

**RECENT FAMILY LAW DEVELOPMENTS
IN MANITOBA***
Freda M. Steel**

I. Introduction

The law with respect to the family is a continually developing area. It is changing constantly and often radically in an attempt to meet changing social mores and conditions. Domestic practitioners must relearn their law every few years and must be prepared for the increasingly complex nature of that law.

The last year, and especially the last few months, have seen a veritable deluge of family law legislation in Manitoba. The Carr Report on the state of family law in Manitoba, which was prepared for the provincial government in May, 1982, recommended seventy-seven changes to Manitoba's existing family law. A number of submissions were received in response to the Carr Report and these submissions, along with the Report, were analyzed by the Attorney General's Department. The result was four major bills introduced in the 1983 Spring Session of the Legislature¹ and a variety of complementary and subsidiary statutory amendments.²

The purpose of this article is to acquaint the practitioner with the recent major developments in family law in Manitoba. The selection of its contents is based on a subjective decision and, at times, the word 'recent' has received a rather elastic interpretation. The developments have been categorized into four areas.³ The first category, which focuses on Courts, deals with the

* This article deals primarily with some recent legislative amendments. It is a companion piece to a paper entitled "Recent Developments in Family Law — Caselaw Developments" which was presented at Hecla Island Residential Seminar, May 19, 1983 sponsored by the Manitoba Bar Association and the Law Society of Manitoba (Legal Studies Office). I would especially like to thank Robyn Moglove Diamond, Head of the Family Law Section of the Manitoba Attorney-General's Department for the assistance provided me in conversation with her and by her papers, "Recent Developments in Legislation Relating to Family Law" presented at the Hecla Island Residential Seminar, 19 May, 1983 and the Provincial Judges Seminar, 12 September, 1983.

** Associate Dean, Faculty of Law, University of Manitoba.

1. *An Act to Amend The Marital Property Act*, S.M. 1982-83, c.53; *An Act to Amend The Family Maintenance Act*, S.M. 1982-83, c.54; *An Act to Amend The Child Welfare Act*, S.M. 1982-83, c.55; *An Act to Amend The Court of Queen's Bench Act*, S.M. 1982-83, c.81.

2. *The Change of Name Act*, S.M. 1982-83, c.56; *The Marriage Act*, S.M. 1982-83, c. 57; *The Vital Statistics Act*, S.M. 1982-83, c.57; *An Act to Amend The Child Custody Enforcement Act*, S.M. 1982-83, c.59; *The Domicile and Habitual Residence Act*, S.M. 1982-83, c.80; *An Act to Amend The Child Welfare Act (2)*, S.M. 1982-83, c.90; *The Reciprocal Enforcement of Maintenance Orders Act*, S.M. 1982, c.12.

Most of the above Acts have been proclaimed on October 1, 1983.

The Change of Name Act, *The Marriage Act*, and *The Vital Statistics Act* will probably come into effect on November 1, 1983. *An Act to Amend The Pension Benefits Act*, S.M. 1982-83, c.79 will become effective in two phases — January 1, 1984 and January 1, 1985.

3. Two important developments which continue the effort of repealing and amending anachronistic relics of the past and which will not be dealt with in this article are the *Domicile and Habitual Residence Act*, *ibid.* and *The Equality of Status Act*, S.M. 1982, c.10.

The Domicile and Habitual Residence Act abolishes the common law rules respecting domicile and provides for rules to determine a person's domicile and habitual residence. The law is simplified by presuming that a person's domicile and habitual residence is where that person's principal home is situated and where he or she intends to reside. A married woman can now acquire a domicile that is independent of her husband. Children generally take the domicile and habitual residence of the parent with whom the child normally resides.

The Equality of Status Act, which was passed in 1982, abolished certain common law and statutory actions relating to the relationships between husband and wife, parent and child, and master and servant.

Section 2 of the Act abolishes the rights that a spouse had at common law to bring certain actions for monetary damages where there had been an intentional interference with the relationship between a husband and a wife. The causes of action that were abolished are commonly grouped together under the heading of "actions for alienation of affection." The Section provides that no action shall be brought:

(a) for criminal conversation;
(b) for enticement or harbouring of a spouse; or
(c) for loss of consortium of a spouse, or for damages arising therefrom.

The Act also abolishes the right to bring an action for damages arising from adultery, or an action for restitution of conjugal rights.

Section 3 abolishes the common law right of a parent to bring an action for damages for the enticement or harbouring of a child, for seduction of a child or for the loss of service of a child. This provision also abolishes the common law right of a master or employer to bring an action for damages for the seduction or loss of service of a servant or employee. See Robyn Moglove Diamond, "Recent Developments in Legislation Relating to Family Law", Hecla Island Residential Seminar, 19 May, 1983, 12-13.

long-awaited establishment of a unified family court in Manitoba. The second category deals with the *Marital Property Act*⁴ and, in particular, the way in which pensions have been dealt with by the Manitoba courts. The third category deals with maintenance and the expansion of rights of and obligations to individuals living in a non-marital cohabitation situation. The fourth area will examine the abolition of the concept of illegitimacy and the action of filiation in Manitoba and the child status provisions which have replaced them.

The article attempts to paint a large picture and such a canvas necessitates that the picture be painted with broad strokes. The fine detailing will appear at a later date as the courts and counsel grapple with the new law.

II. Courts

A. Unified Family Court in Manitoba

There have been fundamental and extensive changes in the substantive area of family law in Canada, in the last fifteen years. However, these substantive changes have not been followed by equally fundamental procedural changes. Substantive reform of family law is useless if the procedure is inefficient, time-consuming or prohibitively expensive. In order to function effectively, the judicial process must provide accessible and immediate relief to families in conflict. Thus, it is appropriate that the recent reforms in Manitoba focus on the process and procedure of family conflict resolution.

The most commonly suggested procedural reform has been the creation of a unified family court.⁵ Recommendations for its establishment have been made for more than ten years. In 1974, the Law Reform Commission of Canada published a working paper proposing a unified family court structure with comprehensive jurisdiction over all family matters.⁶ The decision of the Commission to study this area was prompted by the response of the public to a questionnaire respecting the potential ambit of the Commission's research programmes. The questionnaire results indicated the public's serious concern with the administration of justice in family law matters.

As the various studies and working papers concluded, that public concern is well-founded. In Manitoba, three courts may be responsible for adjudicating issues affecting members of the same family. This overlapping and fragmented jurisdiction leads to several undesirable consequences. One obvious result of overlapping jurisdiction is increased 'forum-shopping.'

4. S.M. 1978, c.24 (M45).

5. See, e.g., Maureen Adamache, "All Together Now: The Unified Family Court Project" (1979), Vol. 13, No. 2 *The Advocate* 27; Claire L'Hereux-Dube, "Family Law in Transition" in *Family Law Dimensions of Justice* (1983); The British Columbia Unified Family Court Pilot Project 1974-1977, Description and Evaluation by Bergen Amren & Flora Macleod; Law Reform Commission of Canada, *Working Paper No. 1, The Family Court*, (January, 1974); Lee K. Ferrier, "Working Paper 1. The Family Court" (1975), 7 *Ottawa L. Rev.* 247; The University of Alberta Institute of Law Research and Reform, *Report No. 25 — The Unified Family Court*, (1978); Ontario Law Reform Commission, "Part V, Family Courts," Report on Family Law, Eighth Annual Report, (1974); Civil Code Revision Office, *Report XXVII — Report on the Family Court*, (1975); John A. MacDonald, "Family Court Reform in British Columbia" (1975), 18 *R.F.L.* 201.

6. Law Reform Commission of Canada, *Working Paper No. 1, The Family Court*, (January, 1974), esp. at 7, 8, and 90.

Lawyers initiate proceedings in a court whose philosophy in family law matters is perceived to be more appropriate to their particular fact situation. It is undesirable and inequitable that the adjudication of family law matters vary, or be perceived to vary, depending upon the court in which proceedings are commenced.

Fragmentation of jurisdiction frequently precludes any one court from considering and resolving the family problems as a whole. These difficulties are compounded by the differences in approach of the various courts administering family law. In addition, the splitting of family law jurisdiction results in a duplication of efforts by judges, lawyers and other court personnel. It leads to increased costs both to the litigants and the court system. The time delays necessitated by fragmented jurisdiction increase the uncertainty and emotional conflict of family disputes.

Thus it is apparent that the present multi-court system is inefficient, costly, time-consuming and inequitable. Further, it encourages distrust of the legal process as a means of solving family problems. While proposals for the exact nature of a unified court vary, it no longer can be a subject of debate that the development of a unified family court is a welcome experiment.

Presently, five provinces have functioning unified family courts, either as pilot projects or as permanent structures.⁷ British Columbia has a variation of the theme of a unified family court.⁸ Manitoba had some stillborn attempts to establish a unified family court. For example, in 1976 the Manitoba Legislature amended the *Queen's Bench Act*⁹ by including an amendment that would have set up a pilot project in St. Boniface. Plans were to create the "St. Boniface Family Law Division of the Manitoba Court of Queen's Bench", but the amendment was never proclaimed in force.¹⁰

It is generally agreed that a unified family court has two outstanding features. It must have comprehensive jurisdiction over all legal issues directly arising from the formation or dissolution of the family. Of equal importance is the presence of auxiliary social services available to the court in the exercise of its judicial function and also to litigants having recourse to the judicial process.¹¹

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7. See: *Judicature Act*, R.S.N.B. 1973, c.J.2, ss.2(4), 11-11.6 as am. by S.N.B. 1978, c.32, ss.2, 9; S.N.B. 1979, c.36, ss.3, 9; S.N.B. 1980, c.28, ss.3, 8; S.N.B. 1981, c.36, ss.2, 7, 9; *The Unified Family Court Act*, S. Nfld. 1977, c.88 as am. by S. Nfld. 1978, c.35, s.24(1); S. Nfld. 1979, c. 14; *Unified Family Court Act*, R.S.O. 1980, c.515; *Judicature Act*, R.S.P.E.I. 1974, c.J-3, s.16.2, as added by S.P.E.I. 1975, c.27 as am. by S.P.E.I. 1978, c.6, s.67(1); S.P.E.I. 1981, c. 12, s.53(3); *The Unified Family Court Act*, S.S. 1978, c.41, as am. by S. S. 1979-80, c.92; S.S. 1980-81, c.90.
 8. *Unified Family Court Act*, S.B.C. 1974, c.99. The scheme consisted of housing a Provincial Court with its summary family law jurisdiction in the same building as a County Court presided over by a County Court Judge who was also a local Justice of the British Columbia Supreme Court and who could therefore deal in all the matrimonial causes, matters within the exclusive jurisdiction of the Supreme Court. This was not an attempt to consolidate all family law powers under one tribunal, but a mere residential readjustment of two different courts under one roof.
 9. R.S.M. 1970, c. C280.
 10. S.M. 1976, c.73.
 11. Julien Payne, "A Conceptual Analysis of Unified Family Courts: A Canadian Perspective" (1982), 20 Conciliation Courts Review 52, at 56; And see also Hon. Rosalie Silberman-Abella, "Procedural Aspects of Managements for Children upon Divorce in Canada" (1983), 61 Can. Bar Rev. 443, at 467.

