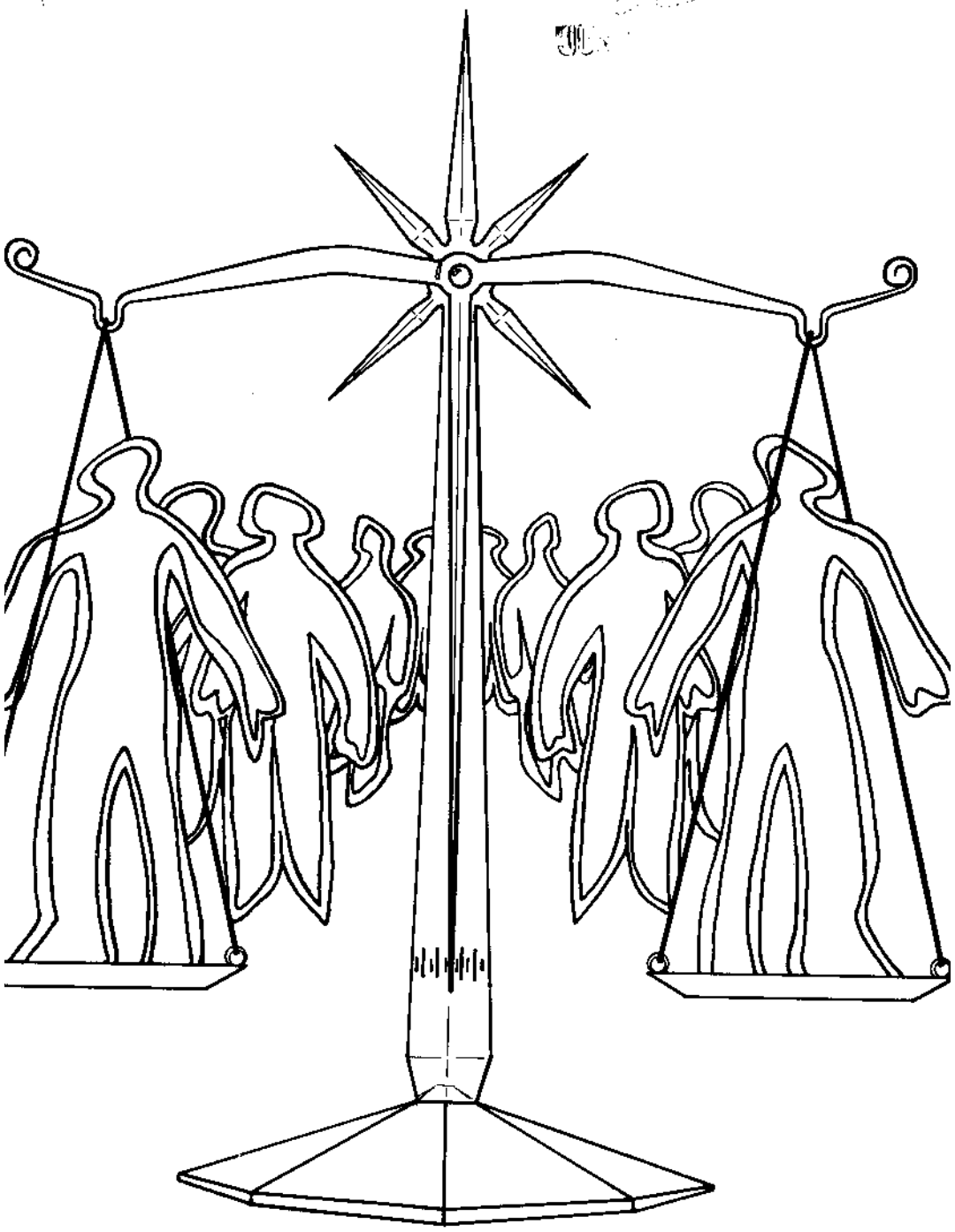
Law Reform Commission of Canada

Commission de réforme du droit du Canada

REPORT

FAMILY LAW



Laws and institutions. . . like clocks, must be occasionally cleaned and wound up, and set to true time

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Available by mail free of charge from

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada K1A 0L6

Catalogue No. J31-20/1976
ISBN 0-662-00740-9

Reprinted 1978

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March 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission in the area of family law.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

REPORT

ON

FAMILY LAW

Commission

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Introduction

Although Canadians have always considered it self-evident that the family has a special and central place in our society, there have in fact been only a few occasions when the legal basis of the family and the legal relationship of its members have received official attention over the past century. Changes we have experienced socially, as well as changes in the composition, structure, expectations and thwarted hopes of families and their members have at best led to palliative accommodations by the law to social pressures, such as making divorce generally available, but hardly to a re-examination of the image of the family the law reflects. This image may by now be so far removed from reality that the law and its institutions may weaken rather than strengthen family life, especially in crisis situations.

Families are not primarily legal institutions. In fact, in the ordinary course of family life nothing is more remote than the use of the law for dealing with personal, economic or other needs. Not so in crisis situations, when the network of relations and understandings breaks down and personal and community resources are no longer able to relieve pressures. It is at these points that the law is seriously considered as an instrument for ordering family relationships and it is also at these points that the law and its institutions show their strengths and weaknesses.

That there are weaknesses was brought forcefully to our attention when, for the purpose of developing our first research program, we inquired into areas of public dissatisfaction. Although the Com-

mission was largely oriented towards criminal law, there was a strong response stressing family law problems. Even though the divorce law had recently been revised and consolidated in the 1968 *Divorce Act*, a great deal of concern was expressed about the divorce process and its aftermath in terms of maintenance, property settlements and the way it dealt with children. Dissatisfaction was expressed not only by those who were or had been involved in the process, but also by agencies and professions working with families in trouble—including the legal profession.

In beginning our work it became obvious rather quickly that there were serious jurisdictional problems. The constitutional division of powers fragmented not just legislative provisions but the entire legal process for dealing with family instability. We were fortunate that various provincial law reform bodies had already started work in this area and a fruitful exchange became possible with most of them.

There is now a large measure of agreement that family problems cannot be neatly divided into federal and provincial concerns. Our first Working Paper on the unified Family Court, following our approach of defining problems in a functional rather than in a classical legal sense, clearly transcended jurisdictional boundaries. It was gratifying to see that although a number of jurisdictional problems remain to be worked out, no one has made exclusive claim to jurisdiction. A new concept in courts—courts with jurisdiction over all significant family matters and oriented towards a resolution of family problems through arbitration and conciliation rather than a pure adversary process—was clearly needed. Although the precise place of such a court in a judicial system may vary from province to province, its purpose, nature and function is no longer in question.

With respect to jurisdiction, it is reasonable that a federal law reform organization should concentrate on the federal law of divorce. But it is one thing to put divorce into a tidy constitutional category of federal law, and something else again to keep it there. A law *is* what it *does*. Most of what the divorce law does, in concrete reality, is anchored in issues of child welfare, property and support which, in almost all contexts other than divorce, are provincial concerns. It would be rather sterile to limit the reform approach to a consideration of grounds for divorce as if they could

somehow be isolated from their consequences. We have instead taken another approach, proposing that the process for dissolution of marriage should be structured on the basis of social and economic consequences. The more important the issue—such as cases where young children are involved—the more time and resources should be brought to bear to keep families together, or where this is not possible, to diminish the harm that is invariably involved. Legal concentration on grounds for divorce, such as fault, clearly reinforces the adversary and accusatory elements of a crisis situation. Anybody who lives in a family or any other close relationship knows that this is no basis for arriving at a mutual understanding. Yet such understanding is essential to any constructive solution, and ought to be a primary goal of legal policy. Even separation as a condition of divorce stresses division.

There is a legitimate concern about fast and easy divorce, often expressed as "divorce on demand". It is easily overlooked however, that what we have now is divorce on demand when, in one way or another, the legal grounds, which may have little or nothing to do with the actual problems facing the spouses, are fulfilled. Most divorces are uncontested but many are based on a bargaining process, often harmful and expensive, that not only shatters the family but also its individual members. The fact that divorce is a painful process does not foster family stability in Canada. It only fosters pain.

The present legal framework for dealing with questions of property and the maintenance of a needy spouse simply does not accord with social reality today. Traditionally, for example, the law has not considered the work of the homemaker as a contribution to, or as having anything to do with the acquisition of property in marriage; equally it did not foresee that women could be independent and responsible for their own lives. Whether the changes in the position of men and women in society and their relation to each other are good or bad is a matter for partisan discussions. That the situation is different there can be no doubt, and this difference must find its expression in the law. There is an evolution in this area at this time, if not a revolution. The law therefore cannot be fixed but must have room to evolve creatively, allowing men and women to define their own roles within marriage, supporting rather than confining individual choices.

The position of children is even more difficult. Although protected by a system of obligations, they have never had independent legal claims. They have no standing to make their voices heard in a system that allows one parent to deprive them of the other because of an instance of adultery. We do not suggest that they should have such a right, but neither do we suggest the retention of such a system. What we should have is a process that tries to get to the reality of why one parent would seriously consider doing this in the first place—a process in which children are heard, in which their interests are always important and at times dominant, and one in which children do not serve as bargaining counters or as objects to be kept and used. Many parents involved in a marriage breakdown cannot see beyond their own needs. The process for dissolution of marriage must compensate for this. It is also important for children to understand, as best they can (and this is often a great deal better than we assume), what the situation is and what their parents are facing. A new approach to the problems of children when a marriage breaks down is essential.

The main thrust of this report, therefore, is on the change of perceptions of family relationships and a change of the means for resolution of family problems. First, we need courts that are capable of assisting constructively in such resolutions. Second, we need a legal framework that recognizes present day conditions in dealing with the responsibilities and expectations of members of today's family. Third, we need a new legal process for dealing with the family in crisis that abandons concepts received from the past that have become artificial and destructive in the context of present family life in Canada. This process should also give us a better understanding of what divides families and what is needed to preserve their stability— something that should be, although it is not now, an effective function of law.

Although this report is directed to the Parliament of Canada, there is no question that any change must be made in close cooperation with the provinces, if it is not to lead to further fragmentation. Various provinces have already made advances in this area and others are in the process of preparing for significant changes. The Government of Canada has also made some beginnings but further steps are necessary if the present ferment of study, exploration and experimentation is to be fruitful.

Beyond the issues of family courts and dissolution of marriage, and the change of philosophy that the proposals on these matters imply, marriage, taxation, pension rights and many other areas have to be considered in developing a coherent legal policy for the family. We hope this report is only a beginning of a process of fashioning such a policy for Canada.

1. The Unified Family Court

1.1 This report proposes a new legal approach to the economic, emotional and behavioural problems arising within the family. The changes in substantive law and procedure proposed in succeeding chapters, taken in their entirety, comprise a new philosophy of family law. This philosophy can more effectively reach its social goals if it is given expression and direction in a system of unified Family Courts—new sorts of courts with new procedures and approaches to family problems in which all significant jurisdiction over family law matters is consolidated.

1.2 The social goals to which we refer are those of preserving and strengthening Canadian families where possible and providing humane and constructive solutions in situations where this cannot be done. These goals are difficult to reconcile with the procedures, structure and governing concepts of the ordinary courts, which are oriented towards a "winner-loser" outcome. Such outcomes neither reflect the true nature of many significant problems in family relationships nor represent in many cases the most appropriate results the law should seek.

1.3 At present the legal problems of the family are dealt with in as many as four or five different courts in a single province. Marriage breakdown raises a number of legal issues, each of which is capable of being resolved in one or another of the various traditional courts. No single court exists to deal with these issues, let alone the basic human difficulties that are at their root. The Family

Court we propose is necessary not only to avoid legal fragmentation of family problems among several courts but also to provide a single legal institution specifically designed to deal with the family as an organic whole.

1.4 A unified Family Court would have a purely judicial aspect where final decisions on legal rights and obligations are involved. But such decisions are only necessary where differences are irreconcilable. Married people with serious family difficulties should have—and do not now have—viable alternatives provided by the legal system for avoiding the adversary process. This means access by spouses to a court that is capable of dealing with social problems without requiring their translation into legal issues before anything can be done about them. The unified Family Court is a new concept in courts, offering a broad spectrum of dispute-resolution techniques and having at its disposal a wide range of solutions. These things are not now available to persons whose family problems have been brought into the legal system. The institutional emphasis of the court should be on the services it makes available to help persons find, if at all possible, consensual solutions to family difficulties rather than on its judicial functions.

