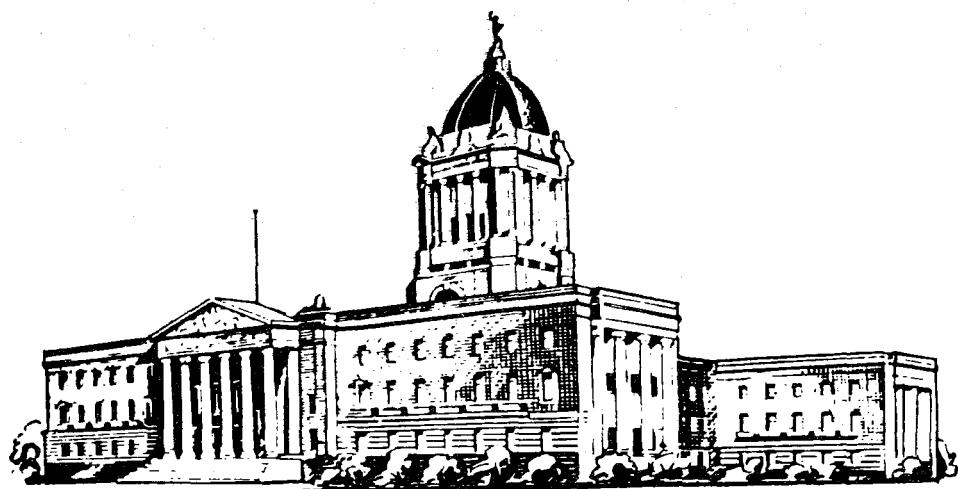




## **Legislative Assembly of Manitoba**

### **HEARINGS OF THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS**

**Chairman  
D.J. Walding, M.L.A.  
Constituency of St. Vital**



**2:30 p.m., Thursday, February 3, 1977.**

THE LEGISLATIVE ASSEMBLY OF MANITOBA  
 STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS  
 2:30 p.m. Thursday, February 3, 1977

MR. CHAIRMAN (Mr. D. J. Walding): Order please. We have a quorum gentlemen, the Committee will come to order. When we adjourned for lunch we were on Page 114, Section (2). Is there any further discussion on the point? Mr. Johnston.

MR. F. JOHNSTON: I think we could belabour Section (2) for a long time as a committee. I think we should really try to have the wording in such a way that it can be done and can be, at least, workable. This way it's written in such a way that I don't see how it could be enforced in any way, shape or form, but I think that the intent of it, that there should be participation in decisions between spouses is right, but we just can't pass legislation that is not workable or ties people down to things. So whether we should eliminate it or not, I would just leave that up to any other comments from any other members of the Committee.

MR. CHAIRMAN: Any further discussion on the point? Mr. Malinowski.

REV. MALINOWSKI: Thank you, Mr. Chairman. Well, I agree with Mr. Johnston, what he said, especially with this Section (2), instead of helping by any legislation, we may just create a chaos. I think maybe we should change it a little, if we have to put something to this effect, like we have in this Section which says participation, especially considering the expenditure of all the income. This is quite a difficult area and as was mentioned before, if a farmer wants to go and buy a tractor or truck or something like this, he has to take his wife with him and now it will be vice versa, if the wife wants to buy something she has to have her husband with her all the time. I don't think that this legislation will help anything.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, the intent of this perhaps is, as the Attorney-General said, is a principle, is all quite a noble concept, but, you know, I could see this being the state that maybe some marriages have deteriorated to, but I think where there is a good marriage, I don't think any of this kind of legislation would work, and who would be determining the periodic clothing allowance and weekly sum of money? Perhaps that should be going into spousal maintenance, that section, because, my God, if they've degenerated to that sort of a situation, I can't see them staying together very long. Like Frank Johnston said, if his wife wants to buy a dress, she's not going to phone Frank up at home and my wife is not going to do the same as far as I'm concerned. I really don't know how you can enforce this, it's a nice statement of principle but it's something that we hope that all marriages would be such that there would be a sharing of the responsibilities, financial and otherwise. If anybody can tell me how we can enforce this then I would say, "yes, maybe it could be warranted." But as far as to put it in as a piece of legislation that this is how we're going to enforce it, I really don't know how we're going to enforce it. Maybe some other members of the Committee have some ideas how it could be enforced, I'm sure I don't.

MR. CHAIRMAN: Mr. Adams.

MR. ADAMS: Mr. Chairman, I think that Section (2) here on Page 114 deals with maintenance and I don't think it has to do with the actual running of a farm or a business. I think this pertains mainly to maintenance but I find these two, (a) and (b) in (3). . . you know, it's cluttering up the Act, I think you could make it more simpler and I would even be prepared to delete those two sections and just leave "A reasonable standard of living in accordance with the family's available means and that any amounts paid under this provision shall be reasonable, taking into account financial circumstances of the family and the actual amounts expended by the other spouse for such purposes." I don't see the need for all this cluttering up of that section.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we have to keep in mind that we are dealing with cases where divorce is pending or very close to pending anyway, and I think you have to look at some of the statistics that occur and I would have to say that it's my belief that in the majority of divorce cases, most of the problems are financial because the wife has not had a reasonable allowance for her own personal use, or because

February 3, 1977

(MR. GRAHAM cont'd) . . . she hasn't had any clothing allowance. This has, in my view anyway, led to much of the breakdown that occurs and if we can prevent a breakdown -- I don't know how you could enforce it but I think that she should, as a partner in that marriage, I think she should have a right to an allowance for her own personal use, just as the husband should have a right to an allowance for his own personal use. Now whether it should be an equal amount . . . Most of the problems in marriage are of a financial nature and maybe it's because we haven't spelled out clearly what the responsibilities of each member are. I think that ignorance and lack of knowledge of what is going on has tended to create suspicion and has been a cause in divorce. Now whether you can work into legislation something which would make everyone aware of what their responsibilities are and the duties that one spouse owes to another, if it will improve the relationship then all well and good.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, in the upper sections, as I said, we do agree that there should be a way of one spouse or the other finding out how much money is coming into the family and this is where I can see where Section (2) might not be needed at all but under Section (3), let's face it . . . Mr. Muldoon when he was here said that in his hearings he was very amazed at how people were enthusiastic, they were saying "finally you've done something to give one of the spouses the opportunity to have an allowance." I say let's face it again, what we're talking about is some tight s.o.b. that goes golfing every night and spends all his money at the golf course -- and it happens in not only working families, in all families -- and the rest of the family is basically suffering; or vice versa, it may be she's wearing fur coats and running around and he's taking care of the children and painting the house. And that's really what we're trying to get at here. Now if we have an arrangement where the amount of money coming into the house can be determined or found out . . . I go back to the earlier discussions where apparently you don't need to go for a separation to find out under another Act or to make an application for maintenance. But if you can find out how much money is coming into the house and there is a provision for a person to go to the court and say that I am being mistreated, or not mistreated but I'm being left out of the greatest part of this income and I think I should have more or an allowance, that they should have some place to go to establish that and a decision be made according to the amount of income coming into the house. And on that basis, I would say if it goes that far, the marriage is in problems anyway, but that provision should be available to somebody to do so. And that's really what we're trying to get at . . . well, let's say a girl or a person who is sort of locked in with children, etc., and is not really getting an allowance from the income of that house, we know it's a problem and we should try to write it some way that there is a way for that person to make application to have better treatment. So if we can establish that they can find out the money and we can establish that they have a place to go to get a fair share of it, that may be it.

MR. CHAIRMAN: The Chair senses a lack of enthusiasm there for Section (2). Section (3), is anybody speaking strongly in favour of Section (3)? Mr. Pawley.

MR. PAWLEY: Well, I was interested this morning in Mr. Silver indicating to us, because I must admit that I was rusty on this point -- I felt that this (3) was important so that proceedings need not be launched for a separation in order to obtain payment of maintenance, because this provision does provide for some reasonable allowance to be paid. And, if in fact (3) is embodied in the law now to some extent, widely enough that it can be judicially applied at the present time, then I suppose we'd be just carrying forward the law. I wonder if Mr. Silver would expand.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: The specific types of payment, called here clothing allowance and personal allowance, there is no provision for this specific type of payment in the present Act. The only thing I was saying was that under the present Act, the way the Act is framed, it is not essential to apply for separation and to get an order for separation in order to get an order for maintenance. Theoretically, the way the present Act is framed, a wife can apply for maintenance payments, not specifically clothing allowance or personal expense allowances but general maintenance payments, without asking for a separation and a judge can order that a husband pay to the wife

(MR. SILVER cont'd) . . . specific payments for maintenance, even though they continue living together. Now in practice I don't know of any case where that has occurred, I don't know of any case where there is an order for maintenance alone without an accompanying separation. But the fact remains that, the way I understand the present Act, it's not essential to have both together.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Then I would see if that is the case, if maintenance would, I would think, always relate to the clothing allowance and for other personal expenses of food and things of necessity, maybe all we need do is to examine the existing provision to see whether or not it could be improved to reflect more the Section (3) because it seems to me in practice or in effect we do have this now. It maybe should be more positive rather than negative, the present provision. I don't know whether this is something we should simply be re-examining in view of the existing provisions in the Act. --(Interjection)-- Yes, to better clarify the existing provisions.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I stand by what I said this morning with respect to our responsibility to protect and defend those spouses who are prisoners of situations over which they have no control. But I have come round I think to accept the view of Mr. Adam and to agree with him that perhaps subsections (a) and (b) of Section (3) are redundant. He described them earlier as being somewhat demeaning and I know what he means by that. I was prepared to go along with the demeaning aspect because I felt it important that people in unfortunate and unhappy situations, who were not a privy or a party to the family income, were at a terrible disadvantage, but I think Mr. Adam would agree to that same reality and I think I agree with what he is saying, that really (a) and (b) perhaps are somewhat demeaning to the concept of marriage and certainly redundant. It would seem to me that if we were going to enshrine the concept that every partner to a marriage is entitled to a reasonable standard of living in accordance with the family's available means, period, that that by implication -- what is a reasonable standard of living? It includes food and clothing and the right to a little bit of independence, financial independence. So I think probably (a) and (b) are implied in the main section, the preamble if you like or the main principle in Clause (3) and for that reason I support Mr. Adam's view on this Section and if we can deal with the point raised by the Attorney-General satisfactorily in terms of just re-emphasizing the fact that there already is an existing right of recourse, we might all be able to accept this Section, revised, and move ahead.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: All that I want to say, because I think Mr. Sherman is basically correct that we can rephrase this, but I would not like to imply by that that I share Mr. Adam's view, because from the days when I was practicing law, the impression that I had was that so many of the marriage breakdowns occurred just because of this type of meanness, where one spouse had to crawl to the other spouse, beg to get something to spend, a little bit of freedom. And those are the marriages that the breakdowns occur in. Sure it's demeaning for the 95 percent marriages where there are no problems but there is that percentage where one would be just surprised as to what little is shared by one spouse with the other for personal things, everyday things.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, through you to the Attorney-General. Do you not think that that concern of yours is covered by the phrase "a reasonable standard of living in accordance with the family's available means"? Would you as a judge, in looking at that family's available means, not say that a reasonable standard of living means she or he has got to have a little bit of money to do this and that?