The Manitoba Unified Family Court fulfills the first necessary component of a unified family court in that it will have comprehensive jurisdiction over all family disputes and particularly, over "every application to the court for an order, judgment or declaration respecting the family status of the parties, custody or wardship of an infant or any other similar application based on the inherent jurisdiction of the court."¹²

There has been much discussion as to the level at which such a court should be established.¹³ In Manitoba, the decision has been made to establish the court at the superior court level. The legislation establishes a new Family Division of the Court of Queen's Bench for the Province of Manitoba.¹⁴ It provides for the appointment of an Associate Chief Justice and five puisne judges. All judges of the Family Division will have the rights, powers and privileges of judges of a superior court.¹⁵

The decision to establish a family court of comprehensive jurisdiction at the superior court level was dictated by a number of factors. One of the major hurdles to an efficient judicial system for resolving family law disputes has been *The Constitution Act, 1867*.¹⁶ The Constitution presents two problems. First, the division of legislative powers between the provinces and the federal government¹⁷ produces an inability of any one jurisdiction to rationalize all of the laws affecting the family and produce a coherent social policy. Second, certain matters must be dealt with by federally appointed judges,¹⁸ which, along with the split responsibility for the administration of the courts, precludes any comprehensive jurisdiction being conferred on a single court, unless that court is superior.

In addition, it has been argued that the establishment of a unified family court with the status of a superior court would signify the importance of family law in the judicial process, which too often has been treated as an unwanted step-child. The elevated status of the court should also attract well-qualified judges and promote the evolution of a practising bar with special expertise in the resolution of family disputes.¹⁹

12. *An Act to Amend the Court of Queen's Bench Act*, c.81, S.M. 1983 s.52(2). With the exception of s.1, the Act comes into effect on a day fixed by proclamation. The Attorney General's Department has indicated that the remaining provisions of the Act will probably be proclaimed by March 1, 1984. Section 1 came into effect on August 19, 1983.

13. *See, e.g., supra*, n.6, at 26 where the Law Reform Commission of Canada proposes three basic alternatives respecting the status and place of a unified family court in the judicial structure: a unified family court set up as a separate court of superior jurisdiction, or as part or division of the existing superior court; a unified family court created as a division of the existing county or district courts; or a unified family court created as a division of the existing provincial court system.

14. *Supra*, n.12.

15. *Ibid.*, s.1.

16. *Constitution Act, 1867*.

17. Marriage and divorce are under federal jurisdiction, *see, ibid.*, at s.91(26), while solemnization of marriage is a matter of provincial jurisdiction, *see, ibid.*, at s.92(12).

18. *Ibid.*, at s.96.

19. Whatever the status of the court, it is essential that the judges of a unified family court be family law specialists. Family law is an area of law qualitatively different from most others, with a high emotional content. It requires a certain knowledge of and openness toward other disciplines and a willingness to adopt more informal and less adversarial procedures than are the norm in other areas.

Family law is not only qualitatively, but also quantitatively, different than other areas. Statistics recently compiled by the Department of Justice indicate that family law cases constitute fifty-three per cent of all civil litigation matters dealt with by Canadian courts. It has become an area of law of sufficient breadth and depth to require a specialized judiciary.

The Berger Commission recommended that the judges of a unified family court devote their time exclusively to family law matters and that all judges sitting in family matters should possess both a strong interest in and special aptitude for this type of work.

The *Saskatchewan Report* (*infra*, n.24, at xx) stated, "Specialist judges are intrinsic to the family court concept and come to be seen by the Saskatoon Bar as indispensable to the operation of the Project."

Arguments have been presented in opposition to the establishment of unified family courts of superior jurisdiction. These include the prospects of unmanageable judicial case loads, the inaccessibility of courts of superior jurisdiction and the risk of entrenching existing formal and expensive procedures. However each of these problems can be rectified by appropriate rules of practice and procedure which could be devised to simplify the resolution of family disputes.²⁰ For example, the introduction of pre-trial conferences has substantially increased settlements. In the Unified Family Court in Hamilton-Wentworth, over a 10 month period in 1981, 937 separate matters were commenced. Available statistics suggest that an early pre-trial conference following the filing of a statement of defence was effective in inducing a settlement in approximately 79% of all cases.²¹ The advantage of a single court of comprehensive jurisdiction is so compelling as to weigh heavily in favour of the establishment of the court at a superior level.

The result of concentrating all jurisdiction in the Family Division is the removal of jurisdiction from the Provincial Court (Family Division). Instead, the new Act appoints every judge of the Provincial Court of Manitoba (Family Division) as an *ex officio* master and referee of the Family Division of the Court of Queen's Bench.²² The use of masters and referees in the area of family law is certainly not new. Both Ontario and British Columbia, for example, use referees or registrars for the purpose of arriving at a quantum of maintenance or valuation of assets. There are many areas of family law which require fact gathering as opposed to the exercise of discretion. For these purposes registrars prove to be very useful and, by eliminating time-consuming tasks assigned to the court, they eliminate the backlog in family disputes.

Rationalization of court structures is only one part of the programme for those who advocate a new family court. The second essential feature is adequate auxiliary support services, such as administrative, counselling, investigative and enforcement services. While a unified family court is a court of law and not a family clinic, it cannot operate in a humanistic vacuum. Adequate non-legal services must be established in the court to ensure that the human as well as the legal problems of marriage and family breakdowns can be constructively solved. These services are necessary because of the distinct character of family law, which necessitates access to non-legal specialists. Most of the established unified family courts have non-legal resources available either on the premises or by arrangements with community resources, and the legal and behavioural aspects operate in a symbiotic relationship.

20. See, Ian Baxter, "Family Litigation in Ontario" (1979), 29 U.T.L.J. 199; A.H. Lief, "Pre-Trial of Family Law in The Supreme Court of Ontario: Simplify and Expedite" (1976), 10 Law Society Gazette 300.

21. Summary of the proceedings of the December 3, 1981 Ontario Family Law Subsection Meeting Panel Discussion on the subject of the Unified Family Court. See also Michael Stevenson, Gary D. Watson and Edward Weizman, "The Impact of Pre-Trial Conferences — An Interim Report on the Ontario Pre-Trial Conference Experience" (1977), 15 O.H.L.J. 591. Family law pre-trial conferences were instituted in the Manitoba Queen's Bench as of September 1, 1982. No statistics have been compiled as to its effectiveness in inducing settlements.

22. *Supra*, n.12 s.11(12).

It is by its ability to accommodate the unique character of family law that the success of the new unified court will be measured. It is true that the legislation recognizes the necessity of a less adversarial approach to the settlement of family law disputes. It provides that where a judge or master considers that an effort should be made to resolve an issue without a formal trial, that judge may refer the matter to a conciliation officer, or to another person chosen by the parties. It is only where the conciliation officer concludes that a settlement cannot be reached by a non-legal method that he shall report to the court that the case is ready for trial.²³

The unified family courts already in operation in Canada, on the whole, have been successful. For example, a recently completed study of Saskatoon's Unified Family Court²⁴ concluded that:

the unified family court concept offers the most sophisticated attempt to date to provide a forum capable of regulating and reallocating the familial obligations following from breakdown.²⁵

One important feature of the Saskatoon Unified Family Court is its counselling service which specializes in separation counselling and counselling on the needs of children of disintegrating families. This service is confidential and is offered at no cost. In 1979, the only year for which comparable data was available, the involvement of the counselling service in contested custody cases served to defuse 72-80% of these cases before they came to trial.

It is useful to compare the Saskatoon experience with Regina, which had no such counselling service. Findings indicate the Saskatoon Unified Family Court obtained adjournments by telephone in 96.6% of cases compared with only 18.5% in Regina where no such means were available for adjournment. The Saskatoon court provided interim relief in 33.3% of cases compared to 9.1% in Regina. It took 75 days to obtain a decree nisi of divorce in Saskatoon as against 100 days in Regina; and, on average, costs awarded against parties in the Saskatoon Unified Family Court were \$281 compared with \$433 in Regina. The Court was able to reduce the expense to clients and the amount of time and money involved in judicial sittings, and also to alleviate much human suffering for families in crises. Overall satisfaction with the Unified Family Court was expressed by clients, lawyers and social agencies in Saskatoon and the Saskatoon court has been acclaimed as one of the most successful of the pilot unified family courts in Canada.²⁶

The ultimate goal of a unified family court is to provide an accessible, humane, low-cost, client-centered judicial and social means for assisting the

23. S.M. 1982-83, c.81, s.52(4) & (5). With respect to the place of conciliation and mediation in the courts generally, see Howard H. Irving and John Gandy, "Family Court Conciliation Project: An Experiment in Support Services" (1977), 25 R.F.L. 47; Conciliation project final report on the Conciliation Project, Provincial Court (Family Division), Toronto, 1980 (Ministry of the Attorney General). Howard H. Irving, Michael Benjamin, Peter E. Bohm and Grant Macdonald, "A Study of Conciliation Counselling in the Family Court of Toronto: Implications for Socio-Legal Practice" in *Family Law: An Interdisciplinary Perspective* (1981).

24. *Team Work: Saskatoon's Unified Family Court Project, 1978-1981*. This study was jointly commissioned by the Saskatchewan Departments of the Attorney General and Social Services, and the federal Ministry of Justice to implement the Law Reform Commission of Canada's proposal for a family court which would improve the range of legal options and social services offered to families in crisis.

25. *Ibid.*, at 209.

26. *Supra*, n.24.

numerous Canadians experiencing family problems. The extent to which the Manitoba Unified Family Court can achieve this goal will depend on a variety of factors such as administration, staffing, financing and operation.

What is apparent is that the establishment of a unified family court within the parameters described will be costly initially. Forms must be changed, physical buildings must be enlarged or renovated to accommodate the extra services to be provided and appropriate and qualified personnel must be hired and, in some cases, trained. This expenditure of funds should be placed in perspective.