1.5 The unified Family Court should be a court with the widest possible family law jurisdiction. This jurisdiction should include dissolution of marriage, interspousal property matters, maintenance of dependants during marriage, matters dealing with children and other salient economic and social issues arising in a family context for which legal solutions must ultimately be provided. There is no single answer for the whole country as to whether unified Family Courts should be a branch of an existing superior court or a new and independent court. This must be determined on a province-by-province basis. We propose that a federal commitment be made to the principle of the unified Family Court so that the provinces can take this into account in planning for future changes in court systems. This should be done as soon as possible, since several provinces have already undertaken court restructuring programs.

1.6 Superior court judges must, under the Constitution, be appointed by federal authority. We are, therefore, mindful of the fact that the creation of a superior court for family law matters

may give rise to jurisdictional problems, for the provinces have up to now exercised the power of appointing judges to hear certain family law matters. This will no longer be possible after the creation of a superior court with comprehensive family law jurisdiction. This problem should not, however, be permitted to impede what appears to be the best approach to the creation of the most effective form of family court. Steps should therefore be taken to resolve the problem, which is essentially a political, not a constitutional one. Consequently, the Federal Government should initiate consultations with the provinces on the matter when it makes its commitment to the concept of the unified Family Court.

1.7 The main alternative to a superior court is a "two-tiered" family court with a provincially appointed judge to hear all matters for which a province can appoint a judge, and a federally appointed judge to hear the rest. Apart from the fact that this adds millions of dollars of extra costs for paying two sets of judges where one would do, there is evidence indicating that the two-tiered system is not as satisfactory as a single-judge court. The British Columbia Royal Commission on Family and Children's Law has established a form of two-tiered court and, after analysing the effectiveness of such courts, has recommended the creation of a unified Family Court with one judge who would be federally appointed. We have also conducted a joint study with the Ministry of the Solicitor General of Canada on unified Family Courts and, after careful consideration conclude that they should be presided over by one federally-appointed judge. This is clearly a matter where the public interest in an effective and properly organized family court requires intergovernmental cooperation to obtain the best possible court structure.

1.8 A unified Family Court will require a sufficient number of properly qualified support staff members. This social arm of the court is a matter of provincial responsibility. It is this service function, not the judicial function that will be the primary contribution of the unified Family Court, enabling it to provide viable alternatives to reliance on judicial solutions for family difficulties. The purpose of the support services is to preserve and strengthen the family where possible and where not, to attempt to establish a decent and workable basis for necessary interspousal trans-

actions affecting children or dealing with property and finances on separation or dissolution of marriage.

1.9 The unified Family Court would make counselling and conciliation services available not only to spouses in the process of dissolution of marriage but also, and more importantly, to married people who seek to avoid that result. Its responsibility would include not just separation and dissolution of marriage, but the ability to function as a human and community resource with respect to all family problems. The creation of these courts would not mean the creation of entirely new facilities staffed by new personnel. Many of the services required for unified Family Courts already exist and are functioning in government and community programs and in existing courts with family law jurisdiction. The change-over should be one of consolidation rather than duplication, rationalizing the delivery of services through utilization of the unified Family Court as their focal point. Whether they are located in the court or in the community is more a matter of cost and convenience than anything else. What is necessary is that appropriate support services be made available to the court, and where appropriate, responsible to it.

1.10 This court will require funding to discharge various functions and responsibilities that are not included in present budgeting concepts of the ordinary courts. Although, as we indicated, a substantial proportion of the services for the unified Family Court are now publicly funded and could be brought within the operational scope of the court without additional costs, some will also have to be established. Its success is a matter of national as well as provincial concern, and the assumption of any new costs should not be left to the provinces alone.

1.11 Unified Family Courts can be expected to come into being and assume jurisdiction under the *Divorce Act* (or its replacement) in different provinces at different times. Being family rather than divorce courts means that the structure and requirements of the courts in one province may be unlike those in another, based on the requirements of each province for dealing with its particular family law matters and family programs. Varying support staff models and programs may be employed, allowing some

provinces to develop new approaches to deal with young offenders, or to divert some family-related criminal law matters from the criminal courts to the unified Family Court. The present rules respecting qualification for federal appointment to a superior court may not be applicable in all cases, particularly with respect to the re-appointment of some present Family Court judges who have experience and proven skills in family matters, but who may not meet all federal criteria. Individual amendments of various federal statutes for each province may be called for by the circumstances surrounding the creation and operation of these courts. All of this will require that Parliament adopt a flexible and supportive response to the particular needs and institutional requirements of the unified Family Court in each province.

1.12 A form of unified Family Court has recently been established in Prince Edward Island, and most of the other provinces have planned or have in operation unified Family Court pilot projects. An interdepartmental committee of the Federal Government is actively engaged with many provinces in working out problems of planning and assisting with funding. These efforts should be continued as high priority matters in order that unified Family Courts come into being at the earliest possible date in every province and territory.

Recommendations

The Commission recommends that:

1. A commitment should be given by the Minister of Justice to the principle of the unified Family Court so that the future existence of these courts can be taken into account by the provinces in devising their plans for changes in court systems.

2. Immediate steps should be taken by the provincial Attorneys General and the Minister of Justice to create in every province a superior court, presided over by a federally-appointed judge, with comprehensive jurisdiction over all family law matters. The court should have a social as well as a legal arm, offering a broad range of dispute-resolution techniques for family problems.

3. The Federal Government should initiate consultations with the provinces on the problems involved in the selection and appointment of judges to the unified Family Courts, including the question of re-appointment of provincially-appointed judges now sitting in family matters.

4. The Federal Government should assume responsibility for a reasonable proportion of costs for any new services made necessary by the creation and maintenance of unified Family Courts.

5. Parliament should adopt a flexible and supportive legislative response to the particular needs and institutional requirements of the unified Family Court in each province.

2. Dissolution of Marriage

2.1 The Canadian law of divorce is based on English law, our 1968 *Divorce Act* being largely derived from the English Matrimonial Causes Act of 1857. The 1968 Act created several new grounds for divorce including separation for a period of three to five years. This constitutes a fundamental departure from old concepts. It allows almost anyone who wants to obtain a divorce to do so, thereby conferring on every married person significant powers of individual control on whether he or she is to remain married. Apart from this, however, the 1968 Act retains most of the essential philosophy, together with the social and behavioural assumptions, of its Victorian predecessor.

2.2 The *Divorce Act* provides that a marriage may be ended on the basis of a "matrimonial offence". Adultery and cruelty are the fault grounds commonly used. "Matrimonial fault" is an ecclesiastical concept adopted by the Matrimonial Causes Act, which provided an answer, based on society as it existed in England a century and a quarter ago, to the question "for what reasons and on what terms ought the law to allow a spouse to end a marriage?" This may have been an adequate answer for nineteenth century England, but the status of marriage in Canada today is significantly different.

2.3 By virtue of marriage the law of 1857 granted a husband rights to his wife's property and income. A wife on the other hand had minimal support for life, and, unless revoked by her husband, the privilege of obtaining goods suitable to their station and rank.

In the Victorian lawmakers' view, the economic interests flowing from marriage should be dealt with in much the same way that the law dealt with other significant economic interests: they should only be taken away for specific cause based on fault. The husband's rights were, however, eroded by developments in equity and early feminist activity and were eventually removed by legislation—a process that was completed in Canada about half a century ago.

2.4 The concept that marriage, rather than full socio-economic opportunity, was the appropriate way for society to meet the economic needs of women, has been discredited as a legal policy by the 1968 divorce reforms and by parallel developments in law reform approaches in the provinces. The central legal rationale for adopting the fault grounds for divorce has therefore disappeared, and yet the "fault culture", solidly entrenched in legal doctrine, precedent and practice, continues to dominate the dissolution of marriages. Retaining fault grounds for dissolution of marriage leaves us with almost insurmountable obstacles to the development of an appropriate legal policy for the family.

2.5 A marriage is a profoundly complex and subtle thing—a continuing series of interrelated transactions extending through time and changing circumstances. In its search to attach the blame, the law fixes on a handful of occurrences that are overt, while the events of real significance to the success or failure of a marriage almost invariably remain hidden in the psychological interaction between the spouses. Continued reliance on the idea that someone can or ought to be labelled as being "at fault" for the disintegration of the personal relationship of a husband and wife will accomplish nothing more than ensuring that law and reality continue to shout their contradictions across a vacuum.

2.6 The *Divorce Act* now provides one non-fault ground for ending a marriage. This is generally termed the "marriage breakdown" ground, since it usually involves the failure of the personal relationship between the spouses, although it is also used in a handful of cases involving *de facto* separation by reason of imprisonment or disappearance of a spouse, non-consummation, or gross addiction to narcotics or alcohol. It contains some fault elements. Divorce based on separation only is available after a period of living separate and apart—three years if the divorce is sought by the

"innocent" (*i.e.* deserted) spouse and five years if sought by the "guilty" (deserting) spouse. The *Divorce Act* does not use the method considered reliable for establishing facts in other situations known to law—sworn testimony—to prove that the marriage has broken down. Rather, the requisite assurance of breakdown is provided by requiring estranged spouses to surrender a significant amount of an adult lifetime to a failed personal relationship. About forty per cent of all divorces are now based on this ground.

2.7 The requirement that the spouses separate seriously limits the availability of this ground for wives. Most are dependent and simply do not have the resources or mobility to leave their homes even though they may find the situation intolerable. In most provinces, if a wife leaves her husband (unless she is driven out by his matrimonial offences), she can no longer look to him for maintenance, even though her inability to provide for herself almost invariably results from her assumption of a financially disabling role within the marriage. The concept of an assured right to maintenance on a temporary basis for rehabilitative assistance does not exist under laws designed to regulate conduct rather than to meet needs. The property laws of most provinces similarly ensure that a dependent wife will have nothing with which to furnish a new home for herself or herself and her children—the household goods and other property belong to the wage-earning spouse. Thus the ability to initiate a separation, like the economic structure of marriage, is sexually determined. A wife who does leave faces serious financial obstacles that do not apply to husbands while she waits out five years for a divorce.

2.8 It is reasonable for the law to do what it can to ensure that spouses are certain that the marriage ought to be terminated. In our view, this could more accurately and humanely be accomplished by such innovations as the provision of effective Family Court counselling facilities to fully ventilate marital problems than by requiring husbands and wives to isolate themselves from each other for an extended period of time. Except for a 90-day trial period for reconciliation, the law requires that separated spouses stop all normal social and family contacts or divorce on marriage breakdown grounds will be denied. It is significantly more likely that divorce will ensue when married persons with family problems are separated

than when they remain together. The present marriage breakdown rules tend to guarantee the outcome the law ostensibly seeks to prevent.

2.9 The philosophy and practice of the law in dealing with the family in difficulty is conducive to and reinforces the assumption of an accusatory and adversary stance by each spouse. The traditional way to avoid the grave economic and personal injuries that can be suffered under the divorce law has been to inflict them on the other spouse. The law provides efficient adversarial weapons with which to do this, as well as to use the occasion of divorce to gain revenge or reparations for such things as rejection, accumulated hostility and disappointed expectations. The limitations created by the adversary relationship prevent the state from taking any constructive or positive approach to husbands and wives with serious marital problems. Marriage, as the major institutional foundation of our society, is primarily supported by laws and legal policies that emphasize the triumph and vindication of one spouse rather than the reconciliation of both. This impairs the ability of the legal system to deal with family breakdown as a continuum in which there could be, with timely and appropriate assistance and adjustment, viable intermediate alternatives for family survival and renewal. The legal system should provide a means to preserve families as well as to dissolve marriages.

2.10 The adversary system, however, is inherently inconsistent with the harmonious resolution of family disputes. It should not be made available, as it is now, as an extension of the destructive capacity of spouses who disagree over their personal relationship. The policy of the law and its institutions should be to help spouses in trouble to reach mutual understanding and sympathy for each other's point of view and feelings and, where divorce becomes unavoidable, to promote fair and constructive arrangements respecting finances, property and children. The legal approach to the family in difficulty should be humane and where possible, healing. Instead, it is one of Canada's great self-inflicted wounds.

2.11 We share the concerns sometimes expressed about the possibility of frivolous or hasty divorce, but the law for the many should not be dictated by the failings of the few. Most persons have a deep-seated interest in establishing and maintaining a structured,

permanent family relationship. This will continue to be the fundamental element of family stability regardless of the content of the laws governing dissolution of marriage. Beyond giving scope for the operation of realistic measures designed to support or help re-establish family stability—something the present law does not conceive to be within its province—the law can only ensure that ending a marriage is a solemn and considered step.