MR. PAWLEY: Yes, but the only worry that I would have about that phrasing is whether or not it could be interpreted that still the one spouse would not share any of the monies with the other spouse, so that there is some choice by the remaining spouse as to what type of clothing, for instance, she does purchase; what type of personal things are expended for recreation purposes, for instance. One could have a very good standard of living but no real sharing insofar as the monies are concerned, one is still holding a tight rein on all the expenditures. Now I don't know whether the preamble in

February 3, 1977

(MR. PAWLEY cont'd) . . . (3) would properly avoid that type of situation. I don't know if I have made myself clear, but there are some marriages where there just is no sharing at all of that responsibility.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think perhaps we should go back and read Mr. Muldoon's testimony on Page 28 of Hansard of November 16th, where he explains why this was brought in. In fact, there were many recommendations made to the Law Reform Commission which suggested -- this Page 28 -- that the pay cheque, an employee's pay cheque, be made out jointly to himself and his spouse. Now the Commission is not recommending that here but there were many submissions made in that respect. Here they are trying to point out that this might have a declaratory value which would be more of an ideal to make people realize that they do have responsibilities and I think that Mr. Muldoon explains it fairly well on Page 28.

MR. CHAIRMAN: Having had your concerns on that point, might we then mark that clause as something that we can take another look at and come back to. Can we move on then to Section (4), recourse through the courts? Mr. Graham.

MR. GRAHAM: Dealing with Section (4) here, I think this is where the Law Reform Commission is at variance with many of the submissions we heard. The Law Reform Commission is recommending that the judge take several circumstances into effect when determining maintenance orders, but most of the submissions we heard have dealt with what we can call no-fault maintenance, and I would like to hear if the Attorney-General concurs with the report of the Law Reform Commission in this regard.

MR. CHAIRMAN: I think you're talking about something a little different there, Mr. Graham. I believe Section (4) deals with the enforceability of Sections (1), (2) and (3), that we have just dealt with. Mr. Sherman.

MR. SHERMAN: Mr. Chairman, subsection (4) or Section (4) is perfectly agreeable to me. The only question I would have is this, what the Attorney-General means by enshrining and underlining the provision that is already in effect. If this is the enshrinement of that provision and if it is acceptable to the Attorney-General and the Committee, it is certainly acceptable to me.

MR. PAWLEY: I think it would be.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I just want to ask a question through you to the Attorney-General. The legislation that we have now on the Statute Books, does it include clothing allowance and weekly spending money, or is it absolutely just strictly bare maintenance?

MR. PAWLEY: I gather from what Mr. Silver said that the existing legislation refers only to maintenance, without specifying whether it is clothing, etc. I think it would be safe to assume that maintenance would include clothing and essentials but it doesn't . . . --(Interjection)-- Not necessarily a personal allowance, right?

MR. GRAHAM: Pardon me, I thought you were on Section 4 instead of subsection (4).

MR. CHAIRMAN: The bottom of Page 114.

MR. GRAHAM: I apologize, Mr. Chairman.

MR. CHAIRMAN: Any further debate on Section (4) then? Mr. Adam.

MR. ADAM: Mr. Chairman, I think the majority of the briefs, as I recall, expressed a great deal of concern with the enforcement in that the offended spouse had to resort to the courts in order to have her rights protected and in most cases, and in many cases, it was such an expensive procedure that they wanted the Crown to set up some sort of a tribunal of some kind to look after that, and I think that was in the majority of the briefs. This still leaves the onus on the offended spouse to go out and take it through the courts. Is that correct? Who enforces this?

MR. PAWLEY: A spouse would have to initiate the proceeding of course to enforce it if he or she felt that any of the protections provided for were not being observed by the other, then she would make a request to the court, an application to the court for a decree simply declaring that a certain right which she has embodied in the law is not being observed.

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: I was just going to mention to Mr. Adam that here we're talking about disclosure and allowance. I think that what you are talking about comes under the next heading which is Interspousal Maintenance. Here we're continuing to discuss disclosure and allowance and matters of disclosure, as I recall the briefs that have been submitted, didn't relate to not going to court on these, it was trying to get no-fault in the interspousal maintenance.

MR. ADAM: There would be some parallel though, would you not think, under this section, the present section where we understand that 75 percent of the judgements given by a court have not been enforced. That is one of the concerns that were expressed. Maybe I'm jumping the gun here a little and going to Section 4, but . . .

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think this whole Section 3, all six parts of it, are dealing with rights that exist while the marriage is still in effect and while they are still living together. Section 4 deals with after they have separated. I think that might help Mr. Adam in that respect.

MR. CHAIRMAN: Right. Mr. Adam.

MR. ADAM: My point in bringing it up, Mr. Chairman, was that we will just have another situation here which will be parallel to the maintenance orders that we have now, unenforceable, and that was just what I was trying to comment on.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I think there are two areas here, one is the procedure to obtain either a judgement or a declaration, and 4 spells out the right of procedure to obtain a declaration. Then, insofar as the enforceability and after one has obtained a judgement or an order, then that depends on so many different factors; it depends upon the means of the party against which that order is directed; it depends upon the efficiency of the system, the enforcement system. But I don't think that this really relates to enforcement, it relates to a right to make an application to the court to declare that a certain right that is spelled out in law has not been observed by one of the spouses to the marriage.

This then relates back to the items which we just travelled through, in which we agreed that we would have to re-examine. So if we tossed out all these items, (1) to (3), then (4) is not necessary.

MR. ADAM: If they are all tied together, then what is meant by (5)?

MR. CHAIRMAN: We haven't got to that yet, Mr. Adam.

MR. ADAM: Well, they are all part of it.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I would be opposed to eliminating Subsection (4) at this point. It refers to "the rights above" and those are the rights that are specified in Subsections (1), (2) and (3), and although we are going to go back to re-examine them, that doesn't say that we are going to delete or abandon all of them. So I think that we should accept Subsection (4) on the grounds that we will be dealing with some rights, they may not be exactly as phrased in (1), (2) and (3) but we will be dealing with some, and all this says is that a spouse has a right to secure those rights and if or she isn't getting those rights they have a right to go to court.

MR. CHAIRMAN: Agreed? (Agreed) We move on then to (5). Mr. Pawley.

MR. PAWLEY: If I could just comment, I think that all it means is that the Crown, if employer, is bound to comply with the requests that may be made to it on behalf of one of the spouses for information dealing with income, etc.

MR. CHAIRMAN: So that really should read "The Crown is bound by provision (1)."

MR. GRAHAM: Disclosure.

MR. PAWLEY: They would have to provide from its records, salary information, income information and what not. Mr. Silver, would that not be your . . .

MR. SILVER: Yes, I don't see any other way that it could be understood.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: I was just wondering here, how much difficulty would the Crown have in obtaining this type of information. Your income tax and so on is a Federal matter and nobody really can inquire really as to how much income a person has. So

February 3, 1977

(MR. BROWN cont'd) . . . I am just wondering how would the Crown obtain that type of information.

MR. PAWLEY: Well, it would have to relate I would think -- now correct me if I'm wrong, Mr. Silver -- to employees working for the Province, which the Crown, the Provincial Crown has access to the records and could provide to the spouse of the Provincial employee that type of information. It wouldn't be able to provide copies of the income tax returns because that's outside of our jurisdiction.

MR. ADAM: Does this only apply to government employees?

MR. PAWLEY: Provincial Government employees, yes.

MR. CHAIRMAN: Anything further on (5)?

MR. PAWLEY: If I could just add, and I wonder a little bit too, you remember when Mr. Muldoon appeared before us he mentioned . . . I know it is a very frustrating experience, a lawyer acts for a spouse, tries to obtain information as to income of the other spouse in proceedings and . . . or even tried to locate the whereabouts of the other spouse and Social Assistance, Unemployment Insurance, whatever it be, Crown agency, they always refuse on the basis of confidentiality to provide that information about a spouse who may have abandoned the other. I don't know whether that strictly relates to (5), it might have led to some of the thinking that went into (5).

MR. CHAIRMAN: Anything further on (5)? Subsection (6), Mr. Pawley.

MR. PAWLEY: Yes, Mr. Silver made a very good point with me in drafting and interpretation of statutes. Of course, if the Crown is not mentioned in the statute in relating to a certain provision then it is not bound, so that it would have to be specifically mentioned otherwise it would not be bound.

MR. CHAIRMAN: If there is nothing then further on (6), maybe we could go to the section on Interspousal Maintenance. Mr. Graham.

MR. GRAHAM: Before we do, Mr. Chairman, is it correct then, to go back to Subsection (1), if we apply (6) to it then it should read "receive annual and complete information from the other spouse concerning family financial conditions." Is that how you would interpret it? One says periodic and it says "on application shall not be more often than once per 12 month period."

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: I think the answer to that is that if you come to court and the court is going to give directions as to the information you should give and perhaps the court is going to say, well, you're going to give it information every three months, and of course if you don't give that information within three months then, of course, you can come back to court and say "he's not complying with the order"; now that is not a new application but that certainly doesn't mean that periodic in one means annual.

MR. GRAHAM: Okay.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: I thought it was clear and I think that's way I understood it, as Mr. Goodman explained it, that one could come back within the 12 month period if there was a breakdown in the marriage subsequently to the first order. Is that correct?

MR. GOODMAN: All right, but I'm saying that you could only make one application every 12 months, but if you've made the application and there is a direction from the court and the spouse does not obey that direction, then you can come back on the basis that he refused to obey the instruction. That's all I'm saying. And, of course, the direction may be that every three months you set out what debts you have, what income you have.

MR. CHAIRMAN: If we can move on then to the matter of Interspousal Maintenance, you will notice that there is a page and a half on the majority and then there is another four pages of minority, dealing with the same topic. I wonder if it would save us time if instead of going through all of those five pages, some of which are obviously contradictory, we might deal with the topic in its entirety.

MR. GRAHAM: Mr. Chairman, I think this is broken down into two categories here; there is non-marital co-habitation, it's a complete separate . . .

MR. CHAIRMAN: That would be the next section that we would deal with.

MR. GRAHAM: Mr. Chairman, I think this is probably the first major point, this Section 4, where the briefs that we have heard have differed significantly with the

(MR. GRAHAM Cont'd) . . . recommendations of the Law Reform Commission. Here we have the Law Reform Commission basically establishing a position which Mr. Muldoon, before this Committee on the 16th, attempted to explain their reasoning why they opted for the fault principle, and I would like the Attorney-General at this time to give us an indication of their basic position on the fault as opposed to the no fault concept. I think it is fair for him to give us some indication at this time.

MR. PAWLEY: I thought you were going to expand on your position. Well, I think that this is a problem which I know that my colleagues and myself on our side have had a very difficult time contending with and we've spent much time on it as I am sure that the Opposition members have. I think we've come down to a position that if we could insert some understanding that in the event of the separation of the parties, and they're living apart and the spouse that is receiving those payments while living apart accepts some responsibility to arrive at a state of self-sufficiency. In other words, if circumstances are not such that he or she appears to be making no reasonable effort to arrive at self-sufficiency, getting back on their own feet, getting away from maintenance payments as soon as possible, if that is the case, that they're doing that, then we think that there is no room for fault. The problem with fault is . . . I think it's been related in itself, leaving it in itself is the fact that it creates so much uncertainty, there's never a black and white situation as so frequently has been indicated to us; there is tremendous costs and delays that are created by the existence of "the hanging of dirty linen" so as to speak, "out in public"; the tremendous human and spiritual losses that are effected by that process through the court; that we feel we should try to steer clear of fault as an element in determining maintenance payments. In saying that, we recognize that there is some responsibility, however, to ensure that the spouse that separates tries to adjust in such circumstances as to demonstrate that he or she is responsive to his or her responsibilities, whether it is raising a family, whether it's going through the proper retraining process on interim basis, or whether it's to . . . whatever it be to get back on one's feet.