An adequate financial foundation for the Unified Family Court is crucial, given not only the past treatment of family law, but also the importance of the area to the general public. In the words of the Ontario Law Reform Commission:

The people . . . ought to recognize clearly the great importance of solid public support, both in financial terms and otherwise, to provide a strong and well equipped family court system, backed by adequate ancillary services. Surely there is more at stake here in both the short and the long term, in human and financial values, than in many other aspects of public administration. There can be few things within the governmental sphere that touch more directly the pulse of the social health of the community.²⁷

The passage of legislation creating a unified family court is the first step and should be greeted with optimism. That optimism should be guarded until the direction and operation of the new Court becomes clear.

B. Provincial Family Court Jurisdiction

Subsection 52(10) of the new Act²⁸ indicates that the Lieutenant Governor in Council may, from time to time, designate the place or the area within which the Family Division has jurisdiction. It is intended that upon the passage of this Act, the Division will be given exclusive jurisdiction for the areas of Winnipeg, St. Boniface and Selkirk.²⁹ Jurisdiction over family law will remain unaltered for the rest of the province. For lawyers practising outside of Winnipeg, mention should be made of the recent Supreme Court of Canada case of *Reference Re Section 6 of the Family Relations Act, 1978*,³⁰ which was the cause of the recent amendment to section 16 of the *Family Maintenance Act*,³¹ limiting the jurisdiction of the Provincial Court. Under the amendment, the Provincial Court can no longer grant orders of non-entry or sole occupancy as such orders infringe upon the jurisdiction of section 96 judges and therefore are contrary to the constitutional division of powers.³²

Reference Re Family Relations Act was an appeal from a decision of the British Columbia Court of Appeal concerning subsections (a), (b), (d) and (e) of Section 6(1) of the *Family Relations Act*.³³ At issue was the

27. Ontario Law Reform Commission, *Family Law Project* Volume 10, p. 264.

28. *Supra*, n.12.

29. Robyn Moglove Diamond, *supra*, n.3 at 34.

30. [1982] 1 S.C.R. 62 (hereinafter referred to *Reference Re Family Relations Act*).

31. S.M. 1978, c. 25(F20).

32. *See, Ibid.*, at s.16(2).

33. S.B.C. 1978, c. 20.

determination of whether provincial judges could validly give orders with respect to these issues or whether they were intruding upon the jurisdiction of Section 96 judges.

The legislation in dispute read as follows:

The Provincial Court has jurisdiction in all matters under this Act, except Part 3, respecting

- (a) guardianship of the person of a child;
- (b) custody of or access to a child;
- (d) occupancy of the family residence and the use of its contents; and
- (e) the making of orders that a person shall not enter premises while they are occupied by a spouse, parent or child.³⁴

The Supreme Court of Canada held that the superior courts did not have exclusive jurisdiction over guardianship and custody. It was natural, following assignment of adoption to the inferior courts by the *Adoption Reference Case*,³⁵ to find the jurisdiction over other related and subsumed areas such as custody and guardianship accorded to the inferior courts. In reaching its decision, the Supreme Court applied the test originally formulated in the *Adoption Reference Case*,³⁶ expanded in *Labour Relations Board (Sask.) v. John East Iron Works Ltd.*³⁷ and stated in the following manner:

[d]oes the jurisdiction conferred by the Act on the appellant board broadly conform to the type of jurisdiction exercised by the superior, district or county courts?³⁸

In answering this question, it is proper to look to the practice in England, but there is no suggestion that this is the exclusive or conclusive recourse. Nor is the determination of the reach of inferior court jurisdiction in any way limited to the exact powers exercised by the inferior courts in 1867. The Court indicated that there has been a progressive relaxation of the judicial outlook on the proper application of Section 96 to the legislative programme of the provinces where summary procedure courts are accorded jurisdiction, either exclusively or concurrently with superior courts. However, the Court concluded that an order of sole occupancy of the family home and its contents is an order dealing with a property interest and jurisdiction over property is exercisable only by a Section 96 court.

With respect to non-entry orders, the disputed legislation read as follows:

- 79(1) A court may, on application, order that, while the spouses continue to live separate and apart, one spouse shall not enter premises while the premises are occupied by the other spouse or child in the custody of the other spouse.
- (2) Subsection (1) applies whether or not the spouse against whom the order is made owns or has a right to possession of the premises.³⁹

34. *Ibid.*, s.6(1).

35. [1938] S.C.R. 398.

36. *Ibid.*

37. [1949] A.C. 134.

38. *Supra*, n. 30, at 71.

39. *Ibid.*, at 89.

Chief Justice Laskin struck down the above section, stating:

I cannot find any basis upon which non-entry orders under s.79 can be assigned to the Provincial Courts when other matters respecting spousal relationships, especially concerning property, are beyond the Provincial Court's jurisdiction.⁴⁰

It should be noted that one possible way to avoid this constitutional problem is for the provincial court to award a non-molestation order as opposed to a non-entry order.

The case of *Kleinsteuber v. Kleinsteuber*⁴¹ (decided before the above Supreme Court of Canada decision) considered the validity of an order under section 34 of the *Family Law Reform Act*, which read as follows:

Upon application, a court may make an order restraining the spouse of the applicant from molesting, annoying or harassing the applicant or children in the lawful custody of the applicant and may require the spouse of the applicant to enter into such recognizance as the court considers appropriate.⁴²

The court held that such an order was within the jurisdiction of the Provincial Court. It was a proper extension of the preventive justice authority which provincial judges had exercised before 1867. Although section 96 courts had assumed injunctive powers in 1867 this did not necessarily curtail the jurisdiction of summary courts in the field of preventive justice. A non-molestation order was differentiated from a non-entry order in that the latter had an affiliation with property and was therefore beyond the jurisdiction of the inferior courts.

Some of our judges in the Provincial Court (Family Division) attempt to achieve the same result by stipulating in the order granted that premises in which the spouse who is the subject of the order has a proprietary interest are excluded from the order. However, it is questionable whether this procedure will result in a valid order given Chief Justice Laskin's reasoning in the *B.C. Reference* case.

The net result of this case (and the statutory amendments that its ratio necessitated) is to further exacerbate the problems that the constitutional division of powers brings to the area of family law. Sole occupancy and non-entry orders are so common in family law disputes that many practitioners will begin instituting all of their actions in the higher courts if they have not done so already. The provincial family courts, the courts which are supposed to be the courts of easy access and speedy relief, will no longer be considered a viable alternative. Of course, for those individuals within the areas of Winnipeg, St. Boniface and Selkirk, the Unified Family Court will solve this problem. Yet what of those in the rest of Manitoba? For them, the frustration remains.

40. *Ibid.*, at 91.

41. (1981), 19 R.F.L. (2d) 15 (Ont. Prov. Ct.).

42. S.O. 1978, c. 2, s. 34. See, *supra*, n. 32, at s. 8(1)(d) for similar legislation in Manitoba.

III. Property

A. Amendments to the *Marital Property Act*

The most recent amendments to the *Marital Property Act*⁴³ do not provide for any substantial changes to the present law. The majority of the amendments are simply intended to clarify the Act and respond to problems which have arisen in the cases.⁴⁴

It is not unusual for a piece of relatively new legislation to give rise to problems of interpretation and judicial pronouncements which are not in line with legislative intention. One example of such a problem, (which gave rise to one of the more significant amendments), is the definition of an asset. Before the amendment, subsection 1(1)(a) of the *Marital Property Act* read as follows:

Asset means any real or personal property or legal or equitable interest therein including, without restricting the generality of the foregoing, a chose in action, money and a marital home, but not including any article of personal apparel⁴⁵

It became obvious, quite soon after the passage of the Act, that the parameters of the words "an article of personal apparel" were not immediately apparent. Many couples purchase pieces of jewelry for investment and such pieces may constitute valuable assets. The question became whether pieces of jewelry could be considered articles of personal apparel.

This issue came before the court in *Berman v. Berman*,⁴⁶ where counsel argued that a diamond ring valued in excess of \$35,000 was personal apparel and therefore excluded from the application of the Act. However, because the court decided that the Act did not apply to the couple for other reasons, the issue was not resolved. The legislation has now been amended to specifically include jewelry within the definition of an asset, thereby making it clear that jewelry is not an article of personal apparel and may be divisible between the parties.

The amendments have also clarified the interrelationship of sections 4 and 7 of the Act. At present, all assets acquired before marriage, except

43. *An Act to Amend The Marital Property Act*, S.M. 1982-83, c. 53. This Act came into effect on October 1, 1983.

44. For example, Section 4(1)(b) has been amended to provide that assets acquired in contemplation of marriage will be included in an accounting under the Act regardless of the marital status of the purchaser at the time of the acquisition, as long as the asset was not acquired while the purchaser was living with a former spouse.

Subsection 10(1) of the Act has been changed to provide that debts incurred with respect to non-shareable assets are not to be included in an accounting.

Section 12 of the legislation has been changed to provide that spouses have a right upon application, to an accounting of assets. This amendment gives spouses the right to apply for an accounting at any time, even where the marriage has not broken down. To correspond with this amendment, section 15 has been changed to provide that the closing date and the valuation date shall be as the spouses agree and in the absence of an agreement, the date when the spouses last cohabited or where the spouses continue to cohabit, the date either of them makes an application for an accounting of assets.

The new subsection 13(3) provides that the court, in exercising its discretion to vary an equal division of assets, shall not consider conduct unless the conduct amounts to dissipation.

Sections 13 and 14 of the Act have been amended by substituting the word "accounting" wherever the phrase "division of assets" is found. This will remove the ambiguity that existed between subsections 6(1), which used the term "accounting", and sections 12, 13 and 14, which used the phrase "division of assets."

A new subsection 17(4) provides for disclosure of assets by both parties in their pleadings on commencement of proceedings under the *Marital Property Act*. Previously, if marital property proceedings were brought alone, financial disclosure was not required. However, if brought with a *Family Maintenance Act* application, disclosure was required. This amendment merely remedies the inconsistency. See, Robyn Moglove Diamond, *supra*, n.3 at 16-17.

45. S.M. 1978 c. 24 (M45), emphasis added.

46. (1979), 12 R.F.L. (2d) 165 (Man. Q.B.).

those acquired in contemplation of marriage, are exempted from division. However, the appreciation, depreciation or income from those assets is included in the accounting. Assets such as gifts and inheritances are also exempted from division,⁴⁷ but so is the income, appreciation and depreciation from these assets. This different treatment of the "fruits" of an excluded asset results in confusion when the court is presented with a gift or inheritance which was acquired before marriage. In these situations, which section takes precedence?