2.12 It is not just important but vital to society that spouses with family problems do their best to work them out. The present law, unfortunately, does nothing in this regard beyond the negative coercion provided by a punitive divorce process. It also tends to cause people to avoid admitting to themselves that they have problems and facing them, until it is too late. Given the importance of maintaining the stability of the family, we suggest that there are alternatives that are clearly superior to the present law for realizing this object at a far lower social and individual cost. We also suggest that this interest not be satisfied at the expense of another of equal importance: the public interest in the individual lives of those spouses, parents and children unfortunate enough to be members of a family that disintegrates. Both these interests deserve to be secured and advanced. This cannot be accomplished without substantial changes in the law dealing with dissolution of marriage.

2.13 The essential elements of a viable marital relationship between a husband and a wife are not defined, created, regulated or preserved by law. We refer to such things as trust, cooperation, affection, tolerance, respect, emotional support, psychological stability, sexuality and generosity. The laws governing marriage presuppose their existence and are only appropriate when they are present. Where they have disappeared, substantial harm, not only to individuals but also to the community, can result when family members are required to continue to rely on such laws for the definition of the rights and obligations of each spouse and the relationships between parents and children.

2.14 When a marriage has broken down, there is much that the law ought to do to assist the persons affected by the radical changes in circumstances to adjust to the new situation and to protect those who have relied to their detriment on the expectation that marriage would be permanent. We suggest a shift in legal policy

towards a process that focuses on the social and economic implications of marriage breakdown for the spouses and their children, premised on finding fair and constructive solutions to the problems resulting from the ending of this most important human relationship.

2.15 This process should not, as is the case at present, be simply an extension into the legal realm of disputes between husbands and wives. This should be avoided by a process that offers no legal confirmation of a spouse's contention that he was right and she was wrong, that she is innocent and he is guilty, that one is good and the other is bad. No legal results should be allowed to follow from such claims or accusations—not dissolution, not financial advantage, not a privileged position vis-à-vis the children. By not placing spouses in a position where the vital interests of one can only be defended by attacking the other, the new process would provide things that have never been available under our divorce laws and their associated procedures: an opportunity for married people to examine their alternatives without adversary polarization on the question of dissolution; a process that does not threaten a spouse with disadvantage because of compromise or admission of inappropriate behaviour; and a law that allows the forgiveness and lowering of defences that are essential elements of genuine attempts at reconciliation without foreclosing the option of dissolution if these attempts do not succeed.

2.16 The purposes of the changes we propose are to enable spouses who are experiencing serious marital discord:

(a) to approach the question of whether or not the marriage should be ended in a non-accusatory and non-adversary legal framework;

(b) to have every opportunity to reconcile without prejudice to the right to dissolution if reconciliation does not succeed;

(c) to have recourse to a legal process that emphasizes negotiation and agreement rather than confrontation and adjudication with respect to the economic consequences of ending the marriage and the making of arrangements that are in the best interests of the children involved; and

(d) to have the protection of new substantive laws in several important areas now unduly affected by subjective or discretionary factors or by concepts that create or result in unfair discrimination on the basis of sex.

2.17 Adjudication should be available where the spouses, having been afforded reasonable opportunity to do so, are unable to agree on matters relating to children and economic readjustment. As well, the court should be able to intervene for the purpose of assessing the family situation, to extend the negotiation period where it believes this would be fruitful, and, where children are concerned, to require and supervise negotiation and to review all arrangements to ensure that the rights of children are fully protected. Dissolution would be available to either spouse on completion of the process to the satisfaction of the court, with an outside time limit imposed to prevent the use of delay as an element in bargaining. The process should be governed by the requirement that the law and its institutions assist the spouses where possible to establish and maintain a positive relationship during and after the dissolution process in personal and financial transactions and in all matters relating to the children of the marriage.

2.18 We propose that the only basis for dissolution of marriage should be the failure of the personal relationship between a husband and wife. We refer hereafter to such a failure as "marriage breakdown". The doctrines of "matrimonial offence", "matrimonial fault", "collusion" and "connivance" should be wholly inapplicable in all future marriage breakdown cases.

2.19 Whether one or both spouses conclude that the relationship has failed is a different matter from whether a third party looking at the marriage would say that a reasonable person ought to agree or disagree with that conclusion. It is each spouse, not some fictitious "reasonable person", who must live with the other, rear children and make the marriage work. We therefore propose that marriage breakdown be non-justiciable, conclusively established by the evidence of one spouse. Marriage breakdown should be established before a judge; like solemnization of marriage, this is a step of significant legal importance having public as well as

personal consequences. Dissolution of marriage should continue to be an act of the court. In this aspect of the dissolution process, however, the function of the court should be *ministerial,* not *judicial,* and the hearing should be *formal* but not *adversarial.*

2.20 We propose that all adversarial pleadings be removed from the law of dissolution of marriage. The process should be commenced by either or both spouses filing with the court a simple and non-accusatory notice of intention to seek dissolution.

2.21 A husband and wife should not be required to separate or live apart as a condition of participating in the dissolution process; nor should remaining together prejudice any right or otherwise adversely affect the legal position of either spouse. The doctrine of "condonation" should be inapplicable in all future marriage breakdown cases.

2.22 The court should be empowered to impose temporary arrangements for the purpose of giving immediate legal security to interests and rights which the law, in an harmonious marriage, contemplates are protected by the personal bonds between the spouses. The court should have power to make temporary orders respecting:

(a) financial provision for a needy spouse and children;

(b) custody, care and upbringing of and access to children;

(c) non-molestation of a spouse and children;

(d) rights of use and occupation of the matrimonial home (including use of its furnishings); and

(e) the prevention of the disposition, removal from the jurisdiction or encumbrance of any asset in which the non-owner spouse may have an interest upon a final order of economic readjustment upon dissolution.

2.23 We propose that whenever children over whom the court has jurisdiction in dissolution proceedings are involved, the law should require that an immediate assessment conference be held by the court. Where a temporary order is sought, the

court should have power to require an assessment conference where it deems it appropriate. An assessment conference would be an informal meeting of the parties before the court, a court officer, a support staff person or a community-based service or facility designated by the court.

2.24 Where a temporary order is sought, the basis for intervention in the form of an assessment conference is that a request for such an order indicates that the state of the relationship between the spouses has apparently reached the point where it is no longer possible for the husband and wife to reach mutually acceptable decisions on the fundamental matters that must be stabilized during the dissolution process. The purposes of this assessment conference would be:

(a) to ascertain whether the husband and wife can agree to temporary or interim arrangements without going before the court for formal judicial determinations on family affairs;

(b) to acquaint the husband and wife with the persons, services and facilities available in the court or the community to assist them in negotiating temporary arrangements for the dissolution process as well as permanent arrangements applicable on dissolution; and

(c) to acquaint the husband and wife with the availability of counselling services in the court or the community that deal with conciliation, reconciliation, separation and dissolution of marriage.

2.25 Where children are involved, whether or not a temporary order is sought, the court should always intervene immediately on the basis of the protection of the basic rights we propose be granted to children. These are the right to economic support and the right to have the most suitable arrangements possible in the circumstances for their custody, care and upbringing. An assessment conference involving children would be for the following purposes:

(a) to ascertain whether the spouses have made appropriate arrangements respecting the care, custody and upbringing of and access to the children during the dissolution process, and

if not, to ascertain whether such arrangements can be agreed to by the spouses;

(b) to ascertain whether the appointment of legal counsel for children is indicated;

(c) to ascertain whether a formal investigative report by a public authority (*e.g.* an Official Guardian or Superintendent of Child Welfare) is indicated;

(d) to ascertain whether a mandatory psychiatric or psychological assessment of the situation is indicated;

(e) to acquaint the husband and wife with the availability of persons, services and facilities in the court or the community to assist them in negotiating temporary arrangements respecting children during the dissolution process as well as permanent arrangements applicable on dissolution;

(f) to enable the court to ascertain the need for, and where necessary to order the further appearance of the husband and wife before the court or a person, service or facility designated by the court to engage in one or more sessions of mandatory negotiation respecting the children; and

(g) generally to help the husband and wife, where possible, to avoid contested temporary or permanent custody proceedings through negotiation and agreement, and otherwise to avoid bringing matters involving the children before the court for adjudication.

2.26 There will be cases where the spouses have not been ordered to appear before the court or a court-designated person or service for an assessment of their situation. In such cases, any facility or service available in or through the court dealing with negotiation, counselling or reconciliation should be open to spouses on a voluntary basis. In either case, these things should be offered without fees or costs to married persons in the dissolution process. Although our immediate concern is with the dissolution of marriage, we suggest that such facilities and services, particularly after the creation of unified Family Courts, be designed with a view to becoming established as community resources available to all married persons whether or not they have taken the step of initiating dissolution proceedings.

2.27 After the notice of intent has been filed, appropriate interim arrangements for children have been made and where necessary the family situation has been stabilized by temporary court orders, there should be a process with the following sequence:

(a) An initial minimum period of time should be established for the husband and wife to consider reconciliation and otherwise to agree, if they can, on justiciable issues (matters of final economic readjustment and permanent arrangements that are in the best interests of children).

(b) If there is no reconciliation and if agreement on justiciable issues has been reached, either spouse should be able to apply for dissolution after expiration of the initial minimum period of time.

(c) If agreement on justiciable issues cannot be reached, either spouse should be able to request adjudication on justiciable issues after the expiration of the initial minimum period of time.

(d) Where adjudication or dissolution is sought after expiration of the initial minimum period of time, the court should have power to order a conference with the spouses to assess whether either reconciliation or agreement on justiciable issues after further negotiation, as the case may be, is a viable possibility.

(e) After assessment of the situation, by a conference or otherwise, the court should have power:

  (1) to proceed to adjudication on the differences between the spouses on economic re-adjustment and matters concerning children; or

  (2) to postpone adjudication for a further reasonable period of time for continued negotiation on justiciable issues; or

  (3) to postpone dissolution for a further reasonable period of time to allow the parties to continue attempts at reconciliation.

(f) If the spouses have been unable to reconcile or to agree on justiciable issues after the expiration of the time allowed for

court-ordered postponement, either spouse should be able to require adjudication respecting justiciable issues; the court should have power to order a final conference—in this case, a pre-trial conference—and proceed to adjudication where last-minute agreement cannot be reached.

(g) Following adjudication and the expiration of an appeal period, either spouse should be able to apply for dissolution.

(h) Upon marriage breakdown being established by the evidence of one or both spouses in a dissolution hearing, the marriage should be declared by the court to be dissolved.

2.28 We propose that Parliament establish a reasonable time framework for the dissolution process. Times should be set in light of such factors as:

(a) the avoidance of undue haste consistent with the serious nature of the dissolution of marriage;

(b) allowing reasonable amounts of time for reconciliation, counselling and emotional adjustment by the spouses;

(c) allowing reasonable amounts of time for negotiations dealing with money, property and children;

(d) providing the court with the ability to tailor the time period, within reasonable limits, to the requirements of the individual case;

(e) avoiding delay where it serves no purpose; and

(f) creating maximum limits to prevent intentional unreasonable delay.

2.29 In order to illustrate the sequence of the basic features of the proposed process within a framework of fixed times, we set out the following table:

Time	Basic Steps in the Process
Initiation of the process	A notice of intent to seek a dissolution is filed by a spouse.
Immediately where children are involved or where a temporary order is sought	The court is required to hold an assessment conference on the situation respecting children; and has power to hold an assessment conference where a temporary order is sought.

Time	Basic Steps in the Process
Not sooner than six months after filing	Where the spouses are unable to reconcile but are able to agree on justiciable issues (economic readjustment and matters concerning children) either may apply for dissolution. A hearing is held and following establishment of marriage breakdown, conclusively established by the evidence of at least one spouse, the marriage is dissolved.
Not sooner than six months after filing	Where the spouses are unable to reconcile and do not agree on justiciable issues, either may apply for adjudication. The court, after assessment, either tries the justiciable issues, following which the case proceeds to dissolution, or postpones trial to allow continued attempts to reach agreement on matters in dispute.
Twelve months after filing	Where the spouses are still unable to reconcile or agree on justiciable issues, either may require a trial of the issues or dissolution as the case may be.
One month after adjudication or the decision to proceed to dissolution	A dissolution hearing is held and following establishment of marriage breakdown, conclusively established by the evidence of at least one spouse, the marriage is dissolved.

