ISSN 0542—5492

Second Session — Thirty-Second Legislature

of the

Legislative Assembly of Manitoba

STANDING COMMITTEE
on
STATUTORY REGULATIONS
and
ORDERS

31-32 Elizabeth II

Chairman
Mr. Peter Fox
Constituency of Concordia

MG-8048

VOL. XXXI No. 2 - 10:00 a.m., THURSDAY, 21 JULY, 1983.

Printed by the Office of the Queens Printer, Province of Manitoba

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Thirty-Second Legislature

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LEGISLATIVE ASSEMBLY OF MANITOBA

THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS

Thursday, 21 July, 1983

TIME — 10:00 a.m.

LOCATION — Legislative Building, Winnipeg

CHAIRMAN — Mr. Peter Fox (Concordia)

ATTENDANCE — QUORUM - 6

Members of the committee present:

Hon. Mr. Penner; Messrs. Ashton, Fox, Kovnats, Mercier and McKenzie; Mrs. Oleson; Ms. Phillips.

WITNESSES:

Representations were made to the committee as follows:

Ms. Anne Riley, Manitoba Association for Rights and Liberties, spoke on Bill Nos. 65 and 66

Written submission was made by Mr. Jerry D'Avignon, Private Citizen, on Bill No. 65

Ms. Myrna Bowman, Private Citizen, spoke on Bill Nos. 64, 65 and 66

Ms. Carole Zoerbe, Mothers Without Custody, spoke on Bill Nos. 65 and 66

Written submission was made by Mr. Paul V. Walsh, Q.C., Solicitor for The Children's Aid Society of Winnipeg, on Bill No. 66

Ms. Maxine Hamilton, NDP Status of Women, spoke on Bill Nos. 64, 65

Mr. Donald Lugtig, Manitoba Association of Social Workers, spoke on Bill Nos. 65, 66

Mr. Murray Smith, Manitoba Teachers' Society, spoke on Bill No. 66

MATTERS UNDER DISCUSSION:

Bill No. 64 - An Act to amend The Marital Property Act

Bill No. 65 - An Act to amend The Family Maintenance Act

Bill No. 66 - An Act to amend The Child Welfare Act

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MR. CHAIRMAN: We have a quorum, ladies and gentleman. The first representation is Anne Riley.

MS. A. RILEY: Mr. Chairman, members of the committee, I will speak on Bills 65 and 66.

The Manitoba Association for Rights and Liberties is in basic agreement with a number of the principles incorporated into Bills 65 and 66. In particular, MARL supports the best interest test in proceedings under The Family Maintenance Act and The Child Welfare Act involving applications for guardianship custody and access. MARL also applauds statutory support for allowing child's views with the respect to alternatives of child care to be known to the presiding judge.

MARL has long advocated "children's rights," including the right to counsel and the right of the child to make representations to the court on his own behalf. Wherever practical, we are of the view that the child's position should be brought to the court's attention, either through counsel or on his own behalf.

Although MARL is pleased with those provisions of Bills 65 and 66 which could lead to more equitable and efficient legal services in the area of family relations in Manitoba, MARL is particularly concerned about other sections of the bills which appear to infringe significantly on basic civil rights of Manitobans. Opinion in MARL was divided on this one, but, in particular, MARL wishes to express concern about 1.3(1), the section that allows a judge to order psychological, psychiatric, social, medical, or other examinations of the child.

MARL takes the view that in certain situations such reports would be beneficial to the judge in determining important matters, such as custody and access. MARL has to, however, recognize the possible infringement upon individual rights, and these must be balanced by the benefit to be derived from such examinations. The only criterion stated in the legislation to warrant the ordering of such reports is that of the best interests of the child, a test likely to be determined differently by different members of the bench.

We'd like to restate also a proposal made by MARL on previous occasions that the courts should be required to choose the least detrimental alternative, rather than the best interests test.

MARL is opposed to allowing a judge to draw a negative inference - Section 1.3(3) - from the unwillingness of any part to the proceedings to submit to a psychiatric or psychological examination. We already have home study reports and people refuse to take those on occasion. There are many reasons, and I think the judge is the best to determine the reasons for their refusal rather than building into the statute.

If I have the permission of the committee, I'd like to elaborate a little bit upon this point of the possible infringement of individual rights. What we really have here, I think, is parents' rights vis-a-vis children's. In MARL we try to represent everyone's rights; it's not always possible.

In many instances, the lawmakers and the courts have decided that there is more benefit to be gained by having certain infringements of individual rights, and in MARL we wouldn't disagree with that, but always we would caution that when you do so, do so carefully and be aware of the intrusion.