A factual situation of this nature was presented to the court in *Dixon v. Dixon*.⁴⁸ In this case, the wife had a bank account given to her by her father prior to the marriage. The court had to decide whether the husband was entitled to one half of the appreciation of monies held by the wife in her bank account. Were the monies to be considered an asset acquired before marriage and dealt with pursuant to section 4 of the Act, or were they to be considered a gift pursuant to section 7 of the Act? The court held that since subsection 7(1) spoke of an asset "acquired by spouse," it must be interpreted as meaning an asset acquired after or during the marriage. Since the wife's bank account was acquired prior to the marriage, it did not fall within section 7. Accordingly, the court held that the bank account was to be considered as an asset in the hands of the wife prior to marriage with the effect of requiring any appreciation to be shared.

The legislature has now amended subsection 4(3) to read as follows:

Where by reason of any provision of subsection 1 this Act does not apply to an asset of the spouse, then, with respect to all assets other than those exempted from the application of this Act by section 7, in any accounting under Part 2, notwithstanding that provision,

- (a) any appreciation in the value that occurred while the spouse was married to and cohabiting with the other spouse shall be added to the inventory of assets of that spouse.⁴⁹

This amendment therefore makes it clear that the decision in *Dixon* is no longer appropriate and section 7 will take precedence over section 4. As a result, all assets excluded from division by section 7, such as gifts, trust benefits and inheritances, will not produce any shareable appreciation or income regardless of whether they were acquired before or after marriage.

While the above amendments were certainly necessary for clarification, a much more significant amendment was passed by the Legislature in 1982, dealing with pensions.

B. Valuation and Division of Pensions

For many couples, a pension is the major property asset of the marriage. The law with respect to pensions has attracted much attention from women's groups and legislators across the country. The ensuing discussion of pensions will be divided between the Canada Pension Plan, which has its own special rules and regulations administered by the Federal Government, and other pensions, which may or may not fall under the *Marital Property Act*.⁵⁰

47. *The Marital Property Act*, S.M. 1978, c. 24, s. 7 (M45).

48. (1981), 25 R.F.L. (2d) 266 (Man. Co. Ct.), hereinafter referred to as *Dixon*.

49. *An Act to Amend the Marital Property Act*, *Supra.*, n. 1, 3.

50. S.M. 1978, c. 24 (M45).

1. Canada Pension Plan

If a marriage ended in divorce at any time after January 1st, 1978, the Canada Pension Plan credits earned by one or both spouses during their years of marriage may be divided equally between them. This change is intended to provide some financial protection to the spouse who worked in the home and could not contribute to the plan or who had lower earnings during the marriage.

To be eligible for a division of pension credits, the following conditions are required:

1. The legal termination of the marriage must be recognized by Canadian law. The marriage may be terminated by either divorce or annulment.
2. The legal termination of marriage must have taken place on or after January 1st, 1978.
3. The spouses must have lived together for a minimum of 36 consecutive months during the marriage.
4. The application must be submitted within three years of the date of dissolution of the marriage. (i.e., three years from the date of annulment or decree absolute.)

With respect to Canada Pension Plan releases or general release clauses contained in separation agreements, the Minister of Health and Welfare takes the position that she is not bound by any release clauses, either specific or general. The government's position is that there is no discretion given to the Minister under the Act as to the granting of a division, and therefore no consideration can be given to a release in a separation agreement.⁵¹

However, the Canadian Pension Appeals Board recently reached unanimous decisions in four separate cases in which the federal government had awarded divorced wives a half-share in the Canada Pension credits of their former husbands despite the existence of separation agreements. The Board said that by agreeing in their divorce settlements to drop claims against their husbands, the women "cannot now claim part of the property of their former spouses. They have waived their rights . . . and are precluded from applying for and receiving a division of pension benefits."⁵²

As a result of these decisions of the Canadian Pension Appeals Board, all individuals negotiating separation agreements should deal with the Canada Pension Plan credits in their agreements, whether by inserting a clause allowing a woman to retain her right to apply for a CPP credit division or by acknowledging that the spouse has surrendered all rights to the other spouse's property, including all CPP credits.⁵³

51. Department of National Health and Welfare, "Better Pensions for Canadians" (1982).

52. *The Globe & Mail*, September 13, 1983, at 12.

53. One example of a clause recognizing the right of the spouse to make such an application is as follows:

"The husband and wife agree that the wife shall be entitled to make application to the Canada Pension Plan for a division of credits, if available, pursuant to the Canada Pension Plan after the dissolution of their marriage provided that if at the time the wife begins receiving such payments under the plan the husband is still obliged to pay support or maintenance to the wife as provided in paragraph x hereof, the amount of such payments by the husband to the wife will be reduced by the amount received by the wife under the said plan."

See, Stephen Grant, "Pensions as Property Interests," *The Canadian Bar Association — Ontario, Continuing Legal Education*, June 3, 1983, p. 9.

Approximately 6,500 spouses have applied to the programme nationally. This represents only 4% of those individuals who have been divorced in that period.⁵⁴ Of the 1,658 divorces granted in Manitoba for the period January 1, 1982 to the end of August, 1982, only 98 applications to split the pension credits were submitted.⁵⁵

It is now time for all family law lawyers to advise their clients of the possibility of this application as a matter of course upon obtaining a decree absolute for a client.

2. Marital Property Act

The Manitoba *Marital Property Act* has always considered pensions to be assets. Originally, such rights were defined as commercial assets. In 1982, *The Marital Property Act* was amended to define the rights under pension plans, annuity policies and life or accident and sickness insurance policies as "family assets."⁵⁶ While the inclusion of these rights as family assets (as opposed to commercial assets) narrows the court's discretion to vary the equal division of these assets,⁵⁷ it does not vary the original acknowledgement of these rights as items of property.⁵⁸

The more difficult problem arises with respect to the valuation and division of an asset of this nature. Whereas chattels and realty can be easily shared, intangibles are much more difficult to divide. A recent British Columbia decision summarizes the problem:

The dilemma results, I think, from the fact that the statute treats pension plan benefits in the same way as assets already in existence and it contemplates a once-for-all division of all such assets as at the time of the "triggering event" which terminates the family relationship. But pension plan assets are not a form of realisable personal property which can be disposed of and divided at any time. Such a plan is not really an "asset" in the conventional sense at all; in such a case as this it is merely a possible source of income which may be received in the future and out of which one spouse may be able to support the other during their retirement.⁵⁹

The value to be placed on a pension was the issue raised in the Manitoba Court of Appeal decision of *Isbister v. Isbister*.⁶⁰ In that case the court considered the wife's right to share in the husband's contribution to three pension plans. Under only one of these plans was there a cash benefit

54. Canadian Advisory Council on the Status of Women, "Women & Pensions: Women in Poverty," A brief presented to the Parliamentary Task Force on Pension Reform at 2.

55. Statistics compiled by the Income Security Programs of Health & Welfare Canada and published in *Headnotes & Footnotes* — October, 1982.

56. *An Act to Amend the Marital Property Act*, S.M. 1982, c. 17, s.2. The only other specific inclusion of a pension as an asset comes in the province of British Columbia and Quebec. Section 45(3)(d) of the British Columbia *Family Relations Act*, R.S.B.C. 1979 c. 121, defines family asset to include "a right of a spouse under an annuity or a pension, home ownership or retirement savings plan." Section 1266(h) of the *Civil Code* of the Province of Quebec provides that RRSP pension rights with an immediate cash value are shareable equally upon marriage breakdown.

57. *The Marital Property Act*, S.M. 1978, c. 24, s. 13.

58. In Alberta, for example, under the *Alberta Matrimonial Property Act*, R.S.A. c. M-9, a pension which was vested and locked in and from which contributions could not be withdrawn and the present value of which could not be ascertained was not considered "property" within the meaning of the legislation — *Herchuk v. Herchuk* (1982), 18 A.C.W.S. (2d) 310 (Alta. Q.B.); but see *contra*, *Re Manister and Mollberg* (1982), 18 A.C.W.S. (2d) 368 (Alta. Q.B.) where a husband's pension plan was considered part of the family assets; the wife's share was determined by applying the years of marriage to the years of the husband's contribution. See also *Kopecky v. Kopecky* (1983), 18 A.C.W.S. (2d) 255 (Alta. Q.B.).

56. *Belcher v. Belcher* (1981), 19 R.F.L. (2d) 352 (B.C.S.C.) at 358.

60. [1981] 5 W.W.R. 443 (Man. C.A.).

payable as of the date of separation. However, in order to obtain that amount the husband would have had to quit his job.

Relying on section 27 of the *Pension Benefits Act*⁶¹ and subsections 10(1)(b) and (c) of the *Federal Pension Benefits Standards Act*⁶², the Court concluded that, although pension benefits were assets falling within the scope of the *Marital Property Act*, no one could place a market value on a pension fund or scheme that was declared by statute to be inalienable, unassignable, unable to be charged and free from seizure, execution and attachment. No value could be placed on these pensions since it would be impossible to put a price on them. In effect, since no one would purchase them they had no value.⁶³

The refusal of the courts to assign a value to pension rights prodded the Legislature into action. In response to the problems arising from the *Isbister* decision, the *Marital Property Act* was amended so that clause 8.1(1) and (2) provide that an asset is to be divided between spouses even though it consists merely of future rights and there is no certainty as to whether these rights will be received in the future. In addition, the new subsection 14(3) states that where a present market value cannot be determined for an asset, the court shall determine a value by using whatever other method or basis the court deems appropriate.⁶⁴ Thus the language

61. S.M. 1975, c. 38. This Act has since been amended. *An Act to Amend the Pension Benefits Act* S.M. 1982-83, c. 79 becomes effective in two parts. Beginning Jan. 1, 1984, a spouse upon marriage breakdown will be entitled to 50% of any pension benefit earned during the years of marriage. The clause also applies to common-law relationships where proper declarations have been made. Beginning Jan. 1, 1985 unequal pension benefits to men and women who make the contributions to their retirement plan is prohibited.

62. R.S.C. 1970, c. P-8.

63. See also the case of *Geisel v. Geisel* (1981), 24 R.F.L. (2d) 424 (Man. Q.B.), which applied *Isbister*. The facts differed in the *Geisel* case since the husband there had already retired and was entitled to pensions which were guaranteed for a period of five years. The present value of the guaranteed portion of the pension was taken into consideration and an equal division of it made. However, relying on *Isbister*, the court refused to take into consideration the value, if any, of the husband's pension after the guaranteed portion had expired.

In the recent decision of *George v. George*, Man. C.A. unreported, July 14, 1983, Suit No. 249/81 Mr. Justice O'Sullivan clarified and narrowed his remarks in *Isbister*. In *Isbister* the court was satisfied that the market value attributed to the pension plans in that case was not supported by the evidence. The court was not presented with and did not consider whether there might be a proper way to divide the asset other than by attributing a substantial market value to it. In the *George* case, counsel for the wife advanced certain alternative arguments as to valuation. Since that case was heard before the addition of section 14(3) to *The Marital Property Act* the court was forced to deal with the concept of the market value of a pension.