2.30 In dissolution proceedings the court will have duties of a judicial nature and duties of a ministerial nature. The most significant duties in the proposed process are as follows:

(a) to conduct or direct the holding of an assessment conference on children and order, where indicated, investigation by public authorities, psychiatric or psychological evaluations, legal representation for children and mandatory negotiation under the supervision of the court;

(b) where it deems it appropriate, to conduct or direct the holding of an assessment conference where a temporary order is sought;

(c) to make temporary orders applicable during dissolution proceedings;

(d) to review and assess, in any case where it deems it appropriate, the agreed arrangements made for the custody, care and upbringing of and financial provision for the children of the marriage to ensure that such arrangements are in the best interests

of the children based on their welfare and emotional well-being, and to return the matter to the spouses for further negotiation or adjudication where it is found that the best interests of the children have not been provided for;

(e) to confirm by order agreed arrangements made for the custody, care and upbringing of, and financial provision for the children of the marriage;

(f) to confirm by order the agreed arrangements for distribution of property and settlement of all issues respecting title to, or possession of property, and the agreed arrangements for financial provision for a needy spouse;

(g) where it deems it appropriate, to conduct or direct the holding of an assessment conference when the spouses are unable to reconcile or to agree on justiciable issues, as the case may be, and to determine whether further attempts by the spouses at reconciliation or agreement on justiciable issues should be made or whether the case should go to adjudication or dissolution;

(h) to adjudicate on the custody, care and upbringing of, and financial provision for the children of the marriage where the spouses are unable to agree on arrangements that are in the best interests of such children;

(i) to adjudicate on the distribution of property and settlement of all issues respecting title to or possession of property and financial provision for a needy spouse where the spouses are unable to agree on these matters;

(j) where it deems it appropriate, to conduct or direct the holding of a pre-trial conference when adjudication becomes mandatory; and

(k) to order the dissolution of the marriage after completion of all steps of the dissolution process.

2.31 Nothing in the proposed process should be allowed to interfere with:

(a) the right of each spouse to independent legal advice;

(b) the right of the spouses to conduct their own negotiations respecting economic readjustment and arrangements respecting children in addition to any negotiations during any required conferences or other sessions involving both spouses; and

(c) the right of each spouse to be accompanied by counsel during any required conferences or other sessions involving the other spouse.

2.32 The proposed process emphasizes a higher possibility for personal involvement by spouses than does the present divorce law. This is for the benefit of the spouses themselves. There will always be some persons in the dissolution process who will not be interested in seriously investigating reconciliation and others may prefer litigation to conciliation and negotiation. Many people will, however, choose to take advantage of the proposed ways to avoid the traditional confrontation through lawyers or in court. Whether they do so is largely up to themselves except where children are involved.

2.33 The law can and should give people alternatives, without being manipulative or coercive, that they do not now have under the *Divorce Act*. As under the present law, a spouse would always have to consider the possibility that a decision that is adverse to his or her interest may be taken for failing to participate or present the other side of the story. It must be recognized, however, that the law cannot successfully require spouses to participate in such things as counselling, therapy, or reconciliation sessions. These must be undertaken on a voluntary basis to be effective. Spouses would be able to choose not to become involved in them and to pursue the dissolution process, as is generally now done under the *Divorce Act*, through lawyers.

2.34 The court should have power to waive or excuse the appearance of a spouse in any part of the process in appropriate cases. This is necessary to provide for such situations as where the spouses live in different parts of Canada, where one spouse is imprisoned, or where a spouse does what some do today in undefended divorce actions and appears neither in person nor by

counsel. In addition there will be cases where the spouses have successfully and apparently permanently established separate lives and dissolution is sought to obtain a formal change in their legal status rather than to obtain the help of the law in settling problems related to money, property or children. Such situations, however, are not of major concern. Reform should be aimed at such circumstances as these: the spouses who live in the same community, who are not necessarily absolutely committed to ending their marriage, who may be unhappy and perhaps emotionally confused, who will want to do what is best for their children and who will want to avoid being hurt or condemned. Persons in this group can, and by and large will take advantage of the opportunities afforded in the proposed process for exploring possibilities for reconciliation, and for assistance in working out decent solutions to the problems caused for themselves and their children by the marriage breakdown.

2.35 This is not a proposal for "easy" or "quick" divorce. Whether it is easier and faster or slower and more arduous will vary from case to case. In every case, however, the answer to this question will turn on factors such as the spouses' ability to come to grips with the consequences of their actions for themselves and their children, and not on such things as the present right to an immediate divorce based on fault or the present requirement of years of delay extracted by the law as reassurance that a marriage has really broken down. The proposal is no different from the present law with respect to an individual spouse's decision whether or not a marriage will end. Taken with the changes in substantive law recommended in the following chapters, it will greatly restrict the use by spouses of arbitrary bargaining advantages flowing from considerations of fault and conduct when settling matters relating to children and the economic consequences of the marriage. It is difficult to go too far with comparisons between what exists now and what is proposed because there are fundamental differences of concept and philosophy involved. Rather than attempting this, we suggest that both approaches be measured against a single standard with which there can be no disagreement: the requirement that Canadian law have a rational, humane and socially valid policy for the family.

Recommendations

The Commission recommends:

1. The only basis for dissolution of marriage should be the failure of the personal relationship between husband and wife. (Referred to in these recommendations as "marriage breakdown".)

2. The doctrines of "matrimonial offence", "matrimonial fault", "collusion", and "connivance" should be inapplicable in all future marriage breakdown cases.

3. Marriage breakdown should be non-justiciable, conclusively established by the evidence of one spouse.

4. All adversarial pleadings should be removed from the law of dissolution of marriage; the dissolution process should be commenced by either or both spouses filing with the court a simple and non-accusatory notice of intent to seek dissolution.

5. Dissolution of marriage should be a ministerial act of the court, established in a formal but not adversarial hearing.

6. A husband and wife should not be required to separate or live apart as a condition of participating in the dissolution process; nor should remaining together prejudice any right or otherwise adversely affect the legal position of either spouse.

7. The doctrine of "condonation" should be inapplicable in all future marriage breakdown cases.

8. The court should have power to make temporary orders respecting:

(a) financial provision for a needy spouse and children;
(b) custody, care and upbringing of and access to children;
(c) non-molestation of a spouse and children;
(d) rights of use and occupation of the matrimonial home (including use of its furnishings); and
(e) the prevention of the disposition, removal from the jurisdiction or encumbrance of any asset in which a non-owner spouse may have an interest upon a final order of economic readjustment upon dissolution.

9. Whenever children over whom the court has jurisdiction in dissolution proceedings are involved, the law should require

that there be an immediate informal meeting of the parties--an "assessment conference"—before the court, a court officer, a support staff person or a community-based service or facility designated by the court for the following purposes:

(a) to ascertain whether the spouses have made appropriate arrangements respecting the care, custody and upbringing of and access to the children during the dissolution process, and if not, to ascertain whether such arrangements can be agreed to by the spouses;

(b) to ascertain whether the appointment of legal counsel for the children is indicated;

(c) to ascertain whether a formal investigative report by a public authority (*e.g.*, an Official Guardian or Superintendent of Child Welfare) is indicated;

(d) to ascertain whether a mandatory psychiatric or psychological assessment of the situation is indicated;

(e) to acquaint the husband and wife with the availability of persons, services and facilities in the court or the community to assist them in negotiating temporary arrangements respecting children during the dissolution process as well as permanent arrangements applicable on dissolution;

(f) to enable the court to ascertain the need for, and where necessary to order the further appearance of the husband and wife before the court or a person, service or facility designated by the court to engage in one or more sessions of mandatory negotiation respecting the children; and

(g) generally to help the husband and wife, where possible, to avoid contested temporary or permanent custody proceedings through negotiation and agreement, and otherwise to avoid bringing matters involving the children before the court for adjudication.

10. Whenever a temporary order is sought the court should have power to require that there be an assessment conference for the following purposes:

(a) to ascertain whether the husband and wife can agree to temporary or interim arrangements without going before the court for formal judicial determinations on family affairs;

(b) to acquaint the husband and wife with the persons, services and facilities available in the court or the community to assist them in negotiating temporary arrangements for the dissolution process as well as permanent arrangements applicable on dissolution; and

(c) to acquaint the husband and wife with the availability of counselling services in the court or the community dealing with conciliation, reconciliation, separation and dissolution of marriage.

11. Any facility or service available in or through the court dealing with negotiation, counselling or reconciliation should be offered without fees or costs to all spouses in the dissolution process.

12. Matters of final economic readjustment and permanent arrangements that are in the best interests of children should be justiciable issues if agreement with respect to such matters cannot be reached.

13. The dissolution process should:

(a) enable the spouses to explore the possibility of reconciliation without prejudice to the right to dissolution if reconciliation does not succeed;

(b) emphasize negotiation and agreement on justiciable issues;

(c) provide for intervention and assessment of the situation by the court at various critical times;

(d) provide adjudication on justiciable issues if agreement cannot be reached after expiration of a reasonable period of time; and

(e) provide for dissolution of the marriage after completion of all steps in the dissolution process.

14. After the notice of intent has been filed, appropriate interim arrangements for children have been made and where necessary the family situation has been stabilized by temporary court orders, there should be a process with the following sequence:

(a) An initial minimum period of time should be established for the husband and wife to consider reconciliation and otherwise

to agree, if they can, on justiciable issues (matters of final economic readjustment and permanent arrangements that are in the best interests of children).

(b) If there is no reconciliation and agreement on justiciable issues has been reached, either spouse should be able to apply for dissolution after expiration of the initial minimum period of time.

(c) If agreement on justiciable issues cannot be reached, either spouse should be able to request adjudication.

(d) Where adjudication or dissolution is sought after expiration of the initial minimum period of time, the court should have power to order a conference with the spouses to assess whether either reconciliation or agreement on justiciable issues after further negotiation, as the case may be, is a viable possibility.

(e) After assessment of the situation, by a conference or otherwise, the court should have power:

(1) to proceed to adjudication on the differences between the spouses on economic readjustment and matters concerning children; or

(2) to postpone adjudication for a further reasonable period of time for continued negotiation on justiciable issues; or

(3) to postpone dissolution for a further reasonable period of time to allow the parties to continue attempts at reconciliation.

(f) If the spouses have been unable to reconcile or to agree on justiciable issues after the expiration of the time allowed for court-ordered postponement, either spouse should be able to require adjudication respecting justiciable issues; the court should have power to order a final conference—in this case, a pre-trial conference—and proceed to adjudication where last-minute agreement cannot be reached.

(g) Following adjudication and the expiration of an appeal period, either spouse should be able to apply for dissolution.

(h) Upon marriage breakdown being established by the evidence of one or both spouses in a dissolution hearing, the marriage should be declared by the court to be dissolved.

15. The dissolution process should be set within a reasonable time frame in light of such factors as:

(a) the avoidance of undue haste consistent with the serious nature of the dissolution of marriage;

(b) allowing reasonable amounts of time for reconciliation, counselling, and emotional adjustment by the spouses;

(c) allowing reasonable amounts of time for negotiations dealing with money, property and children;

(d) providing the court with the ability to tailor the time period, within reasonable limits, to the requirements of the individual case;

(e) avoiding delay where it serves no purpose; and

(f) creating maximum limits to prevent intentional unreasonable delay.

16. Nothing in the proposed process should be allowed to interfere with:

(a) the right of each spouse to independent legal advice;

(b) the right of the spouses to conduct their own negotiations respecting economic readjustment and arrangements respecting children in addition to any negotiations during any required conferences or other sessions involving both spouses; and

(c) the right of each spouse to be accompanied by counsel during any required conference or other sessions involving the other spouse.

17. The court should have power to waive or excuse the appearance of a spouse in any part of the process in appropriate cases.

3. Economic Readjustment on Dissolution of Marriage

3.1 Not only is marriage a personal relationship, it is an economic arrangement as well. It provides for the financial needs of all members of the family unit who are not employed for wages. Property acquired by either spouse is commonly used without regard for ownership. Most services necessary to the family unit are usually provided freely by the family members, rather than by outsiders for remuneration.

3.2 From an economic perspective family functions can be divided into three basic categories: financial provision, household management and child care. Typically, the first of these is accomplished by employment for wages outside the home and involves nothing more or less than furnishing money to the family or for family purposes. The second and third are accomplished by work and services done in the home. The traditional cultural expectation in Canada is that these three functions will be divided along sexual lines: financial provision as the primary responsibility of husbands and household management and child care as the primary responsibility of wives. This expectation is also incorporated into most family law in Canada. Since the law attaches differing economic consequences to different family roles, the unequal economic consequences of marriage breakdown are also divided along sexual lines. We believe this is wrong for two reasons. First, the law ought not to grant or withhold significant financial and property rights for reasons that are ultimately determined by the sex of a spouse—laws that consistently result in economic discrimination according to sex are no more defensible than laws that intentionally create such

results. Second, the law ought to treat both spouses equally in economic terms, regardless of the family role performed.