We already have home study reports which give the physical environment to a large extent of what's happening in the home, whether there's food in the refrigerator and whether there is clothing on the children

and whether the mother is an alcoholic or there are beer bottles about or evidence of this sort and we get the opinion of the social worker. I presume that is meant by social, under social, where it says social report.

In neglect and physical abuse cases it's oftentimes the case that you've got a home study report, you've got the medical report because, of course, we have the section in The Child Welfare Act that insists that doctors must report suspected cases of child abuse and you have in addition to that the testimony of witnesses such as neighbours and by this time the judge often has enough information to make a disposition.

To have a psychiatric or psychological report in such a situation would be overkill, you don't need it. There are other situations, however, where the judge does not have enough information to make the choices of the least detrimental alternative and in these cases - and I'm referring particularly to sexual abuse and emotional abuse cases - the psychiatric report is essential. It is essential, and without it the judge cannot get the information that he needs to make the best determination. However, I think that when we're trying to choose the best and the most nurturing environment for children we have to try to obtain the information we need without unnecessary intrusion.

Going on then, Section 2(3) of Bill 65. Although MARL recognizes the obligation of mutual support on the breakup of long-term common-law relationships MARL is concerned that the provision as worded may lead to unfair results. For example, where one of the parties has supported his or her common-law spouse for the major part of their relationship without major financial contribution by the second party, it may be quite unjust that upon dissolution of the relationship the dependent spouse can apply for maintenance while the contributing spouse cannot. An instance of this was, I'll give an example, by Women and the Law Tuesday night. It would appear on the face of it that the spouse who received the benefit of being supported during the relationship is the only one who can now benefit upon separation of the parties.

MARL is of the view that there's nothing determinative about five years as opposed to a shorter period of cohabitation and that a provision which provides for mutual support upon the dissolution of a common-law relationship should be as flexible as possible, to allow the presiding judge in his discretion to review all of the circumstances.

Section 7(4), dum casta, MARL is in support of Section 7(4) which provides that the dum casta clause is invalid and unenforceable without affecting the validity of the remaining provisions of an agreement. MARL is also in strong support of the abolition of the distinction which exists between the rights of legitimate and illegitimate children. Particularly, MARL has advocated the abolition of the terms themselves, as all children in this society are legitimate and should not have their human rights jeopardized because of choices made by their parents.

In respect to Section 11.7(1), relating to the obtaining of blood tests, MARL is of the view that this provision is an improvement over compulsory blood tests, as recommended in the Carr Report. Opinion is divided as to the effect of the provision which allows the presiding judge to draw a negative inference from the failure to take part in such a test. It may be also that other evidence relating to parentage will be available to the court, and sufficient. Therefore, a blood test obtained in a situation of compulsion may be unnecessary; thus an intrusion into the civil rights of the putative father may be avoided.

Once again, watch out when you're stepping on people's rights and you're intruding into their privacy.

Arising out of Section 14, MARL continues to support the presumption of joint custody of a child on a breakdown of the relationship between the child's parents. It is hoped that such a presumption would take the children out of the unfavourable position of being fought over like other family assets, and it would improve the chances of healthy negotiation and conciliation.

Those are my comments on Bill 65, if there are any questions.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Thank you very much for those comments, Ms. Riley.

With respect to 1.3, I think yours is the third submission that we've heard that has raised concerns about these sections. I can state here, perhaps, for the benefit of other delegations and briefs, that changes will be brought in with respect to 1.3. I just make that comment.

There are permissive sections in both the B.C. and the Ontario statutes, which I think probably meets the second point you made in this connection that there should be something, but less invasive of privacy and other rights; but there must be some power in the court to order reports in certain special circumstances. Would you agree with that?

MS. A. RILEY: Yes, we would.

HON. R. PENNER: But this, as it's presently worded, appears to be too invasive?

MS. A. RILEY: Too invasive.

HON. R. PENNER: Okay. I won't engage you into discussion, nor indeed would it be proper on the appropriate wording, but if we're moving in that direction, subject to what we come up with, that would meet the concerns of MARL and others in that area?

MS. A. RILEY: Yes.

HON. R. PENNER: Would you just advise me, and you may not be able to, because I know others were associated with your brief, as it's indicated on page 4, whether or not there is a body of a case law on this "least detrimental alternative"? We know that there is with respect to "best interest," but how would the courts deal with "least detrimental alternative," and how would MARL define "least detrimental alternative" if it's to be based on a statutory definition?

MS. A. RILEY: As I understand it, this is the wording which is used in some places in the States and has been used with better effect, or this is the idea, the implication. The case law and the references I would have to get for you; I have them at home.

HON. R. PENNER: But they are American?

MS. A. RILEY: They are American.

HON. R. PENNER: To the best of your knowledge, there's no Canadian case law on "least detrimental alternative"?

MS. A. RILEY: No.