64. The relevant sections now read as follows:

"1(2) Notwithstanding clause 1(d) but subject to subsection 3, the following assets are family assets within the meaning and for the purposes of this Act, whether or not the proceeds thereof or the benefits or payments thereunder, as the case may be, are used or intended to be used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes:

- (a) rights under a life insurance policy.
- (b) rights under an accident and sickness insurance policy.
- (c) rights under a life or fixed term annuity policy.
- (d) rights under a pension or superannuation scheme or plan.

8.1(1) Where this Act applies to an asset, it applies

- (a) notwithstanding that the asset consists of mere rights, whether present, future or contingent; and
- (b) notwithstanding that, as at the closing and valuation date of an accounting under section 14 in which the rights are sought to be included as an asset, they have not been realized and it is not ascertainable whether they will ever be realized or to what extent they will be realized;

but the Act does not apply where it is in fact ascertained, as at the closing and valuation date, that there is no reasonable possibility of the rights ever being realized.

8.1(2) In subsection 1, the expression "rights" includes, without restricting the generality of that expression, rights under

- (a) a life insurance policy; or
- (b) an accident and sickness insurance policy; or
- (c) a life or fixed term annuity policy; or
- (d) a pension or superannuation scheme or plan.

used in subsection 14(3) throws the problems of valuation and division back into the laps of the judiciary. While it insists that the pension rights be given a value it leaves the method up to the court's discretion.

There have not been many judgments on the interpretation of these new sections.⁶⁵ A case that deals substantively with the amendments is that of *Heminger v. Heminger & Jones*.⁶⁶ In that case, Judge Deniset grappled with the determination of the value of the pension plan and the method to be applied to its division. Justice Deniset acknowledged that subsection 14(3) indicates that the court must make a decision in terms of valuing the pension. Although the decision may be difficult to make, the court can use its discretion and come to the most appropriate decision in the circumstances.

The Court found that the husband had contributed \$10,000.00 to his pension during the period of cohabitation. The present day value (accrued interest included) would be approximately \$15,000.00. Actuarial evidence was introduced to the effect that assuming an annual increase in salary of 9½ percent and that Mr. Heminger would live to the statistical life expectancy, the pension would be worth \$52,000 in 1997. Justice Deniset did not seem entirely comfortable in accepting this evidence. He pointed out that the assumptions of the actuary were speculative and arbitrary.

I do not know what will happen between now and 1997 any more than I knew in 1969 what would happen between then and now.⁶⁷

Consequently, the Court concluded that to place a value of \$35,000.00 on the husband's pension seemed more appropriate and he awarded the wife one-half of that sum. The Court did not indicate whether the \$35,000.00 represented a discounted sum from \$52,000.00 taking into account that the wife would receive the monies immediately or the rate of the discount factor applied.

14(3) Whether an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1) shall be determined on such other basis or by such other means as is appropriate for assets of that nature."

There were some other amendments made to the Act at the same time that did not deal with pensions.

Previously, the Act empowered a Court to make an Order preserving an asset, but only where it could be established that one spouse was dissipating or absconding with an asset. To ensure that the purpose of the Act is not defeated by any disposal of assets before an equal division of property can be made, subsection 20(1) of the Act was changed to provide for an extension of the power of the Court to make an order of preservation of assets to a spouse who may not be able to prove that the extreme situation of dissipation or absconding exists. Clause 20(1)(c) provides that a certificate of *lis pendens* may issue to ensure preservation of an asset, even where the title to real property is not in issue. To further protect the rights of the spouse, and to prevent disposal of an asset before a court order can be obtained, subsection 20(3) provides that an order for preservation of assets can be obtained on an "ex parte" basis. See, Robyn Moglove Diamond, *Supra*, n. 3 at 11.

65. The first reported case dealing with a pension after the amendments was *Passy v. Passy and Finlan* (1983), 31 R.F.L. (2d) 236 (Man. Q.B.). The hearing of this case took place before the amendment; however, no formal order had yet been entered at the time the amendments to *The Marital Property Act* were given Royal Assent on June 30, 1982. The *Act to Amend the Marital Property Act*, S.M. 1982, c. 17, contained the following exception:

- 7(1) This Act applies to any application under Section 17 of the *Marital Property Act* (a) made on or after March 12, 1982; or (b) subject to subsection (2) made before March 12, 1982.
- 7(2) This Act does not apply to an application under Section 17 of the *Marital Property Act* where an order or judgment finally disposing of the matters raised in the application was made or given before March 12, 1982, notwithstanding that the order or judgment is on that date still subject to appeal.

While taking the amended sections into consideration, Justice Hunt reached the conclusion that there was no reason to change his written reasons for judgment. The words of the Act indicated that assets are to be divided equally between the parties. This does not imply that each asset must be divided equally. Therefore, even considering the pension rights, Justice Hunt still felt the final decision to be equitable to both parties.

66. (1983), 33 R.F.L. (2d) 92 (Man. Q.B.).

67. *Ibid.*, at 96.

Mr. Justice O'Sullivan, in the case of *George v. George*⁶⁸ also expressed disenchantment with the use of actuarial evidence in these kinds of cases.

There is the risk of becoming involved in the same sort of undesirable and haphazard guesswork that nowadays seem to be commonplace in claims for loss of future earning capacity or future expenses in personal injury cases.⁶⁹

Of course, many judicial determinations involve amounts of speculation and consideration of contingencies. However the courts seem to be particularly unhappy when forced to make these determinations with respect to assets of a rather intangible nature.

This was the situation in the case of *Hutchinson v. Hutchinson*.⁷⁰ Although the case does not deal with a pension, it does consider the interpretation of subsection 14(3) of the *Marital Property Act*. In *Hutchinson*, it was the valuation of a Canadian Tire franchise that was in question. By virtue of the terms of the dealership agreement the franchise owner, the National Canadian Tire Corporation Limited, retained the exclusive right, under all circumstances, to purchase or direct the sale of the business according to specific terms. Those terms provided for a valuation based on inventory and fixed assets and did not allow for goodwill. The Court concluded that,

[i]n view of the restriction in the franchise agreement precluding any sale in the open market, subsection 14(2) of the *Marital Property Act* which provides for valuation of an asset as the amount it might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer cannot be utilized.⁷¹

Nonetheless the court held that,

[t]here is not much doubt from the evidence that despite the terms of the agreement with Canadian Tire the business had a real pecuniary value to the respondent in a sense at least of its income producing capability and potential.⁷²

Counsel for the wife, relying on the recent amendment to section 14 of the Act, introduced evidence, through a Toronto accountant, of an analysis of the average annual net profit or income earning capacity of the business for the years 1977 through 1981 which were projected into the future for the number of years until the respondent turned 65 and the present-day value of that projection was then calculated. The applicant submitted that the resulting calculations (which varied in amount according to the discount percentage used) were an appropriate method of valuing the business for the purposes of the *Marital Property Act*.

Unfortunately, the Court would not accept this type of evidence as being of any real help in determining the question of value of the business asset, even allowing for the broad discretionary scope of the Court by the amended legislation.

68. Unreported, Man. C.A., July 14, 1983, Suit No. 249/81.

69. *Ibid.*, at 7.

70. Unreported, Man. Q.B. Dec. 29/82, Suit 15/78.

71. *Ibid.*, at 6.

72. *Ibid.*, at 7.

Mr. Justice Wright states:

Even if I were to make some calculations based on the income earning capacity of the business in order to produce a valuation of the business to the respondent for each of the pertinent dates, and then to arrive at an appreciation figure, it is my view that any value established by this means would involve speculative and arbitrary assumptions and would not be well-founded from reliable evidence. I do not believe the amendments to Section 14 of the *Marital Property Act* intend that evaluation to be reached on such basis.

I am unable to identify any other approach or factual information before me that can be employed to lead to any reasonable method or means of ascertaining the value of the appreciation in the business, if any. In consequence I conclude that any such appreciation, if it did occur, has not been proved and the wife's claim under the *Marital Property Act* relating to the business is rejected.⁷³

If the Court meant by that remark that there was evidence which should and could have been adduced by wife's counsel to prove the appreciation in value of the Canadian Tire franchise since the date of marriage, then the Court was correct in rejecting the wife's claim. However, having concluded that the asset did in fact have a real pecuniary value and assuming that there was no other specific evidence that wife's counsel could have adduced, then the Court was obligated under subsection 14(3) to attempt to value the asset, regardless of the speculative or arbitrary assumptions that had to be made. The section indicates that the value may be ascertained by such other basis or by such other means as is appropriate. While being dissatisfied with the evidence presented, the Court did not indicate which other method might have been more appropriate.

An analogy may be drawn to the law of damages. It is a well-established principle that where the damages are by their inherent nature difficult to assess, the court must do the best it can under the circumstances. Such is the case where the court estimates the damages for loss of expectation of life or for pain and suffering, since it is impossible to measure the loss with mathematical accuracy. That is not to say, however, that a litigant is relieved of his duty to prove the facts upon which the damages are estimated.⁷⁴

A distinction must be drawn between cases where absence of evidence makes it impossible to assess damages, and cases where the assessment is difficult because of the nature of the damage provided. In the former case only nominal damages can be recovered. In the latter case, however, the difficulty of assessment is no ground for refusing substantial damages⁷⁵

Although the courts sometimes appear to be at variance in their approach to the degree of proof required for the assessment of substantial damages, they are guided by a consistent principle. The general rule is that the plaintiff must prove sufficient facts to enable the court to calculate the loss with reasonable certainty. To this must be added the qualification that where the damages are, by their intrinsic nature, incapable of assessment with any degree of certainty, the plaintiff must prove the facts and the court will approximate a sum, even though that approximation may be little better than a guess.⁷⁶

73. *Ibid.*, at 8-9.

74. See, *Williams v. Stephenson* (1903), 33 S.C.R. 323.

75. *Mayne on Damages*, 11th Edition at 5-6.

76. See, *Toronto Transit Commission v. Aqua Taxi Limited et al.* (1956), 6 D.L.R. (2d) 721 (Ont. C.A.).

The same may be said with respect to the valuation of pensions. Inevitably some speculation will be involved in attempting to value a future right. The court must do the best it can and approximate an appropriate sum. A rejection of the applicant's claim should only be warranted if the court has concluded that even under subsection 14(3) the pension has no value or if there was appropriate evidence to be adduced and applicant's counsel did not do so.