Again, to establish the fault principle also leaves too much room as well for the State to end up having to pick up people on social assistance who are found to be at fault and therefore they don't receive any maintenance payments as a result and therefore their only recourse is to fall onto the State Treasury, when in fact the State has, I don't think, contributed to it at all, one iota to the marriage breakdown. The present provisions in the Wives and Family Maintenance Act are very very archaic and we certainly don't go along with those at all. Our inclination would be to remove (h) on Page 116, but to add a provision "in which the separated parties are living," that the court could examine the circumstances under which the separated parties are living, in the likelihood that such circumstances can reasonably be expected to affect the financial status of the parties and whether or not such circumstances are conducive to reasonable efforts being made by the parties to become financially independent.

I think that pretty well spells out our position in respect to Section 4, but we're certainly interested in getting views of the members across the way because it's certainly not a irrevocable point in our discussions.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Can you repeat again that last sentence?

MR. PAWLEY: You mean the paragraph that I would suggest, something along which lines should be included? It would be to the effect that the judge shall consider the circumstances under which the separated parties are living in the likelihood that such circumstances can reasonably be expected to affect the financial status of the parties and whether or not such circumstances are conducive to reasonable efforts being made by the parties to become financially independent. I tell you what we're worried about, if a spouse receiving maintenance payments ends up living in a common-law relationship with somebody else, continued to receive maintenance payments from the other spouse, as I indicated this morning, that would be enough to cause the spouse making those maintenance payments to slit his or her throat, if she had to make maintenance payments under those circumstances. Now, the only thing which was raised by Mrs. Steinbart, I think she felt that such a clause was not necessary, that under such circumstances there could be a motion to vary the judgement, and I think that's something

February 3, 1977

(MR. PAWLEY cont'd) . . . that your counsel will have to further review because if there was any uncertainty as to that we would want to ensure that that is part of the understanding.

MR. CHAIRMAN : Mr. Graham.

MR. GRAHAM: Do you perceive this eliminating many of the costly examinations of the various assets of the spouses in any way?

MR. PAWLEY: I don't think an examination of the assets, but what it would eliminate would be this, I think diminish, would be this soul-wrecking experience of the spouses lining up their friends and mothers-in-law and fathers-in-law and relatives to hang all the dirty linen out in court, even hauling in their children to take points of view opposite to each other. It would eliminate much of that because under the present provisions . . . what is it? You've got separation if you prove common assault, drunkenness, persistent cruelty, desertion, and it's all spied out and this is what gives way to all the difficulties, I think, in the present situation, causing so much uncertainty, causing so much delay and so much expense.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I see we're on subsection (h), Mr. Chairman, but I wonder if I could go back to subsection (c) because we're really sort of dealing with 4 as a whole. The length of the marriage I see is specified as one of the factors that the Law Reform Commission and indeed, I infer, the government sees as being included. I'm just wondering what the justification is for that. There was a former member of the Committee, Mr. Cherniack, who questioned that subject, that consideration, at some length in Committee hearings earlier and I would appreciate the Attorney-General's justification for considering the length of the marriage. I'm not saying that I recommend it be taken out but I'd like to know why he would say to me that we should leave it in.

MR. PAWLEY: I think the concern that we would have about deleting it, (c), would be if obviously they were dealing with two marriages, A's marriage of six months and B's marriage of 30 years, that B would have, during that period of time . . . the length of this marriage would likely contribute more to the impairment of B's ability to reinstate his or herself in the work place, much more so than a short marriage.

MR. F. JOHNSTON: (inaudible)

MR. PAWLEY: Look, no heckling, it's a difficult question. I think that would be the thinking behind it. Now I'd ask Mr. Goodman if he has any thoughts he would like to add to this.

MR. GOODMAN: Well, I think that is the thought. It may well be that it's covered perhaps even in the next section but perhaps just for clarification, to ensure let's say the spouse of long standing and I think this is what they refer to on Page 20 in the third paragraph of the Report, "a spouse of long standing especially if she has not worked outside the home during the years of her marriage, is at a double disadvantage. It seems obvious that the longer people are out of the labour force the more difficult it is to re-establish themselves as wage-earners." So that certainly is a factor and yet it may well be covered in (d), but that is a concern and perhaps even if it is redundant . . .

MR. SHERMAN: Could I just respond to that, Mr. Chairman? I would agree with that if you are talking about the length of the period of the maintenance enforcement. We're not talking about that in this subsection, we're talking about whether maintenance is to be ordered or awarded and what amount is to be ordered, and I don't want to put words into Mr. Cherniack's mouth, but it seems to me the question he was raising, I think it was a good one, was if you are talking about maintenance and amounts of maintenance, what difference does the length of the marriage have to do with it. The length that the maintenance has to be maintained has a great deal to do with it and I agree because if the spouse, let's say it's the wife, it usually is, she's 25 years old and is able to get into Red River Community College, that's one thing; if she's 55 years old and is not able to get into Red River Community College, that's another, but we're talking here about maintenance and presumably a situation where children are involved so I don't see that the length of the marriage has that much to do with it, if the maintenance is designed to be rehabilitative in the first place.

February 3, 1977

235

MR. PAWLEY: You've raised a very good point. I don't know whether Mr. Muldoon . . . he didn't deal with that particular item did he anywhere in the questions? Can we put a re-examine beside that?

MR. SHERMAN: Yes, let's put a re-examine on it.

MR. PAWLEY: Another thing that I would like to just mention is that when we were examining this in caucus we felt that we should delete the words at the beginning of 4, just before the clauses (a), (b), (c), (d), etc., the words just preceding those clauses, the second line above, "all the circumstances of the case, including", so that would read otherwise "the judge shall consider:" and then (a), (b), (c), (d), (e), etc., deleting the words "all the circumstances of the case, including" so that we wouldn't be dealing with the whole ball park in court. Otherwise, we're going to be all over the field as to what can be considered and looked at in the courtroom.

MR. SILVER: It simply limits the discretion of the judge as to what factors he takes into account.

MR. CHAIRMAN: Any other comments on Interspousal Maintenance?

Mr. Adam.

MR. ADAM: Getting back to Mr. Sherman's concern and what would happen in the case . . . I think the intent of this here is to consider a long marriage as opposed to a very short one, for one of the spouses to be able to rehabilitate more quickly than one of long standing. What would happen in an example such as say where -- and it does happen -- where one spouse may be handicapped right from Day One and there may be a breakdown within a year or so and that spouse is unable to support his or herself right from Day One?

MR. PAWLEY: I think that would come under (d), "The extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency."

MR. ADAM: Then the length would not enter into consideration.

MR. PAWLEY: Not there, no, I don't think so.

MR. ADAM: Is that correct, Mr. Silver?

MR. SILVER: Well, in the kind of situation you describe, it would appear to be relevant in the circumstances outlined in (d) or at least clause (d) would relate very much to the situation you described, quite apart from length.

MR. ADAM: That's what I'm getting at.

MR. SHERMAN: Mr. Chairman, through you to Mr. Adam, I just don't see that the length of the marriage has anything to do with it in any circumstance. I think the age of the abandoned spouse, or maybe I shouldn't use the term abandoned, but the rejected spouse, has a great deal to do with it. I can't see the length of the marriage as having . . . What you want to know is, is that women 25 years old and can she be trained for a job in two years, or is she 45 years old and because she has three children to look after unequipped to be trained for a job ever? That's what you've got to be concerned with, not whether they were married for three, seven, ten or fourteen years, it seems to me.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, the length of a marriage, you know, you could be married two years and be 60 years old if the two of you got married when you were 58. The length of the marriage might come into play at that particular time but I can't see it having any bearing other than . . . I can't see the length of marriage having any bearing on it other than that.

MR. SHERMAN: I'm not asking, Mr. Chairman, that we delete that subsection, I just think the Attorney-General said it would agreeable to him to re-examine it and I think we sort of left it that way. I don't think we're finished with (h) though.

MR. PAWLEY: Could I just add another point there? Was there some concern expressed, or am I reading something into the situation, there could be some undue advantage taken of very very short marriages, that there was not such a provision as this.

MR. F. JOHNSTON: . . . consideration of the length of marriage, that would be my thinking behind it. You could have a professional marriager or whatever you want to call them and . . .

February 3, 1977

MR. GRAHAM: Mr. Chairman, I can't recall the exact page, but I well recall Mr. Muldoon raising that issue, that it's quite conceivable that they could be married on Friday and divorced on Monday, and she could demand full maintenance in that respect. I've been looking through Hansard and I can't find the page where he made that reference.

MR. SHERMAN: Why would that not be covered under (b), The respective responsibility of the spouses for the support of others . . . or (a) -- no, no wait, perhaps it isn't covered under (b), that's talking about support of others. --(Interjection)-- (d), The extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency. No, if the marriage has only lasted for two or three weeks, would any judge say that there had been a demonstrable dependency shown there? Would he not suspect that there was some frivolous motivation involved, or at least some motivation that was not related to dependency?

MR. PAWLEY: Mr. Silver just mentioned another point to me, that if we are limiting the judge as to areas that he can examine, then we must be very careful as to the deletion of any of the factors, so all the more reason to re-examine it, I think, very carefully before we remove it.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, in that respect, when you are talking about clause (d), the extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency, and yet further up we have removed from the judge's jurisdiction all the circumstances in the case, I think we should give the judge a fair degree of latitude to examine all of the circumstances. Just for argument's sake I would take the case of a person who has been . . . where both members of the partnership have been working for years but because things aren't going too well, one says "well, to heck with it, I quit" and just stays at home, and a year later files for a divorce or files for a separation and then claims maintenance. At that particular point in time that one spouse is not working and do you take into consideration all the circumstances in that particular case? I would hope that they would.

MR. PAWLEY: Yes, and I think that that was the thinking behind the provision that we added, that it would have to be shown that if that spouse was capable, no family involved that they were responsible for and had skills and ability and health, then that would be one of the elements that would be examined by the judge in weighing any order of maintenance.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, Mr. Chairman, I don't want to delay the Committee on this point really but I would like to get one thing clear in my own mind. When we're talking about no fault maintenance, are we talking about guaranteed maintenance? It's not my impression that we are, we're talking about if it is determined that maintenance would be paid because of the circumstances of the household, then it should be paid on a no fault basis if we accept that principle, assuming we accept that principle. We're not talking about guaranteed maintenance are we, or are we? It's not automatic that a judge is going to decree that there is going to be maintenance.

MR. PAWLEY: No, no.

MR. SHERMAN: He would make the decision. If the couple had only been married for three weeks and then she had taken off for Las Vegas with somebody else, I can't see any self-respecting judge making the decision that she was entitled to some maintenance. So there wouldn't be any maintenance order.

MR. PAWLEY: That's probably a good argument for leaving (c) in, Bud.

MR. SHERMAN: Oh, well you're approaching it from the opposite perspective. Okay, well that's all right, I don't want to hold the Committee up, I'm not asking that it be taken out, I asked that we re-examine it and, Mr. Chairman, I'm satisfied now that we have re-examined it, let's leave it in.

