convinced that the time has come when important changes and solutions can be implemented only if a Family Court is created with original exclusive jurisdiction over the entire field of matters affecting the family.

Some of the most important problems arising from the division of jurisdiction among courts are as follows:

(1) Piecemeal solutions - Because jurisdiction is divided it very often happens that no one court can deal with the whole of the legal problems arising from the breakdown of a marriage or of a family, and piecemeal solutions must be applied.

(2) Delay - Litigants are enabled to delay proceedings in one court by starting, or threatening to start, proceedings in another.

(3) Harassment - Litigants are enabled to harass other litigants by the multiplicity of proceedings which are available in different courts.

(4) Inappropriate procedures - Different procedures are available in different courts, and the most appropriate procedure is often not available for a particular problem.

Particular examples of these problems are as follows:

(1) A maintenance dispute may start in Family Court as a protection order, move to Supreme Court as part of a divorce, come back to Family Court when the Supreme Court order is registered for enforcement, and go back to Supreme Court for variation of the order, with resulting delay, cost, and frustration for the litigant.

(2) A temporary wardship proceeding is usually brought in Family Court, but if the facts suggest that the wardship should be made permanent, another proceeding must be commenced in a different court.

(3) There may be concurrent or consecutive proceedings for custody in the Supreme Court and wardship in the Family Court or in the District Court. The Supreme Court judge has no way of ordering wardship if he perceives that that is what should be done, and his order for custody can be rendered nugatory by an order in the wardship proceedings.

(4) Wardship and maintenance proceedings involving the children of married or unmarried parents must be brought separately in different courts.

Another important problem is that the social services cannot readily be related to a multiplicity of courts, with the result that they are not used as effectively as they might be. They are not as effectively available to litigants, bench and bar in the Supreme Court as they are in the present Family Court, and there is insufficient opportunity for judges and social service personnel to

develop a proper understanding of each other's functions and needs. An example is the use of investigative services in custody matters on divorce.

The Committee is satisfied that the problems are so serious, and that the resulting difficulties to the people who appear before the courts are so great, that solutions must be sought. Its proposal, the creation of a single court to deal with family law matters, will of course create new problems; but these will in the Committee's opinion be lesser problems and can be surmounted. The Committee believes that its proposal will solve some of the most serious of the existing problems and provide the best judicial structure for the solution of the others.

4. DETAILED PROPOSALS

(1) One Court at Provincial Level

(i) Structure of Court

The proposed court should be created by statute in place of the present Family Court, and should be called "The Family Court of Alberta". It should continue to be, as the present Family Court now is, a separate court with its own identity.

The Committee has considered the alternative proposal that the unified Family Court be created as part of the Supreme Court or as a separate superior court, but its view is that it is better to create the court at the Provincial Court level and to base it upon the existing Family Court. The Committee's reasons are as follows:

(1) The great bulk of family law work can best be done by a court which is at home with simplified and summary procedures, and such a court can best be created from the present Family Court and maintained at the Provincial Court level; superior courts tend to follow more complex procedures which are less appropriate to most family law matters than to the other litigation in those courts.

(2) The court should also be at home with the use and effective application of the social services, and the Committee thinks that a court based upon the present Family Court is in the best position to become expert in their use.

(3) The Committee's proposal will create a unified Family Court while doing the least possible violence to existing institutions in order to achieve that end; the creation of a superior court and the working out of its relations with the rest of the judicial system would give rise to far greater practical difficulties than will the adaptation of an existing institution.

The Committee's view is that a judge of the Family Court should act judicially upon evidence properly before him. The social services available through the proposed Family Court should

be directed towards reconciling spouses if that is practicable, or of conciliating specific issues such as custody and maintenance, and to the extent that success is achieved matters will be kept out of the judicial process. Once, however, the parties have called for a judicial determination, there should be a proper adjudication on evidence taken only in open court and legal rights should be ascertained and enforced.

(ii) Constitutional Problem

The Committee's proposal requires the co-operation of the Legislature and Executive of the Province and of the Parliament of Canada and the Federal Executive. Only Parliament can confer jurisdiction in divorce. Only judges appointed by the Governor General can adjudicate upon some of the important matters to be dealt with in Family Court such as divorce, nullity, judicial separation and matters relating to property, and it is doubtful that provincially appointed judges can be empowered to grant injunctions or restraining orders. Only the Legislature of the province can establish the proposed Family Court. The Committee would prefer to see the federal part of the problem solved by two pieces of legislation. One would be an amendment to the Divorce Act which would assign jurisdiction in divorce to the proposed Family Court. The other would be an amendment to the Judges Act which would allow the Governor General to confer upon judges of the Family Court jurisdiction to deal with family law matters which are now reserved for superior court judges. The Committee recognizes, however, that that proposal involves further difficulties in that section 100 of the British North America Act requires that Parliament provide for the payment of judges and that section 99 deals with the security of tenure of judges and may not be appropriate here. The Committee is satisfied that the

problem can be solved by federal-provincial co-operation and they think that both governments should be urged to recognize that the public interest urgently requires that co-operation.