HON. R. PENNER: There was a proposal brought on behalf of the Dakota-Ojibway Tribal Council that the "best interest test" as we are proposing, it might be better if there were some definition, for example, including, without restricting the generality, keeping the child within its family and paying attention to culture and linguistic concerns. If those were there, would that, in your view, improve the efficacy of "best interest test"?

MS. A. RILEY: Opinion is divided. In my opinion, guidelines should be there; but in our group we have others who feel that the judge should be able to take into account anything he wishes. For myself, and I would say probably a majority of my group, we would favour guidelines.

HON. R. PENNER: Those are my questions. Thank you very much.

MS. A. RILEY: Thank you.

MR. CHAIRMAN: Mr. McKenzie.

MR. W. McKENZIE: Thank you, Mr. Chairman. Ms. Riley, on the examinations of the party in Section 1.3(1), one of the witnesses, I think Mr. Fishman, suggested that the psychiatric reports and others should be confidential. Do you support that opinion?

MS. A. RILEY: Confidential to whom?

MR. W. McKENZIE: Yes, that's the . . . okay, go ahead.

MS. A. RILEY: We have a lot of this confidentiality of medical records, and the question is: Confidential to whom? Often, everybody else can get the report but the patient. That's another issue.

I think that what we have, anyway, is we do have psychiatric evidence coming in, but it's done in an underhanded fashion that we don't like. That is, when there is, for example, a custody battle, both sides will begin to sleuth around and see if either party has been seen by a psychiatrist. Now they can determine that, and I won't tell you by what nefarious means.

Then the next thing is to get the report. If a lawyer can get his hands on the report and it's favourable to his client, he'll put it in; if it's not favourable to his client, he'll bury it and just hope to heaven the other side doesn't find out about this. In our view, this is not necessarily helpful to the child, because this may be a very important issue that would be of great help to the judge.

So that is why we have, in the past, taken the position that when such assessments are being made, that perhaps a child's advocate should be appointed to handle the submission of all this evidence, and it shouldn't have to be coming from one side or the other.

MR. W. McKENZIE: Thank you very much.

MS. A. RILEY: Thank you, Mr. McKenzie.

MR. CHAIRMAN: Thank you, Ms. Riley.

MS. A. RILEY: Can I go on then with Bill 66?

Section 17(1) is our major problem here, and I imagine you might have suspected it from us. We disagree with the extension of "police powers" to a family court worker or to a child care agency, allowing workers to enter a person's premises. Once again, this a right-to-privacy issue and we feel it's an unwarranted intrusion into someone's home. For another reason, the protections are already there. This is, of course, going in without a search warrant I'm talking about. MARL is of the view that a peace officer already has the power to enter premises without a search warrant. In those situations where a child's life or safety are endangered, a police officer already has these powers. Now, to extend this right of entry without the use of a warrant to a family court worker or a child care worker would, in our view, constitute a serious contravention of one's right to privacy and civil property rights.

MARL is extremely concerned about the care and safety of our children but it does not view this section as being a positive one in light of the general issue of the public interest. We would suggest that the existing powers of peace officers as well as the effect of a supervisory order imposed by the court is sufficient to protect the interests of our children while preserving rights of privacy and security of the person.

Section 24(3), where the parents or guardian do not consent to the provisions for access. This allows for an application for access by parents or guardian in the course of child welfare proceedings and in particular favours placing the burden of proof upon the child care agency to justify any limitation of access. In connection with this provision, however, MARL would stress the importance of providing independent counsel to the parents or guardian of an apprehended child in order to advise them of their rights regardless of whether or not they wish to contest the apprehension by the child care agency.

Obviously it is of no benefit to a parent or guardian to have the right to bring the matter of access before the court if they have no knowledge of such a right. In light of the serious consequences of any proceeding under The Child Welfare Act, MARL would emphasize the importance of independent counsel to assist all parties involved including the child where appropriate.

Those are my remarks on Bill 66.

HON. R. PENNER: Just one question, Ms. Riley, with respect to 17(1) you have previously made the general comment, I think you made it two or three times appropriately and I, in fact, agree with it that, for whatever that's worth, where rights are being invaded in a sense one has to do so only in exceptional cases and very cautiously. You also made the point that peace officers presently have the power that is set out in 17(1), so what is new is the power then being granted

to an officer of the family court who may not in law be a peace officer or of a child caring agency officer and since this by definition is only a power to be exercised where a child is in immediate danger, would not that really meet the criteria you set out in general?

MS. A. RILEY: If the child is in immediate danger, a peace officer can enter.

HON. R. PENNER: But supposing that - and it may be a remote example but it's one we have to be concerned about because there's routine visits from child caring agencies or an officer of the Family Court comes to a home and at that moment the child is in immediate danger, should they not have the legal power to enter in the best interests of the child?