MR. CHAIRMAN: Is there anything further members wish to bring up under the matter of Interspousal Maintenance. The Committee hasn't dealt with the matter of maintenance where there might be lifelong maintenance due to age or impaired earning ability of mental or physical disability. Is that something you wish to consider at this time?

MR. PAWLEY: Mr. Chairman, under (d), I think that would . . .

MR. CHAIRMAN: Mr. Adam did touch on it.

MR. PAWLEY: I think that comes under (d), I think the judge would have the latitude to examine that under clause (d), the extent to which dependent and the causes and reasons for such dependency. Would that not come under there? Would you not be satisfied that that would . . .

MR. CHAIRMAN: Does that mean then that if a person gets divorced at the age of 20, whose spouse was simply mentally unable to get another job or be retrained, could be saddled with maintenance payments for the rest of his life or 50 years?

MR. PAWLEY: That would be balanced against (c) if you're dealing with a 50 year situation ahead of you. On the other hand if they had been together for 20, 25, 30 years, and the one is handicapped and they're separated, I don't think it would be unreasonable in that circumstance, that there would be a dependency situation created, some dependency situation.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, Mr. Chairman, I don't know what the feelings of the other members of the Committee are, but if we're adopting the principle that no objection means acceptance then we're at the point of slipping past a kind of a milestone in these deliberations because section (h) which relates to fault or no fault, is central to the whole work of the Committee and I don't think we should be silent unless we're prepared to accept the fault principle. I think we should register that for re-examination unless it's the feeling of the Committee that we're going to accept the fault principle, because section (h) implies the fault principle.

MR. PAWLEY: You see I would propose deleting that and replacing it with the circumstance paragraph.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, what we are deleting then is a section which gives them the authority and the refusal to provide support. What do you propose to do if one party refuses to provide support?

MR. PAWLEY: After there is a court order?

MR. GRAHAM: Well this is being taken into consideration when you are establishing a court order.

MR. CHAIRMAN: I don't know whether we have the question clearly . . .

MR. GRAHAM: You're deleting section (h) . . .

MR. PAWLEY: Right.

MR. GRAHAM: . . . which provides for the relative responsibility of both or for the refusal to provide support.

MR. PAWLEY: Gil, do you want to . . .

MR. GOODMAN: I think the simple answer is you wouldn't be going to court unless there was a refusal or a neglect to provide support. The whole purpose of applying for the maintenance is because you are not getting it. If you're getting it, then, of course, in many many cases I'm sure that there is an agreement signed between counsel for the two parties, an agreement will be signed and support will be given. But the only time you are going to come to court is when there is either a refusal or a neglect to provide that support. I don't know that it really means anything in (h) even if it's as it stands but you certainly are not going to go to court for an order of maintenance where you are satisfied, where you are getting the maintenance that you deserve.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: What we are doing in deleting (h) is this, we are simply saying that even if a husband has blatantly refused to provide maintenance that he is well able to afford to provide, the judge should not penalize him and should not order a larger maintenance than he would order in another case where that kind of fault would not exist. In other words, the amount of maintenance or whether there is any maintenance order at all, should be based only on the ability of the paying spouse to pay and the need of the recipient spouse, not on whether the one who is paying has any fault in the matter or not; or whether the recipient spouse has any fault.

MR. GRAHAM: Mr. Chairman, on the basis of that explanation, in essence then what we are saying is that in any marriage breakdown we may very well see every

February 3, 1977

(MR. GRAHAM Cont'd) . . . case going to court to establish what the maintenance will be. I think what we'll be doing is sending every case to court rather than trying to keep them out of court.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: There is nothing to prevent the parties from entering into an agreement without any recourse whatsoever to this legislation. There's nothing here to prevent that from occurring, but what Mr. Silver pointed out is that the judge, in determining the amount of maintenance, would not say "Well, because over a period of four months or five months, the one spouse did not contribute to the other maintenance payments and as a result of that, I'm going to punish that spouse by imposing larger, a larger payment than I otherwise would." We're removing that consideration when we remove paragraph (h).

MR. GRAHAM: No, but aren't you removing a deterrent from court action? If a person is afraid that he may be penalized for some of his actions when he goes to court, he may very well enter a settlement without going to court and a very fair settlement for both parties, but if there is no threat of an added penalty being added by his or her refusal, you might very well be sending a whole bunch of cases to court which ordinarily would be settled outside.

MR. PAWLEY: I don't . . . Gil, do you want . . .

MR. GOODMAN: I was going to say I wish that applied to criminal law.

MR. GRAHAM: Criminal and civil are vastly different.

MR. CHAIRMAN: Mr. Johnston.

MR. FRANK JOHNSTON: Mr. Chairman, I'm having a fair amount of trouble with the no fault concept and I know the desirability of not having people dragged through courts and everything of that nature, but naturally if there is going to be maintenance paid the spouse that has the children is going to receive the most maintenance, I would say, and on that basis the judge will have to make a decision because the one that has had the children put in their care, he'll have to consider that. But what if they have a battle as to who is going to have the children? I would just love to avoid no fault and I have trouble saying to myself, "if I'm not at fault, why have I got to be treated any differently than the other one." If the judge says that we're paying maintenance at such and such an amount and he says, "Well that's fine, now I'm going to get a house and I'm going to live in it, going to live common-law with a lady that has two children because I enjoy children around me and I haven't got my own and I have a right live as well as they live but I can't afford that." You're going to get in a fight. I'm just wondering how we are going to avoid these battles on no fault. Where's there two people without children and both working; where there is certainly a tremendous amount of people who decide that they are not compatible and are not going to live together and they come to agreement, and that happens every day; but where you have a marriage that's been going on for 10 years or so and there's children involved, most of the time there is somebody, one of those spouses, that hasn't been a good partner and the one that has is going to put up a fight about that, for the children especially and . . . I just don't know where we are going to completely avoid saying that somebody is not at fault. Now it has been said in front of this Committee many times, who can decide the fault. If the girl is out running around, the guy maybe caused her to do because he was cruel or something of that nature or didn't buy any clothes in the family; if the guy drinks maybe he drinks because his wife won't have anything to do with him. I really don't know how we can get into all of that, but somewhere along the line somebody is to blame in that particular case of separation. Somewhere along the line and I go so far as to say — and I think Mr. Barrow brought it up in Thompson if I'm not mistaken — if a woman were to commit adultery that does not mean to say she is a bad mother. Right? --(Interjections)-- She could be the best mother in the world but maybe she was committed to run around with some other guy because the guy is a lousy husband and parent, yet you're in a position of very technical law as to who is at fault.

Now I really want to see the dragging out of court cases and everything done away with but I don't know how close we're going to come to it. I can see angles of getting into court over children, I can see angles of getting into court by saying, "If there's no fault in this thing, I deserve as much as the other." There it is, I don't

February 3, 1977

239

(MR. F. JOHNSTON Cont'd) . . . know how we can get around it. I might not have worded that right, Tom, but it's close enough.

MR. PAWLEY: Insofar as the children are concerned, it seems to me that the question of custody of the children would relate to the issue of which of the parents could best assume custody for the children in the interests of the children and that certainly there would be no . . . all circumstances would be examined in that type of situation. --(Interjection)-- Pardon?

MR. F. JOHNSTON: . . . I'm the best parent, you know, I can see a fight coming.

MR. PAWLEY: Yes, well we're going to have that, certainly where there is dispute as to custody, there's no question about it but it won't be fault necessarily that will be questioned, it will be the circumstances in each environment as to whether those habits, whether it be excessive drinking, drug-taking, whatever it be it could probably become evidence in the court but it would relate to the welfare of the children rather than as to whether one is more at fault for certain situations than the other. So I don't see where the welfare of the children would be affected insofar as custody is concerned under 4.

REV. MALINOWSKI: Well, isn't it right that most of the time the mothers get the children regardless of fault?

MR. PAWLEY: Not fully, in fact I had a father in to see me last week with a three year old youngster, who maintained custody of his child, although it is true with younger children it tends to be the mother who succeeds in the custody proceedings. But the courts examine all the circumstances pertaining to the home lives, the care that can be provided by the respective spouses and they will not weigh it on the basis of whether the father should have a priority or the mother should have a priority, only what is in the interest of the child considering all the circumstances. Now I don't think that removing (h) is going to influence that, this doesn't pertain to children, 4 won't pertain to the custody of the children, just to the maintenance as between the couple. In fact what we're saying here is that if there are children involved, in all likelihood there will be a maintenance payment regardless of the issues that now can be raised pertaining to finding of one of the specified charges in the Wives and Family Maintenance Act. Right now a mother in order to obtain maintenance payments for herself under separation proceedings must prove drunkenness, persistent cruelty, all the way down the line in order to receive the payments; even if she has children she would still have to prove one of those to get maintenance for herself, not for the children, those maintenance payments -- am I correct? -- would be paid automatically presently. But in order to obtain that sort of maintenance support for herself so she could better maintain the home and raise the children, she would have to prove one of the specified charges in the Wives and Family Maintenance Act.

MR. SILVER: She'd have to prove absence of maintenance, that she's not getting it.

MR. PAWLEY: But she'd have to prove some charge wouldn't she?

MR. SILVER: If she wanted separation as well, she would have to prove more.

MR. GOODMAN: But not under the Wives and Children Maintenance Act, I mean the key to it is just for maintenance.

MR. PAWLEY: But this doesn't relate to children in any event, this No. 4.

MR. GOODMAN: No.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, from what the Attorney-General has said and what has been said here, I can probably rationalize something then. Are we saying here that regardless of which spouse has the children, which will be decided some other way I guess, there's going to be payments made to spouse -- that's one payment -- and the payment would increase if that spouse had the children but the decision as to who has the children has not been made, but there will be payment made to spouse. But, you know, which comes first, the chicken or the egg here? Who is going to have the children type of thing. You could very easily say, "Okay the maintenance is settled between spouses, now the decision has to be made as to who has the custody of children because they don't agree." And then when there is finally a decision as to which spouse has the children, the payment changes.

February 3, 1977

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: They would have to determine who has the custody of the children before they would arrive at No. 4 here, that would be determined then they would deal with No. 4. The maintenance would depend upon who had the children.

MR. F. JOHNSTON: I can see disagreement on custody of children, there will always be.

MR. PAWLEY: Oh yes, that's where most of the difficulty occurs.

MR. F. JOHNSTON: If we're going to have the custody of children decided first, I can assure you if there is a battle over it, the fault will be decided and whether the payments are changed or not, there will be somebody in court declaring that one is a bad father or mother; but that won't affect the payments according to . . .

MR. PAWLEY: Right.

MR. F. JOHNSTON: I don't think we've got away from the court battles where there are children involved.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Is my assumption correct then that by removing section (h) under No. 4 will not affect the amount of maintenance and by leaving it in that the degree of responsibility by one spouse will determine how much he or she will receive? Is that what I understand this section to be??

MR. PAWLEY: It could.

MR. ADAM: And by removing that, then that will never be a condition to determine the m aintenance amount.

MR. PAWLEY: That's right.

MR. CHAIRMAN: Mr. Malinowski.

REV. MALINOWSKI: I can't understand one thing. For instance if we have a case and the children are staying with the father, do you think that a mother will be able to pay for maintenance of the children, because usually the father pays?

MR. PAWLEY: That could be, and then in that case . . .

REV. MALINOWSKI: I don't know because as I said, usually it is that always the father is paying for maintenance for a mother or for his ex wife, whatever you want to call it, and for the children. But I'm just wondering if it will be the case, opposite.