(2) Jurisdiction of the Court

(i) Problem of Definition

The Committee recognizes that the creation of a specialized court will inevitably give rise to questions about the boundaries of its jurisdiction. The Committee believes that those questions will be minimized by its proposal that the court be given jurisdiction over broadly defined areas of law.

(ii) What is Included

The proposed Family Court should have original exclusive jurisdiction over the following:

1. Divorce, nullity, judicial separation and restitution of conjugal rights.

2. Alimony and maintenance between spouses.

3. Guardianship of the person, maintenance and custody of children.

4. Affiliation proceedings.

5. Neglected children, including temporary and permanent wardships.

6. Adoptions.

7. Variation and enforcement of orders, including the power in the judges of the court to issue garnishment orders which would have effect on a continuing basis.

8. Criminal matters within the family, so long as the family element exceeds the criminal element. Clearly murder belongs in the criminal courts and common assault between husband and wife belong in the proposed Family Court, but the Committee is not sure just where the line should be drawn and thinks that the Board of Review into the Provincial Courts has a better knowledge from which to draw it.

9. Juvenile matters.

10. Injunctions and restraining orders in family matters.

11. Questions of property between husband and wife.

The judges of the proposed Family Court should also have jurisdiction in juvenile matters. The Committee is of the view, however, that, there should continue to be a separate Juvenile Court of which the Family Court judges should be members. The main purpose of that recommendation is to enable Provincial Judges to continue to exercise the jurisdiction of juvenile court judges, particularly in areas outside the metropolitan centres, so that where Family Court judges are not available there will be no reduction of service.

In connection with their family law jurisdiction, the judges of the proposed Family Court should have power to grant injunctions. These would include orders restraining one spouse from molesting another, orders leaving one spouse in the exclusive possession of the matrimonial home, and such other injunctions as might be required in the circumstances of the particular case.

(iii) Transfer to the Supreme Court

As it has said, the Committee believes that the proposed Family Court should have exclusive jurisdiction in matters of family law. However, there will be some matters which can be better dealt with by the Supreme Court. The Committee therefore proposes that an action, or some one or more of the issues therein, may by leave of a judge of the Supreme Court be transferred to the Supreme Court when by reason of the nature of the relief claimed or for other special reason such action or issues may be more conveniently tried in the Supreme Court. Because future needs are not foreseeable the Committee would not impose detailed restrictions upon the transfer power, but it has in mind such things as complex property or company matters. The Supreme Court should also have power to transfer the action or one or more of the issues back to the Family Court.

Property matters are peculiarly associated with Supreme and District Courts. The Committee is of the view, however, that it would be very unfortunate if the Family Court were to have jurisdiction over a divorce but not over the related property matters. It thinks that where the question relates to property which arises from the husband-wife relationship the matter is primarily one of family law; and that if the question is more closely related to property law it can be transferred to the Supreme Court.

A question then arises as to which court should have power to vary and enforce maintenance and custody orders made by the Supreme Court in matters transferred to it. In most cases it will be convenient for the Family Court to do so, but there may be exceptional cases. The Committee is of the view that the best provision is that once a judge of the Supreme Court has made an order for custody or maintenance the order should go back to the Family Court unless the Supreme Court judge otherwise orders, with power in the Family Court to enforce and vary it.

(iv) Service Outside Metropolitan Areas

So far as possible the services of the proposed Family Court should be available throughout the province. The Committee, however, recognizes that there are special problems in providing those services outside the larger population centres.

Judges of the Supreme and District Courts are available on circuit to deal with many family law matters while they are performing their general judicial duties throughout the province. The Committee is of the view that they should have power ex officio to sit in the Family Court. The purpose of that proposal is to allow them to deal with matters coming before them on circuit in order that the level of service available to people living outside the larger population centres will not decline.

The Committee has already recommended that the Juvenile Court remain in being. Provincial Judges of the Provincial Court should have the right ex officio to sit in Juvenile Court in order to maintain at least the existing level of service in that field throughout the province.

(3) Judiciary

(i) Specialized Judges

The next question is whether or not the judges of the proposed Family Court should be specialized. The Committee's view is that specialization will inevitably flow from the creation of a unified family court, though the specialization of an individual judge may be for a fixed period.