3.3 Other consequences of the present law set against the cultural tradition are also unfortunate. As long as it is accepted that marriage, by law, provides for the needs of women, then it will also be accepted that the economy gives an equivalent priority to men. The law supports this result in two fundamental ways: a sexually-determined economic structure in marriage and the lack of a coherent alternative to the legal tradition of sexually-determined financial rights on divorce. The present legal concepts of marital economics also have significant undesirable effects on individual opportunities, horizons and life-choices. It oversimplifies complex cultural phenomena to say that the law—particularly family law—is "responsible" for invidious sexual discrimination in society. But it is apparent that substantial progress towards the elimination of such discrimination is seriously impeded by sexually-based classifications in the law governing the primary social and economic relationship between the sexes.

3.4 The cultural fact (and usual legal requirement) that men are the primary source of family financial provision means that on divorce husbands are the owners of most of the property acquired during marriage. This is a result of the property laws of most (but not all) provinces, which make no special provision for the marital status of property owners. The rule that property is owned by the person who furnished the money to pay for it applies regardless of whether the owner is single or married. The amount of property owned by each spouse on dissolution of marriage therefore turns on whether the spouse was a wage-earner or cared for the children and managed the home. Where both spouses have incomes it is common for one to assume responsibility for mortgage and similar payments while the other makes household purchases of consumables. In many provinces laws intended to protect dependent wives against full contractual liability have resulted in a restriction of the availability of credit to married women, who are, by such laws, poorer risks. This factor tends to result in husbands buying the durable and major family assets (*i.e.* assets that are purchased through mortgage or credit transactions), and therefore owning the property on mar-

riage breakdown. Only three jurisdictions in Canada (Quebec, British Columbia and the Northwest Territories) have legal doctrines that apply partnership rather than classical property rules to husbands and wives in these situations.

3.5 Before 1968, Canadian divorce law assumed that a wife was always the financially dependent spouse. The old rules of maintenance provided a life income to a wife who was the "innocent" party in the divorce and punished a "guilty" wife by giving her nothing. The present rule in the *Divorce Act* does not assume the inherent dependency of women; but neither does it furnish any new rationale to replace the traditional reasons why one spouse should continue to furnish money to the other after divorce has ended all other aspects of the relationship. There is nothing in the old case law that could help a court determine the purpose of maintenance on divorce—all that law was based on the assumed validity of the premise that men ought to support women. This is clearly unsatisfactory. So is the absence of any legislative policy respecting the amount and duration of maintenance.

3.6 We have discussed the other deficiencies of the property and maintenance concepts that apply on divorce at much greater length in our Working Papers on these topics, and will not repeat them here. The point we wish to make is that the economic aspects of the law of dissolution of marriage should treat the family unit as a joint venture, both spouses as equals, and the role of each spouse as having equal value. This it does not do.

3.7 The legal inequality in the maintenance tradition was not effectively removed in the 1968 reforms, and to some extent was perpetuated by the retention of the conduct test. The inequality resulting from the isolation of property considerations from the other matters inherent in the economic consequences of marriage and divorce also survived the recent changes. Parliament did not include property reforms in the 1968 *Divorce Act* in the exercise of its jurisdiction over "Marriage and Divorce" and only some provinces have since used their overlapping jurisdiction of "Property and Civil Rights" to create new systems of laws that are of special application to married property owners.

3.8 Retention in some provinces of a classical property tradition should no longer be allowed to create, as a direct consequence of the federal divorce law, grave economic disadvantage for persons in those provinces who have performed the family role of caring for children and managing a household, rather than taking paid employment. Nor should the content of the provincial law continue to require judges, in the attempt to do justice under federal law, to use maintenance awards to redress imbalances in property. Federal law should simply do directly what it has done indirectly, and give the courts the power to develop a coherent jurisprudence of economic readjustment when a marriage ends.

3.9 Parliament should therefore ensure that the economic consequences of dissolution of marriage are the same as those of other forms of joint economic ventures in which there is a specialization of function for a common purpose. The basic premise of reform should be that the three main economic functions in marriage—financial provision, household management and child care —are equal legal responsibilities of both partners. There should be no preconceptions in law as to how these functions ought to be divided and there ought to be equal economic results if they are.

3.10 No married person should be penalized or enjoy an advantage with respect to property acquired after the date of the marriage as a result of the family function he or she performed. Where this does not occur under provincial law (pursuant to special rules of ownership applying to married property owners), then federal law should provide for this as a matter of the economic consequences of dissolution of marriage. Each level of government has the constitutional competence to create these results. The constitutional grant of legislative power to the provinces over "property and civil rights" cannot, in our view, be reasonably construed as meaning that Parliament's ability to deal with the economic consequences of divorce is confined to what was thought to be necessary and proper according to standards of marriage and divorce existing at Confederation. Those standards must defer to the dynamics of justice. Any constitution is a living part of an evolving culture, not a perpetual monument to the past.

3.11 We propose that Parliament prescribe a basic norm of equality in matters of property on dissolution of marriage, and grant appropriate power to judges to achieve this under federal law. As is done elsewhere in federal legislation—the *Lord's Day Act*, for example—Parliament should allow for the operation of provincial legislative programs that integrate special (and not divorce-oriented) property-sharing regimes into the overall fabric of provincial law. Parliament should also provide that where provincial law has offered a choice of property regimes and the spouses have elected separation of property (*i.e.* non-sharing) or have made special contractual arrangements, then the wishes of the spouses should govern.

3.12 The basic premise that financial provision, child care and household management are equal legal responsibilities of both spouses leads to a concept of financial provision on dissolution of marriage as an assured right in the spouse who has financial needs following from the marriage experience. This is primarily, but not exclusively, related to the division of the family functions. This is inconsistent with the legal tradition that maintenance on divorce can be reduced or lost if the behaviour of the dependent spouse was not "satisfactory".

3.13 The *Divorce Act* of 1968 contains a serious defect in this regard which must be corrected. Before that time, the right to maintenance on divorce could only be lost as a result of a judicial determination, based on known, settled and pre-existing rules of law, that the claimant spouse had committed a matrimonial offence. This was arbitrary, but certain. The 1968 Act changed the law to allow the court to award maintenance in any event, but the result has been a maintenance rule that is both arbitrary and uncertain. The Act now requires that the award be based on the court's evaluation of conduct in addition to a consideration of the spouses' condition, means and circumstances. This means that the financial implications of a maintenance claimant's marital economic experience are always subject to the uncertainty of a behavioural evaluation according to whatever criteria a judge may find compelling. The proper standard of conduct is not defined by law, nor is the nature of the relationship between conduct and financial rights. Both these matters are, according to one appellate court decision, "within the entire and absolute discretion" of the trial

judge. These inherently subjective standards lack the certainty that is essential if justice is to be done in determining the economic consequences of marriage breakdown, where the outcome will often represent the fruits of the labour of the spouses' adult lifetimes.

3.14 Even if it were possible to write rules of law to cover this situation, there are few legal policies that are more cruel or ill-advised than the one giving married people direct financial motives to pursue their recriminations in public after love, trust and understanding have vanished from their personal relationship. Driven by financial threats, each party can only defend his or her interests by attacking the other's character, personality, fitness as a parent and general performance as a spouse. Such testimony is, in any event, notoriously unreliable—the selective memory and biased evidence in husband and wife cases is different in kind, not degree, from the other situations where a judge must weigh conflicting versions of past events and arrive at a factual conclusion. Nor do we believe this policy is defensible, as is sometimes suggested, as having some value as an emotional catharsis. Too much is at stake for persons having real economic needs for the law to justify what it does on the questionable grounds of providing incidental psychological benefits that most spouses would doubtless prefer to obtain in some less expensive and destructive manner.

3.15 Apart from these objections, the assumption of primary responsibility for child care and household management should not carry with it a one-sided risk of economic deprivation on dissolution of marriage. This unilateral risk is inconsistent with marriage as a relationship between legal equals. The fact of primary relevance is the economic disability that follows from being the non-earning spouse; to this we add a number of secondary facts in our detailed recommendation respecting financial provision on dissolution of marriage, all of which are intended to give the courts something they do not now have: a fair and rational set of objective legal criteria for dealing with the economic consequences of marriage breakdown.

3.16 The main purpose of financial provision on dissolution of marriage should be to meet the reasonable needs of the spouse

who performed, on behalf of both spouses, family functions that carry economic disadvantages. Just as the law should characterize financial provision during marriage as a mutual responsibility, it should also treat the economic advantages accruing to the spouse who performs the wage-earning role on behalf of both spouses as a mutual asset. The right to continue to share in this asset after the partnership ends should last as long as the economic needs following from dependency during marriage continue to exist in the face of reasonable efforts by the dependent person to become self sufficient. The duration of the post-dissolution dependency period should be governed by the principle that everyone is ultimately responsible to meet his or her own needs. The financial guarantee provided by law should be one of rehabilitation to overcome economic disadvantages caused by marriage and not a guarantee of security for life for former dependent spouses. The obligation of the former spouse who is required to pay should be balanced by the obligation of the other eventually to become self-sufficient, as all other unmarried persons must be, within a reasonable period of time. The law should still provide for the possibility of a permanent obligation where the economic disability of a spouse flowing from the marriage is permanent.

Recommendations

The Commission recommends that:

1. Settlement of property matters and financial provision on dissolution of marriage should be done in the context of economic re-adjustment and kept separate from matters relating to the breakdown of the personal relationship between the spouses.

Property Matters Between Spouses

2. Parliament should confer power on the court in dissolution proceedings to:

(a) transfer ownership of property from one spouse to the other;

(b) transfer rights to the use of property from one spouse to the other;

(c) require the establishment of trusts, the giving of mortgages and other necessary or desirable steps to secure or make effective its orders respecting property,

for the purpose of equalizing the property position of each spouse with respect to property acquired by either after the date of the marriage.

3. Property acquired by either spouse during the marriage by gift, inheritance, bequest, trust or settlement should be exempt from sharing.

4. Property transfers should not be made under federal law in any case where

(a) the spouses have made a marriage contract or other binding arrangement with respect to their property relationship on dissolution of marriage; or

(b) the spouses' property relationships are governed by a provincial or territorial property regime, whose application is not restricted to cases of dissolution of marriage, and includes some form of property sharing on dissolution; or

(c) the spouses have made an affirmative choice to remain separate as to property pursuant to a choice of property regimes provided under provincial or territorial law which includes the ability to choose a regime having a form of property sharing on dissolution.

5. A right to property sharing should not be adversely affected, forfeited, or reduced because of conduct during the marriage.

Financial Provision Between Spouses

6. Marriage *per se* should not create a right to receive or an obligation to make financial provision after dissolution; a formerly married person should be responsible for himself or herself.

7. A right to financial provision should be created by reasonable needs flowing from:

(a) the division of function in the marriage;

(b) the express or tacit understanding of the spouses that one will make financial provision for the other;

(c) custodial arrangements made with respect to the children of the marriage at the time of dissolution;

(d) the physical or mental disability of either spouse that affects his or her ability to provide for himself or herself; or

(e) the inability of a spouse to obtain gainful employment.

8. The purpose of financial provision on dissolution of marriage should be one of rehabilitation to overcome economic disadvantages caused by marriage and not a guarantee of security for life for former dependent spouses.

9. A right to financial provision should continue for so long as the reasonable needs exist, and no longer; financial provision may be temporary or permanent.

10. A maintained spouse should have an obligation to assume responsibility for himself or herself within a reasonable period of time following dissolution of marriage unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs

(a) it would be unreasonable to expect the maintained spouse to do so, and

(b) it would not be unreasonable to require the other spouse to continue to bear this responsibility.

11. A right to financial provision should not be adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the dissolution of the marriage except:

(a) conduct that results in a diminution of reasonable needs; or

(b) conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of time during which maintained spouses are obliged to prepare themselves to assume responsibility for their own maintenance.

12. The amount of financial provision should be determined by:

(a) the reasonable needs of the spouse with a right to financial provision;

(b) the reasonable needs of the spouse obliged to make financial provision;

(c) the property of each spouse after dissolution of the marriage;

(d) the ability to pay of the spouse who is obliged to make financial provision;

(e) the ability of the maintained spouse to assume partial responsibility for himself or herself; and

(f) the obligations of each spouse towards the children of the marriage.

13. The case law rules respecting the eligibility for, amount of, or rationale behind maintenance on divorce, and all case law dealing with analogous situations, such as alimony, should be discarded.

4. Children and the Dissolution of Marriage

4.1 Children whose parents' marriage breaks down must be a primary focus of legal concern. The process for dissolution of marriage, and the substantive law applied during that process must go beyond the present law and practice in protecting the interests of such children. In this chapter we discuss existing difficulties in this area and make proposals that recognize two fundamental rights that children ought to have when their parents' marriage ends:

(a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and

(b) the right to economic support.