MR. PAWLEY: It could very well happen because it would be very easy for the mother to be a highly paid professional.

REV. MALINOWSKI: That's right.

MR. PAWLEY: And the father a low income worker, yet from the hearing involving the children the professional mother is obviously a poor mother, yet the father really doesn't have the ability to keep the children in . . .

REV. MALINOWSKI: . . . this always the case, that's why, as I said previously . . .

MR. PAWLEY: It could easily happen, I can certainly see the circumstances by which the mother could be required to make payments to the father for maintenance of the children.

REV. MALINOWSKI: It could be but usually it doesn't happen.

MR. PAWLEY: Not very much but I'm sure it probably has and will happen.

REV. MALINOWSKI: Yes, that's why, as I said previously, that usually the mother gets the children, in most cases, because the father is not qualified to be a mother.

MR. PAWLEY: Not necessarily, the courts have varied. You know, back in the Victorian period it seems to me that the tendency was for the courts to grant the father the children, they disagreed with you, they thought the father was better equipped to deal with the children and the father would usually receive the children. Then the pendulum swung to the mother usually receiving the children; now, as I understand it, the court examines the welfare of the children, without particular reference to the sex, you know, the father or the mother in making that determination. In so doing, the children of very tender age generally end up with the mother and older children will . . . well an older boy for instance, 14, 15, will often feel he's best off with his father, all of the circumstances being equal. So it varies a great deal. Last night, as I say, I had a father that just succeeded in winning custody of his two or three year old boy,

(MR. PAWLEY Cont'd) . . . in to see me, so it happens even at a tender age that a father succeeds in court in establishing custody.

REV. MALINOWSKI: . . . that's not very often.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I believe in the field of custody we had two excellent briefs presented to us at our meeting in Thompson. Unfortunately we haven't got the transcript of that hearing yet. Were they not made?

MR. CHAIRMAN: We had some serious problems with the recording equipment in Thompson, it was not possible to get transcripts from the recordings.

MR. GRAHAM: I think in this respect that is indeed unfortunate. As I recall the problems that existed and were brought to our attention there, dealing with the custody of children and the care of children is a severe problem in some of the remote areas and I think we have to, in this field, while we may have a tendency to go for no-fault maintenance, as the Attorney-General has indicated so far, when it comes to custody, I think all factors have to be considered, all factors.

MR. PAWLEY: And certainly that's the way I would want it to be and I would ask legal counsel whether that would not be the case under what we're proposing.

MR. GOODMAN: There's no recommendations on that.

MR. PAWLEY: No recommendations. Should there not be recommendations on this one? Why would there not be some reference . . .

MR. GOODMAN: There are no recommendations to change the law, I guess that's the key to it.

MR. PAWLEY: I see, so the law would remain as it is which would be, again, that welfare of children, the best welfare of the children question and then they would determine the circumstances in the respective homes.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well I'd just like to have it noted for the record, Mr. Chairman, that I accept the . . . am prepared to accept the proposal of the Attorney-General that section (h) be deleted and replaced with the section that he's proposed, with the assurances and the undertakings that have been arrived at in the last 20 minutes of discussion, that is that we recognize that what we're talking about here is maintenance and the principle of no fault in that field. We're not naive or idealistic enough to suggest for one second that this is going to end court battles or custodial battles or family battles because it simply won't. We are assured there will still be determination made as to the custodianship of children and by definition there will be the element of fault implied in those deliberations, considered in those deliberations, but, purely on the principle of no-fault maintenance, I find the Attorney-General's proposal acceptable.

MR. CHAIRMAN: There seems to be general agreement on that point. Is there anything further under the heading of Interspousal Maintenance we should deal with now? If not, perhaps we could go to the heading "Non-Marital Cohabitation", you'll notice there are a couple of paragraphs on Page 116 . . .

MR. PAWLEY: . . . should greet the new member of the Committee, get his name on the record.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: On section 5, Non-Marital Cohabitation, Mr. Chairman, just to get the ball rolling and I'll be brief and defer to my colleagues on my right, I do not accept the proposal of the Manitoba Law Commission, the majority opinion. I subscribe to the minority, the Dissent Opinion offered on Pages 119 and 120. And if you want my justification for that opinion, Mr. Chairman, it is that in my view the majority opinion favours the common-law relationship to the detriment of the institution of marriage; the dissenting opinion respects the institution of marriage and does not downgrade it in favour of the common-law relationship.

MR. CHAIRMAN: Any further discussion? Mr. Graham.

MR. GRAHAM: Mr. Chairman, I believe that the minority position was one that was very well explained by Mr. Muldoon when he appeared before the Committee on the 16th and as he pointed out there, if people choose of their own volition to live outside of the recognized marital bonds, I don't think that we should, by legislation, force them into that concept and the various responsibilities inherent in that concept.

February 3, 1977

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: One thing I'd like to have clarified by legal counsel and I think we would all benefit from it, is the existing law as it presently stands and whether, if we accept the minority report, we will be restricting or narrowing down existing rights; certainly with the majority report we would be broadening the rights within a common-law relationship. What's worrying me about the minority report, and I'd like legal counsel to deal with this question, is whether we would be removing or stripping people of some existing rights that they enjoy in the common-law relationship.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I can't answer that at the moment, I'm not clear as to what the provisions of the minority opinion on this point are, but I can do so in a few moments after I have had a chance to look at them.

MR. CHAIRMAN: Could we go on to the next topic and maybe come back to this . . .

MR. PAWLEY: We'll have to discuss this further in our own group because we haven't talked about this aspect too much I don't believe; I think we could go along with the minority if we are not stripping away some existing rights that exist and I would like to have that assurance.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, as I understand this, if there are children involved, the rules and regulations will almost be exactly the same as being married because there are children involved and the responsibility of those children and the spouse being at home taking care of them, whether they're married or not, it will get very very . . . you know I can't see that it's . . . where there are children involved it's going to be just as much as being married. The birth of the children puts some bond between them or some agreement between them but if there are two people living common-law, who had no children, that don't want to make a commitment of some kind to one another -- and I think Mr. Muldoon brought this out -- even if they stand in front of me as a witness or two witnesses and I think in law one witness is better than two on a Will or something, I'm not sure; if they don't want to go through a religious ceremony, if they are not so inclined, or anything of that nature, but there should be something that says they have committed themselves to one another, whether they do it in front of witness or whether they sign an agreement and file it down at the Statistics or what. Unless there is something done of that kind, I don't know that we should say that either one has a responsibility to the other if there are no children involved. As far as the marriage is concerned, and as Mr. Sherman puts it, it does encourage less marriages but I personally don't want to get into that because I think that there are people who don't have religious convictions of a certain kind or anything of that nature. But if there are no children and no commitment of some kind, I don't know that there is any responsibility to one another if they break up.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Could I present to Mr. Johnston a case that I'm aware of and I don't really know the reason that there has never been a marriage formalized, that a couple that would be . . . the husband is reaching 65 and near retirement, the wife is 62, 63, they've lived together for, I guess, 35 years, the marriage has never been, as I say solemnized, it's been common-law, the entire community thinks that they're married, they've kept it a pretty close secret, but they're not and they have reasons, their own personal reasons. Now the wife is in very poor health, now what, after all these years, and there's adult children now, married children, and what if the spouse that has been paying all these years in supporting the other spouse decides to say, "Well, since my dependent is now ill, ready for the nursing home, I'm just going to drop her off at the nursing home and not assume any further responsibility, I'm not legally married to her, I'm not even recognized insofar as income tax laws are concerned, I can't claim her as a dependent, so I'm just going to drop her off on the State and the State will look after her for the rest of her natural life." Do you feel that an individual should be able to escape any obligations or duties? This is a particular situation I'm thinking of, at least 30, 35 years and I know that there's married children involved, but there has never been a marriage.

MR. F. JOHNSTON: Mr. Chairman, as I said where there are no children involved and I know these children are married, I said the commitment to one another to have a child is something and the fact that she stayed home and raised her children and his children, I would say that there is a marriage bond there of something between them. But the encouragement . . . you know, we talked about short marriages could be a problem. To say that there's going to be responsibility to one another with two people who just live together for five or ten years or something, and there's no children involved . . .

MR. PAWLEY: . . . no problem there with me.

MR. F. JOHNSTON: Yes, but I'm getting to a very fine line as to what the commitment is. But the thing is you could have a very bad situation and you're encouraging bad situations and you are not encouraging the marriage state when you say that they can live together and after five years there will be a responsibility to one or the other spouse and there's no children involved. Quite frankly I think there would be some men take advantage of this situation and I just don't think we are going the right way in that particular case. I would say in law, Mr. Chairman, to the Attorney-General, that that woman would have a tremendous case if she decided to . . .

MR. PAWLEY: She would now I think.

MR. F. JOHNSTON: I think she would right now. -- (Interjection) -- No.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I would like to ask the Attorney-General, in a case such as he mentioned, does he think that a man who has spent 35 years with one woman and raised a family and because she was sick, does he think that he would just walk off and desert her?

MR. PAWLEY: It happens, unfortunately.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I would just like to comment to the Attorney-General on that point too, Mr. Chairman. One, everybody in this world has got, insofar as it is possible for them, has got some responsibility to protect their own interests and it seems to me that the parties to the arrangement the Attorney-General is talking about should have discussed that possibility long ago. The wife should have discussed her vulnerability and maybe has an undertaking from the husband of the sort specified in the dissenting opinion, in which he will be responsible to her. Secondly, the other point I would make is perhaps in this situation that particular party to whom the Attorney-General has referred will get hurt but there is not a section of this law that we're looking at, proposed legislation we're looking at, under which somebody is not going to get hurt. Somebody is going to get hurt by every section and every reform we're looking at here, but the greater good, hopefully, will prevail. And this may be one of those cases where that's the minority who unfortunately is going to get hurt. That may be a hard view but I don't think there is a section in here that is free of injury at some level, whether it's psychological, social, economic or whatever, to somebody.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: In the case that the Attorney-General was mentioning, would not the children then be responsible for their mother? It seems to me that we have a statute somewhere along the line which says that children are responsible for their parents when they can no longer look after themselves.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I believe there is an Act of that kind, I can't give you the specific name of it at the moment, I think I can locate it in a few minutes if you would like to know.

MR. PAWLEY: Let me put it to you this way, I would hate to see us accept anything that would remove from that lady rights that presently exist for her. I would feel happier considering this minority report if I was satisfied that I am not stripping any rights from that type of a person at the present time.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, it is unfortunate that woman is in that position, or we don't know that she's in any position, it could happen I guess, but if it is made known by the Government of Manitoba that unless there is some commitment

February 3, 1977

(MR. F. JOHNSTON Cont'd) . . . between two people, we might be saving a heck of a lot of people today being in the same circumstance that woman is. It's time we made it known that you better start being realistic when you're going to live with another person as to what is involved in it and what can happen to you in the future. As I say, I'm not going to bring the religious aspect into it and I'm sure Father Malinowski here has certain views on the subject, but I think we should make it known to adult people in Manitoba, if there are no children involved or if there are going to be children involved, there is going to have to be some commitment or you could have some very serious things happen to you in the future, and it's time we had people maybe thinking a little more about those things when they get into it.

MR. CHAIRMAN: Mr. Silver I believe has the answer to the question that was raised a few minutes ago. Mr. Silver.