The Committee is of the view that specialization will bring with it the advantage of continuity in particular cases, which is difficult to achieve if the judges are assigned to different sittings each week; and the advantage of experience in dealing with family law matters, which have aspects different from the administration of justice in general. Specialized judges have a much better opportunity to assess the benefits and limitations of the social services and to develop methods of using those services to the best advantage. While the Committee would not recommend the establishment of a unified family court for the sake of specialization, it is of the view that advantages of specialization in this unique field will outweigh the disadvantages.

Some concerns about specialization have been expressed to the Committee. One is that the great bulk of the cases in family law are based on similar facts and that after a long period of time a judge hearing them is likely to become jaded or alternatively is likely to become too closely involved with the social services and to lose objectivity. There are already in existence, however, specialized criminal and family law courts, and the proposed

Family Court will have a broader specialty than the latter now has. Further, the Committee thinks that it will be possible to arrange to transfer a judge out of the proposed Family Court to other provincial courts either when the judge feels the need of change or on a systematic basis. The Committee does not expect the judge to become too much involved with the social services if, as the Committee suggests, the social services are separately administered and the judicial role of the judges is stressed.

Another concern which has been expressed to the Committee is that the supply of first class judges willing to devote their lives to such a specialized field may not be great enough to meet the extra demands which will be placed upon it. The Committee notes, however, that the supply of good judges for the provincial courts specializing in criminal matters and in family matters appears to be increasing, and that the specialized family law bar also appears to be increasing. It thinks that the problem can be met, and that it can be minimized by arrangements for transfer out of the proposed Family Court when transfer is desirable.

The Committee does not see any practicable alternative to a specialized court. If the proposed Family Court were to be part of or associated with the Trial Division of the Supreme Court, it would be possible to have judges of the Trial Division sit on an assignment basis in the Family Court. That arrangement would in the Committee's view require junior judicial officers to do the maintenance, custody and enforcement work now done by the present Family Court and would require those junior judicial officers to be more narrowly specialized than the judges of the Family Court which the Committee proposes and their positions would be less attractive to highly qualified persons. While those

junior judicial officers might be enabled to move back and forth from the Provincial Court, a two-tiered court in which the judges in each court are members of another court would not in the Committee's view be practicable, and would not achieve the desired objectives.

(ii) Workload of the Courts

The Committee's proposal would transfer divorce, nullity, judicial separation, adoption, permanent wardship and some other matters to the Family Court and would give that Court the power to vary all maintenance and custody orders. The transfer would result in the proposed Family Court having substantially more work than the present Family Court, and would require the appointment of additional judges.

The workload of the Trial Division and of the District Court would be reduced accordingly, but that would probably be compensated for by the growth of other work in those courts.

(iii) Recruiting of Judges

It is obvious that the effective operation of the proposed Family Court will depend upon the appointment of judges in whom the legal profession and the public will have confidence. That involves finding judges of high abilities and conscientious devotion to the family law field. The Committee does not think that it can go further than to make this statement of the obvious; the appointment of judges of the Provincial Courts is the function of the Attorney General and it is for him and the Government to ensure that appointments are properly made in the light of their great public importance.

(iv) Chief Judge

The proposed Family Court should have a separate identity. It will have complex problems which will be very different from those of any other court. For these reasons, and because of the importance of the court, the Committee thinks that there should be a Chief Judge of the Family Court whose function relates to that court alone. The Chief Judge should, of course, possess the confidence of the public and of the legal profession.

(v) Present Judges of the Family Court

Some judges of the existing Family Court are not lawyers, and others do not have the qualifications required by the Judges Act. The Committee's view is that such judges should, to the extent possible, continue to exercise their present powers and perform their present duties, either as judges of the Family Court or as judges of the Juvenile Court.

(4) Procedures

Matters in the Family Court are customarily disposed of under a summary procedure, and so are matters dealt with by Family Court judges sitting as Juvenile Court judges. A summary procedure is suitable to most family law matters and should continue to be the rule. However, some of the matters under the jurisdiction of the proposed Family Court will require more elaborate procedures, e.g., some contested divorce and nullity matters and some property matters. The Committee's view is that provision should be made for more elaborate procedures where they are required, such as examinations for discovery and production of documents. In

order to ensure that these procedures are not used to impede litigants in matters which should be dealt with in a summary way, the Committee recommends that they be available only by leave of a judge of the proposed Family Court.