4.2 The creation of a new process enabling arrangements for children to be dealt with in a non-fault oriented milieu will shift the emphasis away from the present overriding need for maintaining a defensive posture in interspousal transactions leading up to the dissolution of marriage. Where children are concerned, the object is to eliminate artificial sources of legal conflict in order to allow parents to deal more openly with the important problem of the effect of marriage breakdown on their children and what can be done about it. It is extremely difficult in a framework premised on confrontation and accusation and lacking in counselling and conciliation services (which would tend to be ineffective in such an atmosphere in any event) to reach the human or psychological reality that is ultimately determinative of the best interests of the children. Unfor-

tunately present law and practice make it unlikely or impossible to have an open approach to and frank discussion of many factors of vital importance to the interests of the children. What is required is a new, more rational and humane process for dealing with the problems that dissolution of marriage creates for children, a process aimed at supporting the efforts of parents—and the courts—in reaching more rational and humane solutions.

4.3 The *Divorce Act* provides that, on granting a decree of divorce, the court may make an order providing for the maintenance, custody, care and upbringing of the children of the marriage "if it thinks fit and just to do so, having regard to the conduct of the parties and the conditions, means and circumstances of each of them". The case law has expanded the meaning of the legislative criteria. The courts apply the test that *the welfare of the child* is the paramount consideration in all matters involving children.

4.4 "Custody" has several legal meanings. It stands for the whole collection of legal powers (many of which connote parental obligations as much as "rights") of fathers and mothers over their children: the power to raise and control the child, to determine the nature and amount of the child's education, to determine his or her religious upbringing, to administer the child's property, to grant or withhold consent to the marriage of an under-age child, to apply to the courts on his or her behalf, and so on. In its narrower sense, it means simply "care and upbringing" or, to use a more vivid but unfortunate phrase, "possession".

4.5 Where custody is granted to one parent, the courts afford the other the right to "reasonable access"—usually worked out between the parents, but where they cannot agree, as directed by the judge.

4.6 Although the *Divorce Act* does not expressly provide for it, a court will occasionally grant custody of the children to a third party such as a grandparent or other relation of one of the spouses. Usually this occurs in cases where a third party has in fact assumed responsibility for raising the child for one reason or another, and has become, in effect, a parent figure.

4.7 Before a final custody order is made at the end of divorce proceedings, a child can be in a state of *de facto* custody or "interim custody". *De facto* custody simply means that the mother and father have worked out, as a practical matter, that the child will live with one of the parents (or other person) after they have separated, but there has been no court order or formal agreement. Interim custody refers to a temporary arrangement by the court placing the child in the custody of one parent after a divorce petition has been filed. An interim order merely determines temporarily where the child will reside and provides for temporary maintenance of the child until the trial. At that time, custody, if contested, will be decided permanently by the court.

4.8 Children of divorcing spouses are not parties to the divorce action. They have no right to be represented by counsel, to call or examine witnesses, or to make submissions to the court. Some courts informally seek out the views and wishes of the children in contested custody actions, but this is by no means a universal practice. The *Divorce Act* makes no provision for it.

4.9 The *Divorce Act* allows the court to make maintenance and custody orders with respect to a child of the husband and wife; a child of the husband or wife if the other spouse stands *in loco parentis* (in place of a parent) to the child; and a child of neither spouse if both stand *in loco parentis* to the child. The power to make a maintenance or custody order stops when a child becomes 16 years old unless the child is under the parents' "charge" and is "unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with the necessaries of life".

4.10 Both spouses are responsible for the maintenance of a child after divorce, but the *Divorce Act* does not set out any specific factors for the court to consider in determining how to apportion the contribution of each parent, the amount a child should receive, or the purpose of maintenance.

4.11 The *Divorce Act* does not distinguish between fathers and mothers as custodians. There is a marked tendency for the courts to give custody of children under ten years or so to mothers.

As children approach their teens, the preference for the mother diminishes.

4.12 Reform should be directed towards several important features of the law and practice that come into play where children are concerned in divorce cases. The whole emphasis given by the process for dissolution of marriage to matters concerning children should be significantly increased. Much more effort should be devoted to the negotiation and the finding of consensual solutions in lieu of litigation over children. The criteria for custody determinations set out in the *Divorce Act* are not satisfactory since they are not addressed to the interests of children and furnish little guidance. Custody considerations sometimes over-emphasize interspousal matters to the exclusion of the all-important parent-child relationship. The traditional legal concepts of proper conduct as a spouse should not be allowed to intervene where the court must determine the strengths and weaknesses of the parties *as parents* rather than as husbands and wives. The parent who should raise a child is not necessarily the legally "innocent" spouse. The law should be made more flexible, making custody less an all-or-nothing proposition; a judicial determination that one parent will assume primary responsibility for raising and caring for a child should not necessarily exclude the other from the legal right to participate as a parent in many other significant areas of the child's life.

4.13 The concept of a child's interest in access to both parents should be brought into the determination of what "reasonable access" should mean. The question of non-parental custodians should be clarified. Wherever possible, measures should be taken to avoid the difficulties created when interim custody arrangements have resulted in a pattern that courts are often reluctant to disturb when the permanent custody issue is finally heard. Children of divorcing parents should be given rights to be heard and to have their wishes taken into account in appropriate cases. The considerations that should apply to maintenance for a child should be articulated. The definition of "children" needs to be revised and the age limits raised. Parliament should establish a positive policy against discrimination on the basis of sex in custody determinations. Finally, all these things should be incorporated into a new process

governed by new legal doctrines respecting the dissolution of marriage that will allow courts, parents and lawyers to deal with the effect of marriage breakdown on children as a central issue rather than as a "collateral matter".

4.14 Arrangements for the custody, care, upbringing and maintenance of children are now usually settled by negotiations between the parents (or their lawyers). When the parents cannot agree these matters are determined by the courts in the context of a defended divorce action, usually dominated by the accusation and recrimination strategies required by a law that seeks to fix responsibility for the marriage breakdown, and that requires each parent to attack the other to protect his or her economic interests. The process for dissolution of marriage that we have proposed would be governed by laws that create no legal incentives to make dissolution of marriage the occasion for a generalized adversarial assault by one spouse on the other. In particular it places increased emphasis on negotiation and agreement where children are concerned. After the lapse of a reasonable period of time for settlement by the parties, either parent would be able to request adjudication with respect to children if agreement has not been reached. At this point the court will be able either to hear the case or require further negotiation for an additional reasonable period of time. Thereafter, either parent should be able to obtain mandatory adjudication on issues involving children. Where there is adjudication, however, questions of who was at fault for the marriage breakdown and whether a spouse is disentitled to maintenance would not be involved, the focus instead being where it should be: what is in the best interests of the children.

4.15 This process should have the following major features:

(a) sources of information and expert advice available to the court in addition to evidence from the parents;

(b) assistance and support for the parents in their search for consensual solutions;

(c) review by the court of parental agreements respecting children, with power to disapprove where statutory criteria are not met;

(d) adjudication by the court where parental agreement cannot be reached; and

(e) legal representation for children.

4.16 In every case where dissolution is sought and children are involved, the court should intervene immediately to ensure that their rights and interests are protected. This is the "assessment conference" described in the chapter dealing with marriage breakdown. We set out again the purposes of this intervention:

(a) to ascertain whether the spouses have made appropriate arrangements respecting the care, custody and upbringing of the children during the dissolution process, and if not, to ascertain whether such arrangements can be agreed to by the spouses;

(b) to ascertain whether the appointment of legal representation for children is indicated;

(c) to ascertain whether a formal investigative report by a public authority (*e.g.* an Official Guardian or Superintendent of Child Welfare) is indicated;

(d) to ascertain whether a mandatory psychiatric or psychological assessment of the situation is indicated;

(e) to acquaint the husband and wife with the availability of persons, services and facilities in the court or the community to assist them in negotiating temporary arrangements respecting children during the dissolution process as well as permanent arrangements applicable on dissolution;

(f) to enable the court to ascertain the need for, and where necessary to order the further appearance of the husband and wife before the court or a person, service or facility designated by the court to engage in one or more sessions of mandatory negotiation respecting the children; and

(g) generally to help the husband and wife, where possible, to avoid contested temporary or permanent custody proceedings through negotiation and agreement, and otherwise to avoid bringing matters involving the children before the court for adjudication.

4.17 We invite attention to the proposal that the court should have power to order that a further assessment conference be held

when a temporary order is sought. Where children are involved, this would mean that one spouse is seeking an order, in general terms, for custody and maintenance of children during the dissolution proceedings. Conferring this power would mean that whenever a contested issue respecting children arose, the court would have the opportunity to deal on an informal or pre-trial basis with the specific problem of prospective litigation over children, and to assist the parents to avoid a formal adversary confrontation where possible.

4.18 The court should be able to obtain objective information about the family situation by having the power to order a formal investigative report of the sort now made in some provinces by provincial authorities. We do not think these should be required in every case as they now are in some provinces. Upon the adoption of our proposed new process, this would be a misuse of available resources. A universal inquiry policy is essentially a product of the present divorce law. The limitations of the conventional adversary process provide no effective source of objective information about situations that are potentially harmful to children. We have proposed that the court, through its assessment of every situation, be the agency to determine whether further investigation is required. This would free provincial authorities to concentrate on the relatively few cases where it appears that the interests of children are seriously jeopardized by the marriage breakdown. This is a matter that requires federal-provincial consultation and cooperation to coordinate policy and to ensure proper use of available resources.

4.19 A second source of information would be from independent experts. The court should be empowered to order that a mental health professional such as a psychiatrist or psychologist interview both parents, the children if necessary, and other persons as may be required, and report his or her findings to the court. The purpose would be to furnish for the court's assistance the facts and conclusions within the expert's area of professional competence that have a bearing on the issue the court must decide. The expert neither should nor would make the decision for the court, as there are other factors to be weighed besides psychological or psychiatric appraisals. But he or she should be free to state opinions, from the

point of view of a mental health professional, on what decisions are indicated. Such reports should be available to the parties and subject to cross-examination. Reports by independent experts would not be necessary in most cases, and would probably be most useful where the parents were unable to agree and adjudication was requested or pending.

4.20 A third source of information should be from the children. Whenever the court finds it appropriate, a child should have the right to have his or her views taken into account, expressing them in person, through a lawyer or through some other person acting on the direction of the court.

4.21 A lawyer representing a child should be independent of the parents. Such representation should be afforded and ordered where, in light of the rights afforded to children of divorcing parents, it appears to the court that having counsel would be in the best interests of the child. In most cases this would occur only where custody was contested, but it should be possible whenever the court finds it desirable. It would be a matter for each province to establish the best way for such legal services to be delivered. The unified Family Courts established as pilot projects by the British Columbia Royal Commission on Family and Children's Law have on staff a "family advocate" whose duties include making representations on behalf of children. Other alternatives are legal aid plans, child welfare services, public trustees, official guardians or development of new support staff concepts in future Family Courts that make independent legal representation available for children.

4.22 Where representation for a child is ordered, the child should have the standing of a party in all matters touching the rights and interests of children, including examination and cross-examination of witnesses, access to social, psychological and other resources made available through the court and the legal process to other parties, and rights of appeal. The child should also be able to be represented in negotiations between parents in matters touching his or her rights and interests.

4.23 It must be recognized that a counsel for a child would be in a somewhat ambiguous position with respect to several aspects

of the traditional solicitor-client relationship. If the child is young, the lawyer would be unable to obtain instructions, and the instructions of an older child may not necessarily be valid or well-considered. Normally a parent instructs a lawyer acting for a child, but this is not possible where a marriage is being dissolved.

4.24 We propose that a counsel for a child have a statutory duty to act in what he or she considers to be the best interests of the child, according to the considerations established by Parliament. Counsel should have a statutory duty to consider the wishes of the child (according to the criteria set out below), and any reports, information or evaluations available to the court and other parties relevant to the child's rights or interests. As a formal matter, the lawyer's duty would be to the child; as a practical matter, however, this proposal relies ultimately on the lawyer's judgment, not that of the child. The court would have the power not only to appoint but to discharge counsel- something that should ensure a standard of performance that is equal to or higher than what is expected of counsel in other situations.

4.25 The matter of the views of the child is not free from difficulty. The child may be too young to form an opinion as to his or her future, or his opinion may not be reliable. Where, however, the wishes of the child can be elicited in circumstances that indicate reliability, without causing psychological damage to the child or damaging relationships with his or her parents, they should be sought. This can be done in several ways: through the legal representative of the child, through reports by provincial authorities, through the findings of a mental health professional or by the judge in chambers. Parliament should therefore provide a statutory direction to the courts that the wishes of a child should be taken into account to the extent the court considers appropriate, having regard to the age and maturity of the child.