MR. SILVER: That's the question as to whether the minority report, the minority opinion in the report restricts the rights of a spouse in a common-law union, that is restricts the rights as they exist under the present law. In one way it broadens the rights and in another way it seems to restrict them. It broadens the rights . . . now the present law has two requirements in order for a common-law wife to have a right to get an order against the husband for maintenance and those two conditions are: (1) they would have to have lived together for a period of one year or more; and (2) he must have been the father of the child born to her. So where two people who are not married and are living together in a common-law union, where they have lived together for one year or more and also there is a child of that union, then she has the same rights as any married woman under the present Act. Now the majority opinion says that she has all the rights of a married woman as long as there is a child or the possibility of a child . . .

MR. PAWLEY: . . . she has to be pregnant.

MR. SILVER: Yes, or even if there is not a child but this union has somehow impaired her economic self-sufficiency, then she has the rights. Okay, so you realize how much broader that is. Now the minority opinion broadens the existing law by taking away the time factor. They don't have to live together for a period of one year, any period at all as long as there is a child, even if they have lived together for one week and there is a child, then she has the same rights as a married woman, but those rights exist only so long as that child is in her custody. Once she does not have the child, then her rights cease. So, in one way it broadens her rights; in another way it restricts them. The present Act doesn't suggest that when the child is no longer in her custody that her rights cease, it's silent on that point and I suppose it's within the authority of the judge to say perhaps that, "Well, you no longer have the child, I don't think you are entitled to maintenance." But the Act is silent on that point.

MR. CHAIRMAN: Would you clarify for me, please, whether they are speaking of child maintenance there or spousal maintenance?

MR. SILVER: In the present Act?

MR. CHAIRMAN: Yes.

MR. SILVER: Both, maintenance in respect to both herself and her child, in the present Act that is.

MR. F. JOHNSTON: Most of the references that counsel made there had child involved, except in one area where it said if the relationship impairs one of the spouses from making an income. Well, that could very easily happen if they decide to live together and for ten years she didn't work then she would have trouble getting back into the working force, but if there is no children involved, I still don't see, unless they made a commitment, that there should be a responsibility on either side. They are adults you know and you just can't say to people that you can go into anything without thinking or looking at some consequence.

MR. CHAIRMAN: Mr. Malinowski.

REV. MALINOWSKI: Thank you. I would like to ask, you know, this point that you have mentioned, one year, the period of one year or more -- this one year or more with child or without child?

MR. SILVER: It must be with child, with, the two things at the same time, the one year and a child.

REV. MALINOWSKI: And the child, or more years and a child.

MR. SILVER: Yes.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, what would happen, for instance, if one of the common-law partners came into the union, the common-law relationship, with a child? How would that situation be taken care of? I'm sure there are many cases where a man moves in with a woman who has some children and vice versa and they live together as if they were married.

MR. SILVER: That's provided for in the report. I think the Committee discussed it earlier today as to the relative degrees of responsibility for child maintenance. I think the situation is that the common-law . . . the natural parent still has the primary responsibility and the common-law parent, as the parent into whose custody the child is brought by a common-law union has the secondary responsibility.

MR. ADAM: I'm not talking about the children now, I'm talking about the maintenance of the spouse in the event that they separate, that's what I'm talking about now.

MR. SILVER: Oh, well if that child is not a child of that union, the child is not a factor.

MR. ADAM: But there is a child mentioned there.

MR. SILVER: If the child is born from that union?

MR. ADAM: No, I'm saying not from that union.

MR. SILVER: Not from that union.

MR. ADAM: But there is a child involved.

MR. SILVER: If the child is not born to that union and the parties separate, then there is no obligation on the other spouse to support that child.

MR. SHERMAN: Haven't we already covered that?

MR. ADAM: I'm talking about the wife now, the common-law.

MR. SHERMAN: Mr. Chairman, have we not already covered that? Did we not establish this morning . . .

MR. CHAIRMAN: Page 111.

MR. SHERMAN: . . . Page 111, subsection 5 of section A, when children are brought by one parent into a common-law liaison, the obligation of both natural parents will endure and the newly acquired common-law step-parent will also be fixed with an alternate secondary obligation to maintain those children.

MR. CHAIRMAN: That is correct.

MR. SILVER: Mr. Adam is asking about the responsibility to support the wife.

MR. ADAM: Yes, if she has a child in that union.

MR. SILVER: If she has a child in that union.

MR. ADAM: Not in the union but she has established a union with that man or otherwise, or vice versa.

MR. SILVER: The only factor would be, under the majority recommendation the only factor to be considered would be whether the union has impaired her economic self-sufficiency, and if it has then she would be entitled to payments.

MR. ADAM: And the minority position is that there has to be a child?

MR. SILVER: Yes, the minority position is that if there is no child, there is no obligation to support the woman.

MR. ADAM: Even if they tried many many years to have one?

MR. SILVER: Right.

MR. ADAM: Mr. Chairman, it seems to me, in our changing times, there appears to be more and more common-law arrangements and it seems to me that if we accept the minority report that we will have the Human Rights people on us for discrimination. Surely some people will be complaining that their freedom to enter into a common-law relationship is being prevented by this legislation, that it takes away some of their rights.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I don't see that there are any rights being infringed, it doesn't stop you from entering into a common-law relationship but the

February 3, 1977

(MR. SHERMAN Cont'd) . . . guarantee that they can enter into a common-law relationship and have the same rights of maintenance as they would have from a standard marital relationship is not there.

MR. PAWLEY: Unless they entered into a separate agreement.

MR. SHERMAN: Unless they entered into a separate agreement. But we are not taking away their right to live common-law, we're just not elevating it to the same status as an institutionalized marriage.

MR. CHAIRMAN: Father Malinowski.

REV. MALINOWSKI: I would like to just make a point concerning this common-law. I am 100 percent with Mr. Johnston considering this situation. I am not putting this from a religious point of view because I am a priest, that has nothing to do with it, but I would like to see a certain commitment from both sides, either way. Like he said, we might be talking about two persons, they don't believe at all, they have no religious conviction whatsoever but still, if they would like to benefit from the regulations or our laws for a married couple, my goodness gracious, they have to commit themselves. It means simply they have to answer the question to be or not to be, are we married or not married, are we parents or not. So I think something considering this situation should be done and I agree 100 percent with Mr. Johnston that there should be certain commitments, some commitments either way, on religious grounds or just go to court and make any agreement and then notify Vital Statistics, 'Okay, I, Mr. Brown, we are living together and we concern ourselves that we are a married couple.' Or something like that. I'm not talking about Mr. Brown.

MR. CHAIRMAN: Mr. Barrow.

MR. BARROW: Mr. Chairman, it is the first time I've spoken today and I tried to stay out of it. I thought we probably would get through today but I don't think we are going to. What Mr. Sherman said about common-law, and also Mr. Johnston, you have to agree with it, but you are also dealing with people and you can have a common-law marriage that's possibly just as well organized and they have the same ethics as the marriage that is done otherwise, according to different people. But what happens in common-law marriages, or any marriage, when it breaks up you get into the spite and the hate and the meanness. We're talking here about people who, when they do break up, are very bitter; we're talking about who gets custody of children. I know marriages where neither one in the family wants the children. A marriage in Snow Lake with four children, they fought over who was going to own the dog. We have listened to briefs, the spite of one against the other. I don't see how we could legislate or agree among ourselves how to make a successful marriage. I think the problem is going to be solved by someone and I don't know how he is going to do it taking in all the factors. I think we're spending an awful lot of time here on something that we can't possibly control. I know common-law marriages that are just as successful as a marriage. I know marriages that were very solemn marriages that have broken up and are just as bitter and I don't know how we're going to solve those problems personally.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well I just wondered . . . I'd like Father Malinowski to comment whether he includes in his general statement "common-law marriages in which there are children that resulted therefrom", are you saying they should then still not have the same . . .

REV. MALINOWSKI: When the children are involved, naturally it is an entirely different situation, but without children, exactly like Mr. Johnston mentioned, when there are no children involved in this situation, there is no obligation to each other if they decide to separate. I'm not saying -- like my colleague, Tommy, mentioned -- that common-law, they are perfect, not perfect but they are successful and so forth. This is not a point. They might be the most happiest couple under the sun but the principle is involved. They would like to have the benefits from the law, from protection that you are making here for them and they are not in that ground or in that circle where we're talking about, I may call, a decent couple or marriage.

MR. PAWLEY: Would you include within children, adult children?

REV. MALINOWSKI: What do you mean, adult?

MR. PAWLEY: Even if the child is no longer dependent. If the child is grown would you recognize that as being a commitment?

REV. MALINOWSKI: Well, of course, the child was involved so it's different. Yes, that's right, then it's a different situation. If the children are grown up or small, it shows physically that there is commitment, they are a parent. But without children it's a different situation.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, I think the present law already says "if there is children involved" or "a child", you know, it's there now. I think maybe Father Malinowski and I just aren't getting it across, if there are no children involved when they break up (as Father Malinowski says if there are, there's been a physical commitment and a raising of a family which is a commitment to a family life), but if there have been no children involved and it may have been a very happy circumstance for 10 or 15 years and I feel sorry if they happen to separate under those circumstances and the girl has been out of the work force, I really do, but to open it up on the basis of saying just live together with no commitment and walk away two years or something like that nature, we're getting into a very dangerous area, that I don't think we should go that far.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I certainly share the concerns of Don Malinowski and Mr. Johnston but on the other hand I'm wondering whether the birth of a child is actually required in order to demonstrate a commitment of love to each other that doesn't really warrant some recognition in law. Surely after a certain period of time, a continued relationship, one to the other, common-law, that should be sufficient to recognize that as an equivalent commitment, I would think, as the birth of a child. Now I'm not sure just at what point one would consider years spent in a common-law relationship to be sufficient commitment, but surely, for instance, after five years of commitment, living together, there should be some recognition of that bond.

MR. F. JOHNSTON: If two people want to live together for five years and they're happy, what Father Malinowski and I are saying is why wouldn't they say in front of a witness if you like on Main Street, that "we are committed to one another" and under that basis they will be, if there are no children involved, under the same regulations as the marital state and you can pay maintenance, etc. But to just turn around and say, blatantly say, you know, it's okay to live together and there's no family involved and now we've decided that it's no longer compatible, we don't feel like living together any more and walk away, and then, after you do that -- and they may have even both been working or something -- after you do that, you turn to one of them and say, you know, there's no commitment in this marriage or this relationship, but you've got to pay. I don't think that we're going the right way; I just don't think that . . . there should be some commitment and our laws at the present time say "if there's children involved" and if you're talking about whether a child makes a commitment, I tell you this, I would hope that if it doesn't, we as legislators will make it look that way so they'll damn well have a commitment to support that child.

MR. PAWLEY: The only thing that bothers me, it seems to me that we're insisting that there be a child in order to create the commitment, that commitment may be just as real but for some reason or other there are no children involved. The commitment is every bit as real, maybe even much greater, much greater commitment, even though there's no children involved. Now, do we deny that couple that right; do we insist that they must go through the recognized marriage ceremony even if for some private reason of their own they prefer to remain detached from each other insofar as the legal ceremony of marriage is concerned?

MR. F. JOHNSTON: Well, Mr. Chairman, on that basis, I personally, if I personally -- I'm not saying "I"; no, I'm not saying it -- live with a girl for 10 years happily and after that 10 years said, "Look, we better sign a paper or something because if the laws of the land are such that we could have a very unstable future or uncertainty, or protection from those laws" and she said, "No, it's time we should part," I'd say, "Good-bye lady" and that's all there is to it.