The most difficult aspect of a difficult problem is the method of division of the value of the asset. This may account for the courts' reluctance to use approximate methods of valuation such as actuarial evidence. This reluctance is explicitly acknowledged by the Court in *George v. George*:

... it could be unfair to require a husband to come up with a large sum of solid cash or money value to pay now for an income stream which may or may not result to him in future.⁷⁷

This problem was resolved in the *George*⁷⁸ case by dividing the pension plan in a manner akin to an *in specie* division. This method entitles the party who did not contribute to the pension to one-half of that proportion of all benefits payable to the other party that the number of months of married cohabitation during which pension contributions were made, is of the total number of months during which such contributions occurred, i.e.,

$$1/2 \times \frac{\text{number of months of married cohabitation during which pension contributions were made}}{\text{total number of months during which contributions were and will be made}}$$

The amount is not payable at the present but rather in the future when the benefits become payable. This approach is similar to the solution adopted by some courts in other provinces.

For example, in the leading British Columbia case of *Rutherford v. Rutherford*,⁷⁹ the Court of Appeal held that:

1. The pension in question was a family asset notwithstanding that it had not vested;
2. The husband had to pay compensation to the wife in the amounts which the wife would have received if the husband had retired and caused the pension payments to be made;
3. The pension was to be valued at the date of separation, not the "triggering event" which, in this case, was the granting of a Decree Nisi of divorce;
4. The portion of the pension earned after the separation was not a family asset;
5. The pension was to be divided in proportion to years of contribution during the marriage; and
6. No order for payment was to be made against the pension commission but rather the husband was appointed as the trustee for the wife's share.

Again, in the case of *Borman v. Borman*,⁸⁰ the court held that each spouse upon retirement was obliged to pay the other from his or her pension

77. *George v. George*, *supra*, n. 68, at 7.

78. *Ibid.*

79. (1981), 127 D.L.R. (3d) 658; see also, Stephen Grant, "Pensions as Property Interests", *supra*, n.53.

80. (1983), 19 A.C.W.S. (2d) 32 (B.C.S.C.). See also *Morgan v. Morgan* (1983), 18 A.C.W.S. (2d) 377 (B.C.S.C.).

benefits a sum which would yield half the value of his or her pension attributable to years of contribution during cohabitation, and the same result would obtain for both spouses or their estates regarding any money to which they became entitled as a result of withdrawal from the plan or by dying before becoming entitled to the pension.

However, this method of division ignores the fact that, depending on the parties, once the marriage breaks down the spouses should be allowed to settle all outstanding matters and go their separate ways. Additionally, it does not deal with the problems of enforcement that might arise twenty or thirty years after the marriage breakdown. Enforcement problems are a continuing and serious problem in family law. Perhaps the dilemma may best be summarized in the following manner:

These considerations would suggest that no single method of distribution should govern all the cases involving pensions. The need to achieve a fair distribution of the pension may require, in one case, that the non-employee spouse receive her share in the form of periodic payments. In another case the convenience of having an immediate distribution of the pension may outweigh any inequity to the employee spouse, which may result from an immediate distribution on the basis of some fraction of the capitalized value of the pension.⁸¹

Thus, it is apparent that the law dealing with pensions is in a state of flux. It is with great anticipation that we await further decisions of the Manitoba courts with respect to the valuation and division of pensions. Until clear guidelines are set by the courts in their interpretations of these sections, settlement of matrimonial property disputes will continue to be inhibited by the uncertain state of the law.

IV. Maintenance

The most controversial statutory amendment to maintenance obligations deals with the expansion of rights to common-law spouses.⁸² *The Family Maintenance Act* has been amended to allow common-law spouses a right to apply for maintenance and other relief under *The Family Maintenance*

81. *Re Fisher and Fisher* (1983), 31 R.F.L. (2d) 274 (Sask. Q.B.), at 283-284.

82. The remaining changes to *The Family Maintenance Act*, *Supra*, n. 1, while important, are of a more minor nature.

The new subsection 6(2) specifies that where a spouse fails to comply with a request to provide financial disclosure, a court, on application by the other spouse, may order that the spouse provide the information and accounting within a specified time, and that, if the spouse fails to comply with a court order, that a spouse would be liable to pay to the applicant spouse an amount not exceeding \$5,000 as a penalty.

Subsection 7(1) has been amended to provide that a spouse can apply to court to fix a maintenance application even when no application for maintenance has been made.

Subsection 7(4) provides that *dum casta* clauses will not be enforceable and all other provisions of an agreement which may contain a *dum casta* clause shall be enforced without regard to that provision.

The types of order that could be granted pursuant to subsection 8 have been expanded to include:

- a) Clause 8(1)(a) — Orders of maintenance can be payable by means of the lump sum payment, periodic payments or both.
- b) Clause 8(1)(j) — Orders of maintenance can provide that the obligation to provide support continue after the death of the spouse and is to be considered a debt of his or her estate. Clauses 8(3) and (4) provide that offers under seal are to be taken into consideration in the assessment of costs.
- c) Clause 8(1)(k) — The order can require that one spouse designate the other spouse or a child as the beneficiary under a particular policy of life insurance.

The new subsection 24.2(1) provides that where the court is convinced that the applicant has the need to learn or confirm the whereabouts of the proposed respondent for the purpose of bringing an application for maintenance or enforcement, court may order that any personal public body provide the court with such particulars as to the address of the proposed respondent as are contained in their records and the court may then give the particulars to such personal person the court considers appropriate. See, Robyn Moglove Diamond, "Recent Developments in Legislation Relating to Family Law", Provincial Judges Seminar, 1 November, 1983, Winnipeg, Manitoba.

Act, where there has been continued cohabitation for a period of not less than five years and the relationship was one in which the applicant has been substantially dependent on the other person for support. The application must be made while the parties are cohabiting or within one year after they cease cohabiting.⁸³

As the Act stood before amendment, common-law spouses could apply for maintenance only if they came within the following circumstances:

a man and a woman who are not married to each other have cohabited for a period of one year or more *and there is a child of the union*, . . . if an application for an order is made thereunder by or on behalf of the man or the woman while they are still cohabiting or within one year after they cease cohabiting.⁸⁴

This resulted in the incongruous situation that a woman would be entitled to maintenance even though the children of the union were over the age of 18, had been given up for adoption or had even been apprehended by the state.⁸⁵ On the other hand, a woman who had been living with a man for over 20 years and had become dependent upon him but could not for reasons of health give birth to a child would not have been able to obtain any support.

Although the elimination of criteria based on fertility can only be seen as a progressive step, two issues arise from this expansion of the category of common-law spouses. The first relates to the policy implications behind the legislation. The state of marriage carries with it specific rights and obligations as well as a change in status. How far should the state intervene by assigning those same rights and obligations to two individuals who have chosen not to marry? Second, since the birth of a child is no longer the distinguishing characteristic between a common-law relationship and a more temporary liaison, what criteria can be substituted in its place?

At common-law, there was no obligation of support as far as cohabitees were concerned. The right to obtain support payments from another person after the termination of unmarried cohabitation has been strictly a creation of statute. There is no such statutory provision in England or in the United States.⁸⁶ In Canada, several provinces other than Manitoba have provided for an obligation of support in a cohabitation situation.⁸⁷ However it is questionable whether prior to these statutory enactments, full consideration was given to the social ramifications.

83. *An Act to Amend The Family Maintenance Act*, S.M. 1982-83, c. 54, 2(3). The new subsection 2(4) provides that an application cannot be made by a common-law spouse for relief where the parties have, in writing, made an agreement with respect to maintenance including an agreement to waive maintenance.

84. *The Family Maintenance Act*, S.M. 1978, c.25, s. 11(1).

85. *Fedorick v. Barker* (1982), 24 R.F.L. (2d) 217 (Prov. Cl.); the court held that the applicant was entitled to maintenance for herself even though there were no biological children of the union but, rather, children to whom the respondent stood *in loco parentis*. The claim for maintenance could be maintained regardless of the age of the children and could continue even after the children had reached the age of majority. And see *Todaro v. Colacino*, (1983), 147 D.L.R. (3d) 378 (Man. C.A.).

86. W. Holland, *Unmarried Couples: Legal Aspects of Cohabitation* (1982), 101, at 119. See also, G. Douthweite, *Unmarried Couples and the Law* (1979). However, in Australia, Tasmania has provision for support in a cohabiting agreement which has lasted for at least twelve months: see *Maintenance Act 1967-73* (Tas.) s. 16. And in South Australia see section 11 of the *Family Relations Act, 1975* . . . "has had sexual relations with that other person resulting in the birth of a child."

87. See *The Family Relations Act*, R.S.B.C., 1979, c.121, s.1(c); *The Child and Family Services and Family Relations Act*, S.N.B. 1980, C. C-2.1, S.112(3); *The Maintenance Act*, R.S. Nfld. 1970, c.223, s.10A; *Family Maintenance Act*, S.N.S. 1980, c.6, s.2(m); *Family Law Reform Act*: R.S.O. 1980, c.52, s.14(b); *The Matrimonial Property and Family Support Amendment Ordinance*, O.Y.T. 1980 (2nd) c.15, s.30.6(1).

It is felt by opponents of legislative regulation that to treat common-law spouses in the same way as married couples, even in limited areas, may undermine the institution of marriage. If rights are granted to common-law spouses, this may result in a contest between the legal spouse and the *common-law* spouse. The rights of a legal spouse may be adversely affected by the rights conferred on cohabitants, thereby undercutting the protection traditionally given to married persons.

Moreover, the expectations of cohabitants and married spouses are different. It is now fairly easy to obtain a divorce and if two people decide to live together rather than to marry, then they may have deliberately chosen to adopt this different lifestyle. An argument may be made that these people have chosen not to marry because they do not wish to assume the obligations of marriage.

A unique commitment is made by those who marry and not, as they are well aware, by those who refrain from marrying, and no amount of emphasis on the similarities between spouses and cohabitants can obscure the difference, one of the most fundamental in human existence. This is not an argument for the superiority of marriage or even its centrality, but rather for the preservation of the freedom to try alternative forms of relationship, a freedom which is at present being eroded by the increased tendency of the law to impose on the formerly cohabiting couple the status and structure of traditional marriage . . . ⁸⁸

On the other hand, it may be argued that exactly because many cohabitation relationships are so very similar to marriage that appropriate legislation is required. Adopting a functional approach, since the relationships are so similar perhaps they should be treated in a similar way. Each relationship can involve a substantial degree of stability and commitment from the parties, economic and emotional interdependence and the development of relationships as a unit with the outside community.

Additionally, the assumption that individuals enter into a common-law relationship based on a deliberate choice not to marry may imply a more explicit motivation than is actually present. Although certain cohabitants have considered marriage and expressly rejected the possibility, this is not often the case.⁸⁹ Much more likely is a relationship where the issue has not been explicitly discussed.