4.26 Negotiation between parents under the new process could be done as it is now—by themselves or through lawyers. Parliament should, however, provide for court or court-approved persons who would assist parents to work out consensual temporary and permanent arrangements respecting children. Where available, such a service should be provided to all parents on a voluntary

basis. In addition, the court should have power, in cases where it finds it appropriate, to order parents to attend one or more sessions of mandatory negotiation. We believe it is important for the dissolution process to provide a place for trained personnel who would sit down with the parents and assist them in identifying and resolving, through negotiation, the issues that the breakdown of their marriage raises in regard to their children. We envisage in this role a suitably trained person who would explore questions of custody, care, upbringing, access and maintenance with the parents to help them understand what the law requires of them, to discover where they can agree, and to assist them to deal honestly with themselves and each other on the issue of what is best for their children. Ideally, this would be a support service of the unified Family Court. Until such courts come into existence, community based facilities will have to be employed. It is appropriate, however, for Parliament to include this in the new process in any event, so that all courts that have access to such services will be able to integrate them into their procedure for dealing with children.

4.27 Where an agreement has been successfully negotiated between parents concerning matters of custody, care, upbringing, access and maintenance, the court should have power to require that it be submitted for review and approval. In every case the court would have a basic profile of the family situation resulting from the assessment conference to help it determine whether formal review of the arrangements made by the parents is necessary or desirable. There may also be information indicating a need for review contained in an investigation concluded by the public authorities. In some cases the court would also have additional data provided by counsel for a child, by experts, or both. We propose that the court have power, where it appears necessary to evaluate the agreement properly, to order such inquiries by the public authority or such other person as the court may designate. Where there is a unified Family Court, such investigative functions could be part of the duties of the support staff.

4.28 Where the court is unable to approve the agreement of the parties, it should return it to them indicating areas where clarification or alteration appears necessary. If an agreement

satisfactory to the court cannot be made within the time allotted under the dissolution process, the matter can be taken to adjudication by either parent.

4.29 All dispositions respecting the custody, care and upbringing of and access to children should be made according to their best interests based on their welfare and emotional well-being. In determining what is in the best interests of a child, the court should consider the social, psychological and economic needs of the child and should take into account the following factors:

(a) the kind of relationships the child has with the persons to whom custody, care and upbringing might be entrusted, and any other persons, such as brothers and sisters, who have a close connection with the question of the child's custody, care and upbringing;

(b) the personality and character of the child and his or her emotional and physical needs;

(c) the capacity to be parents of persons to whom the custody, care and upbringing of the child might be entrusted, the kind of home environment they would provide for the child, and the kind of plans they have for the child's future; and

(d) the preference of the child to the extent that the court considers it appropriate having regard to the age and maturity of the child,

(e) the financial resources and needs of each of the parents.

4.30 Although the *Divorce Act* speaks of "custody, care and upbringing" (thus indicating that "custody" is not necessarily the same as "care and upbringing"), it is a matter of common practice for parents, lawyers and judges alike to deal with these things together. Placing a child in the home of one parent or the other for care and upbringing is usually a necessary consequence of the fact that husbands and wives stop living together when their marriage ends. However, terminating the participation by both parents in many long-range aspects of their childrens' lives (as opposed to day-to-day decisions) is not.

4.31 A determination that one parent shall have not only "care and upbringing" of a child but also "custody" in the broad

sense of the *Divorce Act* severs many legal relationships and responsibilities that exist between the child and the other parent. In some cases the poor state of the interspousal relationship may make this desirable, since husbands and wives can act out their hostilities by refusing to be reasonable or cooperative with respect to matters affecting their children. Yet in many other cases this does not happen. In the latter circumstances, the almost invariable practice of granting custody in its broad legal sense to the parent who is responsible for a child's care and upbringing poses an unnecessary threat to both parents while conferring no particular benefit on their children. This creates a psychological hazard that contributes to some of the extraordinary bitterness in some custody cases. We therefore propose that Parliament provide that the court may, in cases where it finds it proper to do so, order that any of the powers granted by law to parents as joint legal custodians of a child continue to be exercised by either parent.

4.32 Access to a child should be an intrinsic aspect of arrangements or dispositions made for the child's custody, care and upbringing. The purpose of access is to recognize a child's interest in a continuing relationship with each parent. The extent to which a child sees the parent who is not responsible for his or her care and upbringing is something to be worked out according to the same criteria we propose with respect to other matters that must be determined according to the best interests of the child.

4.33 It would be desirable for Parliament to satisfactorily define the factors that the court should consider with respect to maintenance of a child. These factors should be:

(a) the financial and educational needs of the child;
(b) the physical and emotional condition of the child;
(c) the upbringing and standard of living the child would have enjoyed had the marriage not been dissolved;
(d) the income, earning capacity, property and other financial resources of the child; and
(e) the financial resources and needs of each of the parents.

As under the present law, parents would continue to have a mutual obligation towards the maintenance of their children. This obli-

gation should be apportioned between the parents according to their relative abilities to contribute, in light of the financial resources and needs of each.

4.34 The *Divorce Act* provides that the court has no power to order maintenance or custody with respect to a child who is 16 or older unless the child is in the "charge" of the parents and "unable, by reason of illness, disability or other cause to withdraw himself from their charge or to provide himself with the necessaries of life". We suggest that the power of the court to deal with both custody and maintenance be extended upwards in all cases, without reference to the child's ability to withdraw himself or herself from parental charge.

4.35 In many cases there will be no need for dealing with the custody of older minors, but the courts should have the ability to do so in appropriate cases. We suggest that the lowest of the provincial ages of majority should be chosen as the upper limit for custody—18 years. There is no social justification for empowering a court to make a custody order respecting a person who had attained majority under the law of the province where he or she resided, and little to be gained by making custodial arrangements for persons over 18 years in any event, even though they remain for a short while, as minors.

4.36 We propose shifting the basic upper limit for maintenance for a child from 16 to 18 years. Most children are not emancipated and self-supporting by their 16th year, and are usually in the middle of a high school education. The fact that a child of 16 or over is continuing his or her full-time education is often recognized by courts as bringing the child within the extended meaning of "child" in the *Divorce Act* and therefore eligible for maintenance after age 16. We believe it would be appropriate to prescribe the age at which most children finish high school as the age to which parents whose marriage has been dissolved normally ought to be expected to maintain their children.

4.37 We recommend extending the provisions for maintenance (as opposed to custody) beyond the age of 18 years in several specific instances. At present, by a slight straining of the language

in the *Divorce Act*, courts will sometimes classify a young person continuing in university or vocational training as being unable to withdraw from his parents charge, and therefore as a "child" who is eligible for maintenance even though he or she may be many years past age 16. This should be provided for directly. We propose that the court should have power to order maintenance for a child for a reasonable period beyond the age of 18, in order to ensure that the child receives the education or training he or she might reasonably have expected to receive if the marriage had not been dissolved. This should be coupled with the power to impose terms and conditions on the child to ensure that the financial assistance is employed for the intended purpose.

4.38 We also suggest that a child remain eligible for court-ordered parental support beyond age 18 for reasons of his or her illness or disability. At present, responsibility for most disabled persons over 18 years has been assumed by the state—a policy that is both humane and proper. We do not propose that this be altered in any way. We suggest, however, that there may be circumstances where a disabled or sick young person would not be eligible for assistance under a federal or provincial program and whose reliance upon parental support may be jeopardized by the dissolution of the marriage. It would therefore be desirable for federal law to provide for the possibility of extended parental support, as the *Divorce Act* now does, while placing on the court the obligation in each instance to decide whether this would be appropriate in view of the eligibility and need of the child for maintenance from public sources.

4.39 We propose that Parliament endorse through legislation the principle that one parent is not to be preferred as the custodial parent on the basis of sex. Custody of a child is entrusted to a particular individual and not to a representative of popular conceptions about what a man or a woman is supposed to be capable of doing or ought to do. Sexual stereotypes are irrelevant in determining the individual capacity of a parent to love, care for and raise a child.

4.40 Occasionally a court will grant custody of the children of divorcing spouses to a third party. The *Divorce Act* makes no

provision for this. This raises the serious question of whether the fact of dissolution of marriage, and nothing more, should in every case automatically expose parents and children to the possibility of custody being given to a third party. We view with some antipathy the idea that dissolution of marriage *per se* should be the circumstance that singles out parents to account for and justify the continuation of their relationship with their children, or that the end of the marriage should set the question of parental versus non-parental custody completely at large.

4.41 At the same time, it is obvious that there will be some situations where a consideration of the best interests of children will make it absolutely clear that they would be better off in the custody of someone other than their parents. We do not believe it would be proper for Parliament to create any presumption in favour of natural parents as custodians because this would tend to operate against the interests of the children in those few cases where third parties ought to have custody. On the other hand, we do not agree with the view that every time a marriage is dissolved, parents ought to stand in the same position vis-à-vis their children as any other persons who seek to intervene in the custody issue. We suggest that the appropriate way to deal with this matter would be to provide for a finding by the court, acting on its own motion or at the behest of any person on the basis of information that it considers to be reliable, that the best interests of a child appear to require that persons other than the husband and wife whose marriage is being dissolved be considered as custodians. Where such a finding is made, the other persons should be added as parties to the proceedings.

4.42 Under the present law, the final determination on custody is made by the court at the same time as the decision on the divorce petition. This may be some months or years after the parents have separated. Between separation and the hearing, a child may have been living with one of the parents as a result of an interim custody order—a temporary arrangement made by the court, for the sake of ensuring that the child is cared for until the hearing. It is also possible for the parents to have worked out a temporary or *de facto* arrangement without there having been an

interim order. Where there is a custody dispute, interim or *de facto* arrangements often have a significant effect on the final outcome. Because the courts are understandably reluctant to unduly disturb the environment of a child after the failure of the parents' marriage, the temporary arrangement tends to be seen as something that it is in the child's best interest not to change.

4.43 Several of our proposals will affect this situation. Many persons leave their spouses because the law places them at a disadvantage if they do not. Where one spouse has committed adultery, the other runs the risk of being taken to have "condoned the offence" and of losing his or her grounds for divorce by staying and trying to work things out. The marriage breakdown ground, as we have pointed out, generally requires separation for three to five years. In either case, the children are likely to get settled in with one parent or the other. By eliminating fault grounds and the requirement that people separate in order to establish marriage breakdown, the number of situations in which ultimate custody dispositions are significantly influenced by temporary arrangements will be reduced.

4.44 Parents will still separate for other reasons. Where this happens the most the law can do is to try to minimize as much as possible the effect that the dissolution process has on the custodial opportunities of the parent who does not have interim or *de facto* custody. First, the procedures employed to assist the spouses to agree on arrangements respecting children should be given first priority in the dissolution process. Second, Parliament should specify that the detailed criteria we have proposed to guide the courts in custody determinations should apply in temporary custody matters so that it is clear that what is intended is a full hearing on the merits. This would shift the emphasis away from the order that, under the present Act, is made at the time of divorce, to the point in the process where the legal decision on custody is, for practical purposes, now most often made. Parents would still be able to negotiate with respect to final arrangements, as they now can, and either should be able to obtain a final adjudication on custody which may have a different result from the temporary custody determination. If, however, the temporary order con-

tinues to have the same influence on the final order as an interim order under the *Divorce Act*—something we view as inevitable—then the law should do all it can to ensure that the temporary arrangements represent the best interests of the child as they appeared before being influenced by a prolonged period of residence with only one parent.

4.45. The question of which children are covered by the *Divorce Act*'s definition of a "child" and "children of the marriage" raises no problems in the great majority of cases. Most divorces involve children born of the marriage. The peripheral cases raise some complex theoretical issues, many of which have not come before the courts for solution. The main difficulties appear to be:

(a) the scope of the phrase "*in loco parentis*";
(b) the position of adopted children;
(c) the position of children of the spouses born prior to the marriage; and
(d) the position of step-parents.

We will not go into technical details on all the actual and potential problems that the present definition raises in these and other areas. It is sufficient to note that there are plenty of them.

4.46 We propose that "child" should include:

(a) a child of the husband and wife born during the marriage;
(b) a child of the husband and wife born before the marriage, whether or not the child was legitimated by the parents' marriage;
(c) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other; and
(d) any child not covered by these specific categories who has been accepted and treated by the spouses as a child of their family.

The definition of "child" should exclude children who have been placed with parents, to provide a foster home, by a governmental or private agency.