MR. PAWLEY: Could I give you another instance . . .

February 3, 1977

MR. F. JOHNSTON: Let's talk about an adult responsibility . . .

MR. PAWLEY: I just want to question . . .

MR. CHAIRMAN: Order please. Gentlemen, we have been on this for a good half an hour now. I hear two members of the Committee arguing, I think for the minority position; I'm not sure whether anyone is arguing strenuously for the majority position. I have two more speakers on my list. If we cannot come to an agreement, maybe we could pass over this and come back to it later on. I have Mr. Adam and Mr. Graham on the list, Mr. Adam.

MR. ADAM: Well, Mr. Chairman, I think what Mr. Johnston has said, I think the opposite is probably correct. I think if we wanted to, we could find many many common-law relationships that are common-law because one spouse does not want to have any obligation towards the other. If we do accept the majority recommendation and these spouses find out that they do have some responsibility, they may just maybe all get married then. I know that there are many cases where a husband walks in, in a family, and he's just shacking up because he has no responsibilities but if he finds out that he does, well, he may just get married.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, all I want to say is that we have people living in this country today who have their citizenship in other countries, they realize that for their own personal reasons they want to maintain another citizenship, but they live in our country and they're denied the right to vote and they're quite willing to live under those circumstances and yet we deny them many of the privileges that exist to Canadian citizens over it. And if they want to live that way, that's fine, I don't think we should compel them to become Canadian citizens, nor do I think that we should compel people to get married, but let them know that if they don't that there are some privileges of marriage or some of the financial arrangements after marriage that will be denied them. I think it's quite simple that way.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: That is right, I think, Mr. Chairman. I agree with Mr. Graham. When I say that I favour the dissenting opinion it's not because I think we or anybody else has any right to tell those two people not to live common-law, or to stand up in front of a witness with a piece of paper, that isn't the argument at all. The argument is the institution of marriage as the fundamental institution in society and Father Malinowski and Mr. Johnston have talked a good deal about commitment and I think commitment is important. I agree with them but my argument is a little bit different because what I'm concerned with really is the maintenance of that child and I'm prepared to buy the dissenting opinion because it takes into account the fact that there is an offspring of that union and somebody has to maintain it and there should be a responsibility on the part of those two parents. That's what makes the difference. It's not a question . . . the Attorney-General says just because you have a child, does that make it any stronger commitment than the relationship between two people who for some reason or another can't or don't have a child, and I say "no". I can see that other couple as having as strong a commitment as the couple that had a child, but the child makes a difference in terms of society. What the majority and minority opinions say here, and I agree with them, is that the child has got to be maintained -- in essence, I know it's maintenance to the mother but, in essence, what it's saying is that that child has to be . . . there has to be maintenance for that child. And that to me is the important thing and if there is no child then it's up to those two people to work out their own arrangement as to who is going to defend themselves and protect themselves and whether there is going to be any maintenance between them, but it should not automatically be enshrined in law, that is a privilege reserved to those who go through the solemnization ceremony.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I think what we have to do in view of this discussion is to -- and you are right, Mr. Chairman, we've had a lot of good back and forth debate on this -- we should just write to re-examine them and return to it next time because there's a lot of pros and cons. I know people who are late in years living in a common-law relationship and because they consider themselves close to each other, but for reasons of their own, you know, they've gone through a marriage or two, they don't

(MR. PAWLEY Cont'd) . . . want to enter into formal commitment, I know sometimes because they indicate they've gone through enough, so much agony and difficulty disentangling themselves earlier that they don't want to take the chance the second time or the third time and there are all these reasons that are advanced. I recognize the validity of the concerns about making this certainly too easy a situation. I only wondered if there was an equivalent to a child such as a five year period of commitment to each other or something of that nature. But saying that, Mr. Chairman, I think we have to re-examine it on our side, obviously.

MR. CHAIRMAN: Is that agreed then, that we'll move on to the next item and perhaps come back to that later? We then move to Page 121, Part II, the Property Disposition. It starts off, A. the Marital Home with a definition and a discussion on the definition section. Is there any feeling that the marital home should include the furnishings therein?

MR. PAWLEY: I wonder if I could just say by way of introduction some of our thinking on this. We've had the two opposing viewpoints, the one community property, immediate vesting, and we've had the deferred sharing concept advanced to us. We had a lot of difficulty in resolving because I think that we all kind of like the concept of community property, the community property concept if it's workable. You know we see a lot of problems in ensuring that it really will work and it's certainly being attempted now in a number of jurisdictions, in California for one and Washington. So we have an opportunity to ascertain the experience there. There were some aspects though that we did feel, or some property that we felt should be immediate vesting rather than deferred, beyond that which the Law Reform Commission proposed. The Law Reform Commission only dealt with marital home being really immediate vesting and while we discussed it, we felt that, for the most part, the property should be deferred, deferred sharing until termination of marriage, but we did feel that there were assets that should be considered immediate, for immediate vesting, community property if you wish, besides the marital home. For instance, the furnishings within the home, the second home if there was a cottage, a summer cottage, the car, all those items of personal property which the spouses used together as part of their marriage relationship from day to day, personal assets. We felt that they should fall into immediate property category and all the other assets, the investment, the business, the farm, would be on a deferred basis.

So you might say from our point of view, we've come down in favour of deferred but some community property beyond the recommendation of the Manitoba Law Reform Commission Report.

February 3, 1977

MR. GRAHAM: Mr. Chairman, I think that the Law Reform Commission probably had their greatest problem with this very subject and in any talks that I have had with the various members of the Law Reform Commission, they certainly didn't treat it lightly at all. I think their inclination was somewhat similar to that expressed by the Attorney-General but they have also realized the legal implications and the effect it would have in the business world and the transaction of business and for that reason I think the Law Reform Commission made their recommendations as they did. I am sure that if we are to benefit from the wisdom of those that heard briefs which were far in excess of the briefs that we heard, unfortunately the briefs that were presented to the Law Reform Commission were not made available to this Committee, and I think that they have considered this matter very seriously and at great length and have come up with the recommendations that they have made. Now maybe the Attorney-General has had the opportunity of reviewing the briefs that were made to the Law Reform Commission. I know myself, I have not.

MR. PAWLEY: I am just wondering if I could pose this question. If we agree with the Law Reform Commission that the marital home ought to be immediate vesting, should be considered as joint as per the recommendations, then could we not agree that it would be rather inconsistent to stop with the marital home only and not consider that which is contained within that home, the furnishings to begin with? Why should we exclude the furniture if we accept the fact that the marital home be immediate? Why should we exclude the car which is used together as the family car? The other personal property, whatever it be, that is used together jointly by the couple as part of their marriage interplay - just as a home is, together they use it - would it not be consistent to include all such items? But I agree, I think that insofar as the business or the farm operations or investments are concerned, that we are inviting a great number of legal problems at this point. We may be, you know, I am not sure what the experience in other jurisdictions has been. I don't think we should embark on that journey, we don't know what type of waters we are going to be sailing over. So if we restricted it to the marital home as proposed by the Law Reform Commission, the only thing that I am proposing is it seems to me there is some other items that would be just as reasonable to include in the immediate, as the marital home, items of a family nature, that are used together, and I don't know why we would restrict it only to the home.

MR. GRAHAM: Mr. Chairman, in return, I would like to ask the Attorney-General, he has suggested, say, the family car. Now I know an automobile is a vital necessity in the farming trade, a means of transportation. Many of those farmers do not even use an automobile, they have only a truck. Would that be considered part of the family property? The wife drives it. You are already getting into a field of which jurisdiction does it fall in? Is it part of the farm operation or does it belong to the family?

MR. PAWLEY: Harry, you could still ask that question probably for the farm house because there might be a bedroom for the hired man and another corner in which the farmer does his bookkeeping.

MR. GRAHAM: Indeed, he usually does.

MR. PAWLEY: So that part of the farm home may be used for business purposes as well.

MR. GRAHAM: In most cases it is.

MR. SHERMAN: Well if we get bogged down in that, Mr. Chairman, we are likely to be splitting hairs for some substantial time. I think that the term "home" implies not only the house, the homestead, but those items that are essential to the operation of the home. It certainly would include all furniture and appliances in my view. I am not sure about this point of a car but I think home should be intended to imply or this should state that it includes those items essential to the operation of a home and that includes all the furnishings and appliances. Now whether we have to look at the car separately --(Interjection)-- Well, that's a dwelling place and my view is that that would be covered in the same way. I am not sure about cars because certainly a lot of families don't have a car but a lot of families have two cars and one or the other is often in the name of one or the other of the spouses, independent of the other spouse, so I think we will probably have to look at automobiles separately. I would agree with the Attorney-General that the term "home" should be broadened to include furnishings and appliances.

MR. CHAIRMAN: If I could just say, I have one slight problem with the extension of that to a family cottage or a car or boat and there is one other suggestion by the Law Reform Commission that the marital home, as defined, shall go to the spouse having custody of the children in the event of a breakup. If marital home is then to include a car and a boat and a cottage, there may not be anything else left to divide between the two spouses.

MR. PAWLEY: There would still have to be the equal division, Jim. It would still be 50-50.

MR. CHAIRMAN: . . . include those other assets in the marital home then you are not dividing them between the two, it would have to stay with the spouse having the children.

MR. PAWLEY: But, Jim, it would be a very grim situation if the spouse maintaining the custody of the children got an empty house without any furnishings.

MR. CHAIRMAN: I am not arguing about the furnishings, etc., it's the car and the cottage and the boat and the snowmobile. -- (Interjection) -- No, it was the suggestion that the Attorney-General was making that those other assets be included in the definition of the marital home.

MR. PAWLEY: Matrimonial assets for immediate vesting, but they need not in the event of custody of children go to that spouse which is. . .

MR. SILVER: It is just a matter of possession.

MR. PAWLEY: Yes, it is a question of possession. I don't think that in that situation you mention that the car or the snowmobile or the cottage should go necessarily to the spouse that receives custody of the children. I think only that which is essential to the better bringing up of the child should receive that in possession. But I think these other items could be considered under matrimonial assets of a family nature.

MR. CHAIRMAN: If that distinction is made in there then that would satisfy that point that I had.

MR. GRAHAM: Mr. Chairman, the fundamental question here is the difference between immediate sharing and deferred sharing and it is not a question of disposition at all on dissolution - that is all looked after. It is purely a question of whether it be immediate joint property or deferred and I think that we have to look at it in the light of what is desirable and what the effect would be or if there would be any effect in a difference between immediate sharing and deferred sharing. What would be the implications? If you had an immediate joint ownership of an automobile or a boat or a summer cottage, would that be different than single ownership? What would be the results or the implications, say, in business transactions or liabilities?

MR. PAWLEY: It would mean that those assets would be jointly owned and thus would be jointly available to liability suits involving either of the parties. It would simply mean in principle that from day one of the marriage that there would be co-ownership, co-management, co-participation involving those items that are non business but yet are items that go to enrich the family in their day by day existence. So that when it comes to a question of consideration as to whether to spend the money on a snowmobile or a cottage, at least there is a relationship there that must be dealt with on an equitable basis as to where the priorities of the family go in the day by day spending. Now I don't know whether there is that much other legal implications. --(Interjection) -- Oh, yes, the sale of all these items, of course, and mortgaging of these items would require joint signatures so that in fact one spouse could not waste or discard items or sell items which are important to both the spouses together as part of their marriage relationship. There would have to be joint signatures just as there is on the homestead or mortgaging of that homestead, there would have to be joint participation. I see your problem is the car, basically, isn't it?