Even accepting that the appropriate policy is to extend the support obligation to cohabitation relationships, definitional criteria must still be sought. It is not easy to determine whether a couple is living in a *de facto* relationship. The Manitoba legislation, in expanding the category to which such obligations will attach, has limited the parameters of such a relationship by three conditions:

1. that the man and woman have cohabited continuously for a period of not less than five years; and

88. R.L. Deech, "The Case Against Legal Recognition of Cohabitation" (1980), 29 I.C.L.Q. 480, 484. See also N. Bala, "Consequences of Separation for Unmarried Couples: Canadian Developments" (1980), 6 Q.L.J. 72, and Winifred Holland, "Support Obligations from Cohabitation", unpublished paper presented at Montebello, Quebec, March, 1983.

89. For those couples who have explicitly rejected marriage and have entered into a cohabitation situation in order to avoid marriage-like obligations, they can accomplish their intention through the use of contract. See *An Act to Amend the Family Maintenance Act*, S.M. 1982-83, c. 54 s. 2(4).

2. that the cohabitation take place in a relationship in which one person has been substantially dependent on the other for support; and
3. that the application be made within one year from the end of the relationship.

The first condition raises two potential problems of interpretation. What does it mean to cohabit and what does it mean to cohabit continuously? In the case of *Dicks v. Zavitz*⁹⁰ the parties resided together from November 12, 1969 until February, 1979, at which time the applicant left the respondent's residence. During this period of time the parties separated on numerous occasions for varying lengths of time from 3 days to 6 weeks. In defining the term "cohabitation," the court indicated that in everyday language it meant living together as man and wife.

I have referred to the 'marriage-like' relationship contemplated by the Act, and in my opinion this is analogous to the marriage relationship dealt with by the Divorce Act, R.S.C. 1970 c.D-8, and the decisions under that statute are helpful in a reference to the establishment of a period of living separate and apart (in effect the interruption of cohabitation) or conversely, whether a period of living separate and apart has been interrupted by the resumption of cohabitation.⁹¹

A finding that the parties are living separate and apart from each other has been made where the following circumstances were present:

- 1) spouses are occupying separate bedrooms;
- 2) absence of sexual relations;
- 3) little of any communication between spouses;
- 4) wife performing no domestic services for husband;
- 5) eating meals separately;
- 6) no social activities.⁹²

The court in *Dicks v. Zavitz* stated that where the converse of all of the above factors were present then the parties could be considered to be cohabiting within the context of the definition.

The second issue with which the Manitoba courts will have to grapple is the problem arising from calculation of the period of cohabitation. The legislation states that the period must be one of continuous cohabitation for not less than five years. In attempting to interpret these words, it would seem that there are three alternative approaches available.

First, the court may opt for the simplest course, namely, that no breaks in the period of cohabitation would be allowed. Clearly, such a test, while simple in its application, would be quite unreasonable. In any relationship of five years duration breaks are bound to occur for a multitude of reasons which would have neither the intention nor the effect of putting an end to the relationship.

90. (1979), 13 R.F.L. (2d) 179 (Ont. Prov. Ct.).

91. *Ibid.*, at 183, quoting *Re Feehan and Attwells*, [1979] 1 F.L.R.A.C. 315 at 322, adopted in *Sanderson v. Russell* (1979), R.F.L. (2d) 81 (Ont. C.A.). See also, *Bellis v. Innis* (1981), 21 R.F.L. (2d) 40 (B.C.Co.Ct.).

92. *Ibid.*, quoting *Cooper v. Cooper* (1972), 10 R.F.L. 184, 187 (Ont. H.C.).

This approach was rejected by the Manitoba courts when dealing with the previous legislation on this point.⁹³ That legislation required that a woman cohabit with a man for a period of one year or more. In rejecting the argument that the year could not be interrupted, the Court of Appeal stated that:

I am of the view that the Legislature of this province would not have passed a protective Act which could be interpreted so that a period of cohabitation could end, say, in 11 months and then begin again, say, two weeks later, and thus defeat the object of the Act.⁹⁴

If some breaks are to be permitted, how does one identify a relationship which has actually terminated? The court could allow for partings between the couple upon consent where they were for a limited time period and/or for a limited purpose. Any other breaks would be taken to terminate the relationship. Such an approach is, artificial and could treat a relationship as at an end where this was not intended by the parties.

The above approaches are objective in application and inappropriate to determine when a relationship has broken down. Much more appropriate is the third alternative approach wherein the court looks to the intention of the parties and applies a subjective test to determine when and if the relationship has been terminated. This was the approach taken by the Ontario Court of Appeal in *Sanderson v. Russell*.⁹⁵ In that case, the man and woman lived together from July, 1971 to May, 1977. Although this would amount to more than a five year period in aggregate, Mr. Russell argued that a five-day separation in February, 1976 broke the period of cohabitation and that therefore there was not the requisite period of continuous cohabitation required by the Act.

In attempting to decide this issue the court indicated that a couple cohabits when they live together in a "marriage-like state." Such a "marriage-like" relationship has come to an end "... when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner, that this particular state of mind is a settled one."⁹⁶ The question will often be largely one of fact. The court concluded that in this particular case the five-day separation was merely a temporary lovers' quarrel and did not constitute a break in the cohabitation.

Going even further, the court in *Dicks v. Zavitz*⁹⁷ applied the concept of constructive desertion to a situation where the separation was brought

93. *The Wives' and Children's Maintenance Act*, R.S.M. 1970, c. W170, s.6(a).

94. *Hourie v. Pettit* (1974), 15 R.F.L. 210 (Man. C.A.) p. 210, 212, per Guy, J.A.

95. (1979), 9 R.F.L. (2d) 81 (Ont. C.A.). In interpreting this new legislation, Manitoba courts will undoubtedly have reference to Ontario cases since the legislation is most similar to the statute of that province. Section 14 of the Family Law Reform Act R.S.O. 1980, c. 52 expands the definition of spouse for the purposes of maintenance obligations.

"In this part

b) "spouse" means a spouse as defined in section 1, and in addition includes,

i) either of a man and woman not being married to each other who have cohabited, A) continuously for a period of not less than five years, or B) in a relationship of some permanence where there is a child born of whom they are the natural parents,

and have so cohabited within the preceding year

96. *Ibid.*, at 87-88, per Morden J.A.

97. *Supra*, n. 90.

about by the conduct of one of the cohabiters. In that case the man made various sadistic demands and consequently the woman left him for periods ranging from three days to six weeks out of their ten years relationship. The court held that:

... Mrs. Dicks had no real intention of ending the relationship... Although there were periods of physical separation, these were analogous to the period of reflection or re-assessment considered in *Feehan v. Attwells*..., where the physical separation following a fight is a part of a "cooling-off" period that does not demonstrate a settled state of mind that the relationship is at an end.⁹⁸

Thus, the courts in Ontario have now accepted that there may be various breaks in the period which do not necessarily interrupt the period of cohabitation. The period of cohabitation will only be brought to an end when at least one party has demonstrated a settle intention to treat the relationship as being at an end. They apply a flexible, subjective, factually based test to determine the existence of "continuous cohabitation," which is very similar to that used to determine the point at which spouses are considered to be living separate and apart under the *Divorce Act*.⁹⁹

The last issue on this point concerns the requirement that a situation of economic dependency exist in the relationship. This requirement is not unique to Manitoba. The concept of economic dependency is present in the New Brunswick legislation as well.¹⁰⁰ Although the Ontario legislation does not expressly refer to economic dependency, it was the view of Steinberg, J. in *Re Stoikiewicz v. Filas*¹⁰¹ that in order to fall within Section 14 of the Ontario *Family Law Reform Act*,¹⁰² there had to have been an assumption of a support obligation. In that case the woman and man lived in the same apartment but she lived on welfare and paid him rent. Steinberg, J. was of the view that the parties had continued their economic life on an arm's length basis and there was consequently no support obligation.

It would seem fairly obvious that even where a support obligation is imposed, it must be imposed on the same principles as it is imposed on married unions. Thus, there would be an obligation to become self-supporting after separation¹⁰³ and the awards would be primarily on a rehabilitative basis. The Ontario decisions indicate that this has been the tendency to date.¹⁰⁴

V. Children

In recent years the laws affecting or regulating the child's role in society have been subjected to intense public scrutiny. The result in Manitoba is that the law with respect to children has been considerably altered, rearranged and revamped.¹⁰⁵ There have been significant attempts to improve

98. *Ibid.*, at 186-187.

99. R.S.C. 1970, c. D-8.

100. *Child and Family Services and Family Relations Act* S.N.B. 1980, c. C-2.1 section 112(3), "... in which one person has been substantially dependent upon the other for support ..."

101. (1978), 7 R.F.L. (2d) 366 (Ont. U.F.C.).

102. S.O. 1978, c. 2.

103. *The Family Maintenance Act*, S.M. 1978, c. 25, s.4 (F20).

104. Although it depends on the facts, most orders have been for a short period; in *Dicks v. Zavitz* (1979), 13 R.F.L. (2d) 179 (Ont. Prov. Ct.) the award was for three years and in *Re Labbe and McCullough* (1979), 23 O.R. (2d) 536 (Prov. Ct.) the award was for one year. And see W. Holland, *Unmarried Couples: Legal Aspects of Cohabitation*, *supra.*, n. 86, and N. Bala, "Consequences of Separation for Unmarried Couples: Canadian Developments", *supra.*, n. 88.

105. An analysis of all these reforms would constitute an article in its own right and is beyond the scope of this paper.

the effectiveness of custody order enforcement in both the civil and criminal sphere. *The Child Welfare Act* and *The Family Maintenance Act* have been restructured so as to delineate more clearly the differences between the concepts of guardianship and custody. The concept of illegitimacy has been abolished and provisions have been changed to adapt to this reform.

With respect to enforcement, the new *Child Custody Enforcement Act* was passed and proclaimed in 1982.¹⁰⁶ The *Act* is intended to strengthen the powers of the courts faced with the difficult problem of enforcing custody orders. The increased enforcement powers found in the *Act* are applicable to custody orders made outside the province of Manitoba, and also to orders made by the Manitoba courts.¹⁰⁷ The *Act* further provides that a court may order that the police provide assistance in situations in which there are reasonable grounds to believe that a child is being unlawfully withheld from a person entitled to custody or access, or that a person is intending to remove a child from the Province of Manitoba in contravention of a custody order or separation agreement.¹⁰⁸

A companion effort to increase the effectiveness of custody orders was an amendment in the criminal sphere. In 1982, the provisions of the *Criminal Code* with respect to child abduction were amended to make it a criminal offence for a joint custodial parent to remove a child from the care and control of the other joint custodial parent where there is not a custody order. The section requires that no charges be laid without the consent of the Attorney General.¹⁰⁹

In addition to the changes regarding enforcement, there have been substantial amendments to *The Child Welfare Act*.¹¹⁰ In the new legislative scheme, the term "guardian" will apply only to third parties, such as agencies or grandparents and such relationships will be dealt with by *The Child Welfare Act* exclusively. Any dealings between children and parents will be dealt with pursuant to *The Family Maintenance Act* and will be referred to as custody and access.¹¹¹

106. *Child Custody Enforcement Act, supra.*, n. 2.