A concern that has been expressed is that providing for the more elaborate procedures in the proposed Family Court must necessarily cause either the present expeditious machinery or the more elaborate procedures to suffer. The Committee does not think that that result will follow. The great bulk of cases should be dealt with through a simple procedure. The judges of the court administering the more elaborate procedures will be qualified lawyers and should be able to manage them properly in the comparatively small number of cases in which they will be appropriate.

In view of the additional responsibilities which would be given to the proposed Family Court, the Committee attaches great importance to the preparation of Rules of Court. The Rules should not complicate those matters which should be dealt with by a summary procedure, but they should make provision for interlocutory proceedings by leave of the court and they should provide for such things as service ex juris and garnishment. Some of the Rules may be patterned after the Alberta Rules of Court, and some of the latter Rules may be incorporated by reference. The Rules should be prepared when the Committee's proposal has been accepted in principle and decisions have been made as to the precise structure of the court.

(5) Appeals

The Committee recommends that an appellant have a choice between an appeal to the Appellate Division and an appeal to a panel of three judges drawn from the Family Court. A

litigant who wishes to appeal from the panel of three judges should have the further right to appeal to the Appellate Division, but only by leave of a judge of the latter court. The Committee expects that if an important question of law or policy is involved the appellant will go to the Appellate Division in the first place, but that in most cases a matter of amount or a complaint about the assessment of evidence will be involved and the appellant will be likely to choose the appeal to the Family Court panel. Supervision by the Appellate Division will tend to ensure adherence to general legal principles, and supervision by the Family Court bench en banc will tend to ensure uniformity of approach by Family Court Judges.

The Committee makes its recommendation for alternative forms of appeal because it is of the view that an appeal to the Appellate Division will often be impractical. The great bulk of family law matters involve questions of fact, urgent matters such as custody, or matters which, however great their importance in human terms, involve small sums of money which do not appear to justify the cost of such an appeal. It is for that reason that the Committee would not confine a litigant to a right of appeal to the Appellate Division. The Committee also considered an appeal to a judge of the Trial Division either de novo or on the record but does not like trials de novo and does not want to suggest an appeal from one single judge to another single judge.

(6) Social Services

The Committee is of the view that a number of social services should be available through the Family Court to the judges and to the litigants. These should include intake

and information services, legal representation, conciliation services, investigative services in relation to custody matters, and follow-through services including collection services and conciliation of access disputes. The Committee does not express any view as to the extent or organization of these services since those subjects are being considered by the Social Services Committee convened by the Institute. The Committee, however, wishes to comment on two matters.

The first is the relationship between the judge and the social services. The Committee has already said that the function of the judge is the judicial function of adjudicating upon evidence properly before him. There should be no blurring of the roles of adjudication on the one hand and conciliation and investigation on the other. Social workers will give evidence before the judge and when custody or a juvenile matter is involved the judge may ask the social services to investigate, but the services themselves should be separate and apart from the judge. The availability of social services should be a principal characteristic of the proposed Family Court, but when the stage of adjudication is reached the court should be a court of law.

The Committee's second comment is that the social services should be available to litigants but that there should be no compulsion or coercion upon litigants to use them.

5. INTERIM STEPS

There will be some lapse of time before the proposed Family Court can be created and clothed with the exclusive jurisdiction recommended by the Committee. Some interim steps can be taken by the Legislature at any time, and the Committee recommends that they be taken as soon as possible.

One of the major problems experienced by the existing Family Court is that it is responsible for enforcing maintenance orders made by the Supreme Court but has no power to vary them to meet the different circumstances which they often perceive when an order comes before them for enforcement. The Committee recommends that two steps be taken as soon as possible to reduce the number of such cases. The first is to empower the judges of the present Family Court to make maintenance orders in favour of spouses, ex-spouses and children both before and after divorce, and the Committee recommends that legislation be passed to that effect. The second is to provide that maintenance orders made by the Family Court will survive a decree of divorce, nullity or judicial separation unless the Supreme Court judge grants an order in different terms, in which event the Family Court order would be deemed to be amended accordingly.

The Committee indeed would like to recommend that upon registration in the Family Court for enforcement a Supreme Court maintenance order become an order of the Family Court so that the Family Court could vary it. It appears to the Committee, however, that it is doubtful that the province has the power to make such a provision, particularly in cases of divorce, and that such a provision will have to wait the general solution to the constitutional problem.

The Committee also recommends another interim step. Jurisdiction to grant permanent wardship should be transferred from District Court to the present Family Court. The present division of jurisdiction under which permanent wardships are within the jurisdiction of the District Court and temporary wardships are within the jurisdiction of the Family Court creates an awkward situation as the remedies are very closely

associated and it should be possible to obtain either in one court without the need for a new proceeding in another court.