MR. SHERMAN: Perhaps, Mr. Chairman, the definition. Maybe we should be looking at the term "marital home." Maybe what we should be talking about first is something that, for lack of a better term, we could describe as the marital homestead and that would be the main dwelling place of that couple during the period of their marriage and it would include the furnishings and the appliances that were generally regarded to have been part of that homestead. That would then enable us to separate all the things like land, like cottages, like boats, and as Mr. Adam suggests, power

February 3, 1977

(MR. SHERMAN cont'd) . . . . lawnmowers and aircraft and all the rest of it and put them into an asset category. You know, we might have to go at this step by step and just start with the dwelling that perhaps should be called the marital homestead rather than the marital home or some such title that would enable us to differentiate it, that is the essential thing that would then . . and it would answer the point that you raised, Mr. Chairman, about the person with the custody of the children shall have the marital home, what is required for the person with the custody of the children is that house or whatever, condominium, with the furniture and the appliances. It is quite separate and distinct from what the couple is going to do with all those assets including the cars, etc. So I don't know but what we may have to break this down and just take it step by step like that.

MR. SILVER: Well I just thought that it might assist the members if I indicated briefly how I propose to handle this aspect of the matter in the drafting. However, before I do that, may I just comment and add to what the Attorney-General said a couple of minutes ago as to the differences that result in all of these family assets, car, boat, etc. vesting immediately, and the differences mentioned were that now the wife or the husband, as the case may be, is going to have to be a co-party to the sale of any of these items and to the mortgaging of any of these items. There is one other aspect that I wanted to bring to the attention of the Committee and that is if none of these items vest until - apart from the marital home of course - if none of these items vest until there is a breakdown of the marriage, then anyone who wants to purchase any one of these items, or anyone dealing with the owner of these items, knows that he doesn't have to worry about who owns them as long as there is no breakdown in the marriage because they won't vest until that time. But once they begin to vest immediately, then it becomes a little more difficult because the purchaser is going to have to be on his guard to make sure whether or not the wife has an interest or the husband has an interest and if he or she does that he or she is a party to the sale, so it will mean more documents and so forth and more legal advice and more going to lawyers. So that is just by way of comments.

Now as to the matter of these two kinds of assets, those that are going to vest immediately upon acquisition and the others that are going to vest later on in the event of a breakdown in the marriage and a few other situations, I propose to handle it in this way, in the way that I will suggest, simply because it is a pretty difficult thing to set out specifically in detail each and every item of furniture, and to say the following items, car, boat, cottage and so forth, are going to vest now and everything else later on. Now I propose not to mention these things specifically at all in the legislation. I would deal, first of all, separately with the homestead and, indeed, the homestead will vest in a different manner because in the homestead both spouses will become joint owners as distinct from equal owners so that upon the death of one the other one becomes the owner of the whole thing whereas in the sharing of the other items, other than homestead, it is just a case of equal ownership; on the death of one, well, the survivor still remains the owner of his or her own half and the other one is just a matter of disposal by Will or under the Devolution of Estates Act. So for that reason, if for no other, I deal separately first with the homestead, then after that I have concocted a broad definition of assets that have to do with the production of income and I call all those "commercial assets" for want of a better name, and anything that is not within that definition, anything that is not an income-producing item is a family asset. So everything that is a commercial asset and that can be fitted into the category of income-producing chattels or real estate will vest later on and anything else, anything that cannot be fitted into the category of income producing or business purposes or things like that will vest immediately. So that by doing that I get around the difficulty of mentioning specific assets and getting bogged down - I am not suggesting that this broad definition will solve the whole thing - and I think we will have to provide for perhaps regulations to be made later on to cover questionable situations, as for example where a particular asset is partly used for business and partly for the family, but in the Act itself I propose to use a definition of this kind stating the broad principle.

MR. PAWLEY: Mr. Silver raised one point that I must admit, you know, ought to cause us to reflect a little bit more on the direction which we were going and proposing.

February 3, 1977

253

(MR. PAWLEY cont'd) . . . . . The concern, for instance, in connection with the sale of a boat, that documents would have to be drawn up beyond the present declaration that there is no wife or the wife has consented or something to that effect. So you are saying, and what you propose, that we are going to look at the possibility of more legal work, eh?

MR. SILVER: More complexities.

MR. PAWLEY: I don't want to be accused of pouring cream into the cups of the legal profession.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Thank you, Mr. Chairman. Pertaining to Mr. Silver's comments, through you to Mr. Silver, when you say immediate vesting, are you saying "immediately upon purchase" or "immediately upon separation"?

MR. SILVER: No, immediately upon purchase, and, of course, the significance of when it vests is that until it vests the spouse who owns its can do with it as he pleases: sell it, mortgage it, dispose of it, doing anything he wants to. But once the interest of the other spouse has vested, then he can't do anything with it unless the other spouse consents.

MR. ADAM: Yes, that is why I raise this point because if there is immediate vesting upon the purchase of any family asset, if there was not that safeguard, perhaps the husband or the wife could say, "Well, you know, my marriage isn't going to last more than another three months" - at the outset - "and let's get rid of all I can while I have the chance." So it seems to me that we should have some safeguards in that area, so I brought that point up.

MR. SILVER: On the other hand, there is a safeguard later on in the recommendations against dissipation of assets. If a spouse, with the thought in mind that you mentioned, just goes ahead and tries to rid himself of everything simply to make sure that the other spouse will have nothing left when the time comes for her to get her share, then the other spouse can apply to the court for an order for an immediate division of the assets on the ground that the other spouse is dissipating the assets, or alternatively she can apply for a receiving order so that the court can appoint a receiver to make sure that the other spouse does not do away with the property or abscond with it or do anything like that, so there are those safeguards.

MR. GRAHAM: Mr. Chairman, with regard to the marital home and immediate joint ownership, would this automatic equal sharing have any effect or would it be subject to the Gift Tax Act at all?

MR. PAWLEY: Mr. Chairman, one of the items which I think we would have to ensure is that anything that we do here by law, any legal changes that we make by law, it would have to be clearly understood that that would not bring about any tax implications to anyone, anything that we impose by law. So the answer to that would be no, and I think we would have to make sure that we protect Manitobans from that possibility because of our legal actions in here.

. . . I think that Mr. Silver has raised a point that I want to reflect a little bit on, I am sure that other members still want to reflect on, this subject of what should we do, just take a little time to further look at it.

MR. SILVER: Even without this immediate vesting of the family assets, there is complexity enough in terms of the various documents that a couple may have to complete and get legal advice on. The only effect of making this change in the vesting aspect is that it adds to that, but I am not suggesting that if everything vested later on, that it would all be very very simple and no legal documents would be required and no legal advice would have to be obtained. I am not saying that at all. This merely adds to what would have to be done anyway and maybe it is worth it.

MR. SHERMAN: Mr. Chairman, what I understand Mr. Silver to be saying is that he is proposing a mix really of the concept of instantaneous community of property and deferred sharing which I think is very interesting and certainly will be studied very carefully by members on our side. It meets head on many of the concerns that were expressed by delegations appearing before the Committee and have been felt in our own minds having to do strictly with business and farming operations. But let me ask Mr. Silver this, through you Mr. Chairman, what is Mr. Silver's definition in this legislation that he is conceptualizing right now of the marital home. What does he mean by a marital home?

February 3, 1977

MR. SILVER: Well the Law Reform Commission's recommendation is that the marital home be defined in exactly the same way as the homestead is now defined in the Dower Act. There is no change in that concept and I propose we change that.

MR. SHERMAN: And what is that? House, furniture and appliances?

MR. SILVER: No, just the house.

MR. PAWLEY: You would put the furniture under a separate heading, Mr. Silver?

MR. SILVER: The furniture would come under the broad definition of non-business assets.

MR. SHERMAN: Family assets? Commercial or otherwise?

MR. SILVER: Otherwise.

MR. GRAHAM: Mr. Chairman, the question of the designation as defined under The Dower Act, where it states that a homestead shall be the 160 acres on which the dwelling is situated and such other 160 acres as the owner designates. Now when can he designate that other quarter section? Must it be designated immediately or would that other quarter section be deferred and how does he designate it?

MR. F. JOHNSTON: . . . propose to change that? He said the Commission's recommendations - it was to be like the Dower Act and Mr. Silver said he is proposing to change that slightly.

MR. SILVER: No, I was not going to change the definition of a homestead.

MR. F. JOHNSTON: Oh, I see.

MR. SILVER: That would involve a substantive change.

MR. PAWLEY: Mr. Graham is raising a very interesting question because the homestead now, affidavits are taken every day and that property is sold, people are declaring it's not part of their homestead. When does a farmer decide which second 160 acres is part of his or her homestead; especially if he is selling his entire farm operation, he has to designate some second quarter section as his homestead.

MR. GRAHAM: . . . joint title. It has to be right away, I would imagine, but who has the say, does he have the say on what other quarter section it shall be or are they going to have a great big fight over that.

MR. PAWLEY: I don't know and that's the existing practice. I don't know what is done.

MR. SILVER: . . . that section that the owner designates. Obviously whoever has title is the owner and he'll designate.

MR. PAWLEY: But the peculiar thing is that I have never found myself running up against this, so outfarm holdings, it might be a section of land, a transfer involving the home, 160 acres, wife consenting, and the remaining three-quarter section simply being sold with a straight transfer with a declaration that it is not part of the homestead, and yet under this it would seem to be impossible that there has to be one of the second quarter sections designated. Yet it flows through the Land Titles Office without any difficulty in registration process.

MR. BROWN: It seems to me, Mr. Chairman, that there is a bit of a discrepancy here. When you are talking about town people, you are talking really about house only; when you are talking about rural people then you are talking about homestead and you are talking probably the total business. I wonder if that is the intent of this legislation or whether that has been an oversight.

MR. SHERMAN: I don't see, Mr. Chairman, how we can live with that definition of homestead; that was the point of my question. And also in my earlier suggestion that what we have to start with here is a definition we can all agree on. I don't see how we can live with that definition of homestead in what is going to be an all-encompassing law here covering you know many more situations that exist on Simcoe Street and Notre Dame Avenue and that exists in the constituencies of Birtle-Russell and Gladstone.

MR. CHAIRMAN: I wonder if that might be a suitable time for us to adjourn, it is almost 5:30.

MR. PAWLEY: . . . raise some legal questions that Mr. Silver and Mr. Goodman should look at for us.

MR. CHAIRMAN: We have made considerable progress today. The Chair had hoped that we would complete a review today. Is it your wish to come back this evening and attempt to complete it?

MR. GRAHAM: Well, Mr. Chairman, I think that we need to get some of these definitions clarified and I would hope that probably we could have a meeting next week.

MR. CHAIRMAN: I had asked Committee members to reserve the 8th in case we needed another day. Is it your will and pleasure to come back on the 8th?

MR. PAWLEY: I concur with Mr. Graham. We certainly need quite a bit of clarification. I think we have to reflect on some of the positions and that a few days would be very helpful to us, Mr. Chairman.

MR. CHAIRMAN: Do we have agreement on that point?

MR. SHERMAN: Tuesday, the 8th?

MR. CHAIRMAN: Tuesday, the 8th, 10 a.m. in this room. If that is agreed, the Committee is adjourned.