107. *The Child Custody Enforcement Act, ibid.*, s.2; *An Act to Amend the Child Custody Enforcement Act, ibid.*, s.1.

108. *The Child Custody Enforcement Act, ibid.*, s.9. See also, Section 13 of the legislation which allows the court to order any person or public body with information as to the address of the person subject to the custody order, to provide that information for the purpose of enforcing the custody order, and Robyn Moglove Diamond, *supra*, n.82 at 1-3.

109. *An Act to Amend the Criminal Code*, S.C. 1980-81-82 c. 125, s.20 adding s. 250.2 to the *Criminal Code* R.S.C. 1970, c.C-34. The Attorney General for the Province of Manitoba has given all Crown Attorneys his consent to commence proceedings under Section 250.2(1) of the *Criminal Code* in appropriate circumstances. The policy directive that has been given is as follows:

"Where a parent removes a child from the custody of another parent who has custody of the child by virtue of an agreement or an implied agreement evidenced by the passage of time or otherwise, a charge under Subsection 250.2(1) of the *Code* would likely be appropriate.

In other circumstances, where a Crown Attorney is of the opinion that a charge under Subsection 250.2(1) of the *Code* is warranted, instructions should be obtained from the Director of Prosecutions before proceedings are commenced. However, in an emergency situation, the Crown Attorneys are authorized to commence proceedings but subsequently, approval must be obtained from the Director of Prosecutions. For example, where there is no express or implied agreement between the spouses but where there is evidence that one parent or guardian is proceeding to remove the child from Manitoba with the intent to deprive the other parent or guardian of the possession of the child, immediate action may be required." See also, Robyn Moglove Diamond, *supra*, n.109 at 8-9.

110. *An Act to Amend The Child Welfare Act, supra.*, n. 1. This *Act* came into force October 1, 1983. *An Act to Amend The Child Welfare Act* [2], *supra.*, n. 2 came into force on August 18, 1983 and gives the Lieutenant Governor in Council the power to appoint directors of the society rather than have all the directors elected.

111. In addition to the restructuring children and parents have been given additional rights and obligations (*An Act to Amend The Child Welfare Act, supra.*, n. 1, i.1, 1.2, 1.3). Maintenance payments for a child can now be extended by a court beyond the age of 18, if certain conditions are met (s. 12(5)). With respect to the increasing acceptance of the concept of joint custody, the *Act* now provides that in the absence of a court order, the rights of parents in the custody and control of their children are joint. However, where the parents have never lived together after the birth of the child, the parent with whom the child resides has the sole custody and control of the child, unless and until the court orders otherwise (s. 14.1). A non-custodial parent retains the same rights as a custodial parent to receive school, medical, psychological, dental and other reports affecting the child (s. 14.1(4)). Where an application for custody or access has been made or the applicant has the need to learn or confirm the whereabouts of the respondent for purposes of bringing an application for maintenance or enforcement, the court may order that a person or public body provide the court with such particulars as to the address of the proposed respondent, as are contained in their records (s. 8.1). See, Robyn Moglove Diamond, *supra*, n.82 at 23-24.

However, without minimizing the significance of the foregoing changes, the amendment that perhaps best reflects the changing social mores of our province is the abolition of the distinction between legitimate and illegitimate children.

At common-law, an illegitimate child was *fillius nullius*, (i.e., the son of no man), and as a consequence could not succeed to his or her father's estate. Remedial legislation in the form of *The Legitimacy Act*¹¹² provided for the legitimation of children born of voidable marriages and some void marriages. As well, marriage of the natural parents of an illegitimate child was deemed to legitimate that child. As a result of this remedial legislation, it is no longer quite true to say that the illegitimate child is *fillius nullius*. However, there are still situations in which legal discrimination exists. The Ontario Law Reform Commission summarizes some of these situations as follows:

1. The status of the child at common law has led the courts to conclude that any reference to "child", "children" or "issue" in a will or other document should be taken to refer only to children born within marriage. If A left a will containing a gift to "my children" the courts would undoubtedly hold that A's child born outside his marriage should not take a share
2. Section 28(1) of *The Devolution of Estates Act* provides that subject to certain exceptions "an illegitimate child or relative shall not share" on an intestacy. This means that the child born outside marriage will not benefit in any of the many situations where a child of married parents would benefit from the estate of the person who dies without leaving a will.

Section 28(2) modifies section 28(1) by providing that:

Where the mother of an illegitimate child dies intestate as respects all or any of her real or personal property and does not leave any legitimate issue surviving her, the illegitimate child, or, if he is dead, his issue, is entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.

It should be noted, however, that the modification is conditional on the mother not having any children born within marriage. Should she have such children, they alone take the property.

Section 28(3) further modifies section 28(1) and the common law by providing that:

Where an illegitimate child dies intestate in respect of all or any of his real or personal property, his mother, if surviving, is entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.

This modification, however, relates only to the mother of the child born outside marriage, and no other ascendant or collateral relative traced through his parents may share in the child's intestacy.¹¹³

Despite the statutory modifications of the common law concept of illegitimacy, the problem remains and, indeed, appears to be growing. Statistical evidence indicates that an increasing number of children are being born outside marriage and a declining proportion of them cease to be illegitimate in consequence of legitimation or adoption.¹¹⁴ In addition to the less favour-

112. R.S.M., 1970, c. C130.

113. Ontario Law Reform Commission, *Report on Family Law, Part III*, (1973), pp. 1-4.

114. See, *The Law Commission Report on Family Law, Illegitimacy* (London, 1982) p. 5 and Lecte, "Adoption Trends and Illegitimate Births 1951-77" 14 *Population Trends*, (1978), 9.

able treatment which the law continues to afford illegitimate children, the position of an illegitimate child's father differs from that of the father of a legitimate child.

For example, Manitoba's *Child Welfare Act* defines a child in need of protection to include "a child born to parents not married to each other whose mother is unable or unwilling to care for him".¹¹⁵ No legislative mention is made of the ability of the father of a child born out of wedlock to care for the child. Similarly, a child born out of wedlock can be adopted without the father's consent and he need not even be notified of the proposed adoption.¹¹⁶

The provisions of the new "Child Status" section of *The Family Maintenance Act*, implement the Uniform Child Status Act drafted by the Uniform Law Conference of Canada and presently enacted by the provinces of New Brunswick¹¹⁷ and Ontario.¹¹⁸ The legislation provides that upon the implementation of these provisions *The Legitimacy Act*¹¹⁹ and the filiation provisions found in *The Child Welfare Act* will be repealed.¹²⁰ The effect of these amendments is that all legal distinctions which had existed between legitimate and illegitimate children are abolished and illegitimate children will have the same rights as legitimate children in all respects.

The new child status provisions of *The Family Maintenance Act* specify situations in which a presumption of paternity will arise.¹²¹ Where the fact situation does not give rise to a presumption of parentage, an application can be made to a court for a declaration of parentage.¹²² Two major changes in this area are that corroboration is no longer required in proving parentage and a court may order that blood samples be taken.¹²³

With the abolition of illegitimacy comes a corresponding increase in the status of the natural father. The discriminatory treatment afforded natural fathers has been questioned on a number of grounds, the most recent of which is the ground of offending the *Canadian Charter of Rights and Freedoms*.¹²⁴ It seems inevitable that legislation which discriminates against unwed fathers would have been challenged as a violation of the equality

115. S.M. 1974, c. 30 (C80).

116. *Ibid.*, s.101. But see *Tasse v. Sweeney* Man. Q.B. (unreported).

117. (July 13, 1983) Suit No. 1028/83 per Wilson, J.

118. *Children's Law Reform Act*, R.S.O. 1980, c.68 2.1(1) states that a person is the child of his natural parents and his status is independent of whether he was born within or outside of marriage. In short, the Act attempts to abolish any common law distinction between legitimate and illegitimate children (section 1(4)) and to incorporate the same approach in construing statutes, regulations, orders, by-laws, or instruments under provincial law made before or after March 31, 1978 (section 2(1), (2)).

119. *Supra*, n. 112.

120. S.M. 1974, c. 30, (C80) Pt. V.

121. *Supra*, n.1, s.11.9.

122. *Ibid.*, s.11.5.

Clause 11.5(2) states the test to be applied in determining whether a person is or is not in law the father of the child shall be based on the balance of probabilities.

123. Clause 11.7(1) provides that on an application for a declaration of parentage, the court may order that persons named by the court provide blood samples for analysis and the results of analysis be submitted in evidence. The legislation provides that where a person refuses to submit a blood test that person shall not be subject to contempt of court proceedings or other penalties for failure to comply with the court order. See, Robyn Moglove Diamond, *supra*, n.82 at 18-19.

124. Can. Const. *The Canadian Charter of Rights and Freedoms* (1982).

provisions of section 15 of the *Charter*, which are due to come into effect in April of 1985.¹²⁵ In the interim, however, a challenge could have been made to such legislation on the ground that it violated rights protected under section 7 of the *Charter*.¹²⁶

In the amendments, the rights of the natural father have been expanded with regard to custody. Specifically, he has been given rights to be notified of, and allowed to participate in, legal proceedings involving his child, including adoption proceedings.¹²⁷ In effect, the law now recognizes that the natural father is entitled to rights and not only the obligation to pay maintenance.

VI. Conclusion

The legislative reforms surveyed in this paper were necessary to bring Manitoba family law into the 1980's. The restructuring of Acts and technical amendments are always necessary to ensure efficient operation and logical consistency. The new Unified Family Court is a procedural reform which has been recommended for over a decade. The extension of rights to common-law spouses and natural fathers and the abolition of the concept of illegitimacy are progressive steps which already have been taken by other provinces. Of course, each province has its own cultural milieu which will shape and, in turn, be shaped by its legislation. We can only await with interest the way in which these legislative reforms are received and interpreted by the courts and the impact they will have on the community which they are intended to regulate.

125. *Ibid.*, s.32(2) provides that s.15 will come into force April 17, 1985.

126. See, N. Bala, "Section 7 of the Canadian Charter of Rights: Family Law and the Liberty Interest" unpublished, March, 1983; Dale Gibson, "Impact of Canadian Charter of Rights and Freedoms on Manitoba Statutes", Dec. 1982, Legal Research Institute, University of Manitoba.

127. *Supra*, n. 1, s.11.