4.47 The fourth category listed above—other children treated as members of the family—is a matter of social, not legal relationships. Such children might be:

(a) a child of a spouse by a former marriage that ended in divorce;
(b) a child of a spouse by a former marriage that ended in the death of the other parent;
(c) a child adopted by a spouse before the marriage;
(d) a child born to one spouse and a third party during the marriage; and
(e) a child of another couple taken in and raised by the spouses as their own.

Various legal relationships between these children and third parties exist, such as rights of support in some cases against natural parents and rights of inheritance in others. A third party may have a right to claim custody of a child that has been raised by the divorcing spouses. Almost all possible circumstances giving rise to legal relationships between a child in this category and a parent who is not one of the divorcing spouses arise under provincial law, and some constitutional questions are presented. In the case, for example, of a child of another couple taken in on an informal basis and raised by the divorcing spouses, it is not clear whether federal law can confer jurisdiction to deal with the custody of the child—at least in the sense of the broad powers that a parent has against any other person. Such a child is already in the joint *legal* custody of the natural parents under provincial law, regardless of the fact that care and upbringing has been by the divorcing spouses. Assuming that the question is resolved in favour of federal jurisdiction, if custody of such a child is granted to one of the divorcing spouses, it is not clear whether this would be custody only as against the other spouse, or whether this would also extinguish the custodial powers of the natural parents. The combinations are numerous and the complexities endless.

4.48 Another related problem when a child in this category is involved in a dissolution case is whether it is right for a court to look to one of the divorcing spouses as the source of maintenance for such a child. If a man marries a woman with a child by a former marriage, acts as a parent to the child and supports it during the

marriage, the matter is not free from difficulty if the marriage ends and it is asked why what may have been an act of kindness should turn into a legal obligation until the child is grown.

4.49 To a child, however, the existence or non-existence of these legal relationships, constitutional problems and abstract and unanswerable moral speculations are all meaningless. The issues they pose admittedly all exist for good reasons, but not much of the learning on federal-provincial powers or legal rights and obligations of parents versus step-parents concerns itself with the welfare and happiness of children. We therefore suggest that decisions under federal law respecting the custody, care and upbringing of children in this fourth category should be expressly stated by Parliament to be limited in application to a determination of rights and obligations between the parties whose marriage is being dissolved. This would deal with the needs of children flowing from the marriage breakdown without purporting to be the same as or to replace custodial rights granted under provincial law to the natural parents of such children. We further propose that either spouse should be able to join as a party to a maintenance adjudication any other person who is in a relationship with the child that involves a maintenance obligation, and that the court should have power to apportion the maintenance obligation to the child among the parties where it finds this to be in the best interests of the child.

Recommendations

The Commission recommends:

1. Children should have two fundamental rights when their parents' marriage ends:

(a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and

(b) the right to economic support.

2. Where children are concerned, the process for dissolution of marriage should have the following major features:

(a) sources of information and expert advice available to the court in addition to evidence from the parties;

(b) assistance and support for the parents in their search for consensual solutions;

(c) review by the court of parental agreements respecting children, with power to disapprove where statutory criteria are not met;

(d) adjudication by the court where parental agreement cannot be reached; and

(e) legal representation for children.

3. Whenever children over whom the court has jurisdiction in dissolution proceedings are involved, the law should require that there be an immediate informal meeting of the parties—an "assessment conference"—before the court, a court officer, a support staff person or a community-based service or facility designated by the court, for the following purposes:

(a) to ascertain whether the spouses have made appropriate arrangements respecting the care, custody and upbringing of the children during the dissolution process, and if not, to ascertain whether such arrangements can be agreed to by the spouses;

(b) to ascertain whether the appointment of legal representation for children is indicated;

(c) to ascertain whether a formal investigative report by a public authority (*e.g.* an Official Guardian or Superintendent of Child Welfare) is indicated;

(d) to ascertain whether a mandatory psychiatric or psychological assessment of the situation is indicated;

(e) to acquaint the husband and wife with the availability of persons, services and facilities in the court or the community to assist them in negotiating temporary arrangements respecting children during the dissolution process as well as permanent arrangements applicable on dissolution;

(f) to enable the court to ascertain the need for, and where necessary to order the further appearance of the husband and wife before the court or a person, service or facility designated by

the court to engage in one or more sessions of mandatory negotiation respecting the children; and

(g) generally to help the husband and wife, where possible, to avoid contested temporary or permanent custody proceedings through negotiation and agreement, and otherwise to avoid bringing matters involving the children before the court for adjudication.

4. Formal investigative reports by a public authority (*e.g.* an Official Guardian or Superintendent of Child Welfare) should not be required in every case; whether such a report is necessary should be determined by the court.

5. The court should have power to order that a mental health professional such as a psychiatrist or psychologist interview each of the parents, the children if necessary, and other persons as may be required, and report his or her findings to the court.

6. The court should have power to order legal representation for a child, independent of the legal representation of either parent.

7. Where representation for a child is ordered, the child should have the standing of a party in all matters touching the rights and interests of children, including examination and cross-examination of witnesses, access to social, psychological and other resources made available through the court and the legal process to other parties, and rights of appeal; the child should also be able to be represented in negotiations between parents in matters touching his or her rights and interests.

8. Parliament should provide that the wishes of a child should be taken into account to the extent the court considers appropriate, having regard to the age and maturity of the child.

9. The process for dissolution of marriage should include court or court-approved persons who would assist parents to work out consensual temporary and permanent arrangements respecting children, available to all parents on a voluntary basis, with power in the court where it finds it appropriate to order parents to attend one or more sessions of mandatory negotiation.

10. Where an agreement has been successfully negotiated between parents concerning matters of custody, care, upbringing,

access and maintenance, the court should have power to require that it be submitted for review and approval.

11. Where it appears necessary to evaluate the agreement properly, the court should have power to order inquiries by the public authority or such other person as the court may designate.

12. Where the court is unable to approve the agreement of the parties, it should return it to them indicating areas where changes appear necessary.

13. All dispositions respecting the custody, care and upbringing of and access to children should be made according to their best interests based on their welfare and emotional well-being. In determining what is in the best interests of a child, the court should consider the social, psychological and economic needs of the child and should take into account the following factors:

(a) the kind of relationships the child has with the persons to whom custody, care and upbringing might be entrusted, and any other persons, such as brothers and sisters, who have a close connection with the question of the child's custody, care and upbringing;

(b) the personality and character of the child and his or her emotional and physical needs;

(c) the capacity to be parents of persons to whom the custody, care and upbringing of the child might be entrusted, the kind of home environment they would provide for the child, and the kind of plans they have for the child's future; and

(d) the preference of the child to the extent that the court considers it appropriate having regard to the age and maturity of the child.

14. The court should have power, in cases where it finds it proper to do so, to order that any of the legal powers of parents as joint legal custodians of a child continue to be exercised by either parent.

15. Parliament should define the factors that the court should consider with respect to maintenance of a child, as follows:

(a) the financial and educational needs of the child;

(b) the physical and emotional condition of the child;

(c) the upbringing and standard of living that the child would have enjoyed had the marriage not been dissolved;

(d) the income, earning capacity, property and other financial resources of the child; and

(e) the financial resources and needs of each of the parents.

16. Parents should continue to have a mutual financial obligation towards the maintenance of their children, apportioned according to their relative abilities to contribute, in light of the financial resources and needs of each.

17. The court should have power to make a custody order for a child up to the age of 18 years.

18. The court should have power to make a maintenance order for a child up to the age of 18 years.

19. The court should have power to make a maintenance order for a child beyond the age of 18 years in order to ensure that the child receives the education or training he or she might reasonably have expected to receive if the marriage had not been dissolved. Where this is done the court should have power to impose terms and conditions on the child to ensure that the financial assistance is employed for its intended purpose.

20. The court should have power to make a maintenance order for a child beyond the age of 18 years where the child is ill or disabled and dependent on parental support, and this support is jeopardized by the dissolution of the marriage.

21. Parliament should endorse through legislation the principle that no person is to be preferred as the custodial parent on the basis of sex.

22. A third party should not be considered as a custodian unless the court, acting on its own motion or at the behest of any person, on the basis of information that it considers reliable, makes a finding that the best interests of a child appear to require that a person other than the husband or wife whose marriage is being dissolved be considered as a custodian. Where such a finding is made, the other person should be added as a party to the proceedings.

23. Procedures employed to assist spouses to agree on arrangements respecting children should be given first priority in the dissolution process.

24. A temporary custody hearing should be a full hearing on the merits, based on the detailed criteria proposed to guide the courts in determining the best interests of a child.

25. The court should have power to make custody and maintenance orders respecting:

(a) a child of the husband and wife born during the marriage;

(b) a child of the husband and wife born before the marriage, whether or not the child was legitimated by the marriage of his or her parents;

(c) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other; and

(d) any child not covered by these specific categories who has been accepted and treated by the spouses as a child of their family;

but not with respect to children who have been placed with the spouses, to provide a foster home, by a governmental or private agency.

26. With respect to a child who has been accepted and treated as a child of the family (category (d) in the previous recommendation):

(a) the effect of orders as to their custody, care and upbringing should be expressly stated to be limited in application to a determination of rights and obligations between the parties whose marriage is being dissolved; and

(b) either spouse should be able to join any other person as a party to a maintenance adjudication involving such a child if such person is in a relationship with the child that involves a maintenance obligation, and the court should have power to apportion the maintenance obligation among the parties where it finds this to be in the best interests of the child.

5. Conclusions

5.1 There are several matters we did not touch upon in this report. The *Divorce Act* is a complex instrument and many of its detailed provisions require modification or adjustment. We have conducted studies on most of these aspects of the Act and trust that they will be of assistance to those who will be developing new family law legislation and implementing new policies. We are certain, however, that this report says quite enough without going into a comprehensive analysis of all possible changes. This is intentional. The function of a law reform commission is not to kill alligators, so to speak, as much as it is to drain the swamp. We have, accordingly, presented a proposal for fundamental reform. This report is intended to furnish some clear choices on basic policy objectives in family law, to articulate the values inherent in the choices, and to say why we believe one course of action is preferable to another. Once the premises for legislative reform have been determined, most of the detail will fall into place.

5.2 One exception must be noted, however. We refer to enforcement of maintenance obligations. Although not dealt with in this report, this is something of basic concern, not "detail". Making significant improvements in the present situation cannot be accomplished by an immediate federal legislative program. The present inability of the law to have its orders carried out is simply the external or visible manifestation of the failure of the present legal policy of the family. Reform of the enforcement aspect must

begin with changes in the concept in family law, such as revision of the basis for support obligations and eligibility for support, and changes in structure, such as the creation of unified Family Courts. Until there is a rational underlying policy for family law, and until there are proper tools to implement that policy, successful enforcement of maintenance obligations will continue to elude our grasp, defeated by hundreds of thousands of individual decisions not to cooperate with even the sternest enforcement measures. We have published a study paper on enforcement in which these themes are more thoroughly canvassed. Within the present legal and institutional context of family law, however, most specific prescriptions for enforcing maintenance obligations would simply be proposals for new ways to achieve failure.

5.3 It is necessary to say directly something that is implicit in all the work we and our provincial counterparts have done in family law. Federal-provincial cooperation on a major scale is essential if the Canadian family is to benefit fully from the reform of family law. Initial and continuing intergovernmental coordination on both the concepts and details of family law reform is the only path that will lead to the goals sought by all who are concerned with this subject.

5.4 Finally we would like to re-emphasize that the family is the basic unit in society whatever its structure may be. Changes in that structure and stress resulting from such changes are bound to continue. It is important that the Provincial and Federal Governments take concerted action to create both new legal institutions and a new basic philosophy of family law to ensure an appropriate response to the significant legal and social problems in this area that lie ahead.

Appendix

A. Contributions

A great number of people and organizations have made an input into this report. An analysis of written presentations and responses has been completed by the Commission and seriously weighed in coming to conclusions in this report. There were also, however, innumerable discussions and meetings on our Working Papers, and organizations such as The Vanier Institute of the Family, The National Action Committee for the Ontario Status of Women, The National Council of Women and the Anglican Church of Canada. Government departments, in particular the Department of Justice, the Department of Health and Welfare, and Statistics Canada have given a great deal of assistance and cooperation.

The Commission gratefully acknowledges all these contributions. We would also like to thank former Members of the Commission and our dedicated staff under the outstanding leadership of the Director of the Family Law Project, Professor Julien Payne.

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B. Publications

The report is based on numerous internal and external documents filed in the Archives of the Commission and indicated in our Annual Reports. The following are those that have been published and are available through Information Canada.

Working Papers:

The Family Court (No. 1-1974)

Family Property (No. 8-1975)

Maintenance on Divorce (No. 12-1975)

Divorce (No. 13-1975)

Background Volumes:

Studies on Family Property Law (1974)

Studies on Divorce (1976)