MS. A. RILEY: Well, we are concerned about the invasion of privacy and feel that a simple phone call to a peace officer would bring him to the scene.

HON. R. PENNER: Perhaps too late.

MS. A. RILEY: I see your point.

MR. CHAIRMAN: Mr. Evans.

HON. L. EVANS: Yes, following along on that question, Mr. Chairman, I would like to ask Ms. Riley for her opinion on the other portion, the Attorney-General referred to immediate danger, but it says or (b) for the child who is unable to look after and care for himself has been left without any responsibile person to care for him.

MS. A. RILEY: All that is required is a phone call to get a policeman down there to pick up that child.

HON. L. EVANS: Well, I'm not talking necessarily - I'm more concerned with the Children's Aid Society, the child caring agency aspect of it.

MS. A. RILEY: I know that this is a power that the Children's Aid workers would really like to have because they feel very strongly that they should have the right to do this but we are concerned about people who are not authorized peace officers being able to walk in and just take children as they see fit.

HON. L. EVANS: So you're saying that you have no problem with 17(1)(b) even though a child may be left alone. You're not concerned that we authorize a child caring agency . . .

MS. A. RILEY: Well now we're getting into . . .

HON. L. EVANS: . . . with the right to walk in and look after that child.

MS. A. RILEY: Well, we're getting into an area where I think that the Native people who spoke on Tuesday night would probably say this better than I do. But that there's a difference in values sometimes between the social worker and the people they're serving and what happens is the social worker may feel that this child is in immediate danger, as Mr. Penner has said, or that the child is alone without care. There may be an aunt nearby or next door looking in. There may be some other provision and so on, not that this is necessarily justifiable and not that we would ever support abuse of any kind or neglect. But we're concerned that some over-solicitous and well-meaning social worker will step in and use this clause. I think it just provides one extra bit of caution if she has to phone the policeman to come down from the police station to apprehend the child.

HON. L. EVANS: Well, just as a matter - I'm supposed to only ask you questions and not enter into debate, so I would have to put it in a rhetorical way. Are you familiar with the existing act, Section 17(1) which in effect gives us this power now, or gives the agency the power now to enter if a child is in immediate danger . . .

MS. A. RILEY: In immediate danger, that's right.

HON. L. EVANS: . . . or is left without any responsible person to care for him? Are you aware that it's already existing?

MS. A. RILEY: I am aware that it's there. I am aware that it's there.

MR. CHAIRMAN: Mr. Mercier.

MR. G. MERCIER: Thank you, Mr. Chairman. I apologize for being a little late and not hearing during all of your submission. I've read it though and if you've covered this ground in answer to a question, just let me know.

On Page 2 of your brief you talk about Section 2(3) of Bill 65, the common-law section.

MS. A. RILEY: Yes, the common law section.

MR. G. MERCIER: Are you suggesting there should be some amendments to that particular section?

MS. A. RILEY: I think what we're suggesting is that it should be left to the discretion of the judge and that there are too many individual situations that you can't outline them all. To have one blanket provision like this is going to do a disservice to too many people. It's well-meaning, the intention is very good, but there was a point raised by Women and the Law on Tuesday night to illustrate this very well, where the young woman puts her husband through Medicine and at the end of it, he chucks her. Now, is he entitled then to more support after she's put him through medicine? Maybe a far-fetched one, but not so far-fetched.

If you are planning to implement this section, I would very much like to see some kind of alteration in the wording at least, at the very least.

MR. G. MERCIER: And are you suggesting there should not be a specific time period set out in that section?

MS. A. RILEY: That's what we're suggesting.

MR. CHAIRMAN: Ms. Phillips.

MS. M. PHILLIPS: Yes, Ms. Riley, on that one, in the example that you used, would you not think a judge would look at that and say this person is no longer substantially dependent? The wording that you have in there . . .

MS. A. RILEY: Well, if he wants to do a specialty, Ms. Phillips, after his medical degree, and he says, "I need more support to continue."

What I am saying is that there are many individual circumstances and that the judge should take some cognizance of common-law relationships and that they do bind people in some respect. To make a blanket provision with this wording, particularly, is of concern to us.

MS. M. PHILLIPS: Do you have any suggestions on how to narrow that from the word "substantially." To me, the word "substantially" is fairly narrow. A judge would have to have a lot of proof that they were substantially dependent.

MS. A. RILEY: Yes, that's one thing, but they prove this kind of thing all the time. The word "substantially" doesn't upset me so much as the fact that the other side doesn't have the equal opportunity to apply for support for themselves.

MR. CHAIRMAN: Anyone else? Thank you, Ms. Riley.

MS. A. RILEY: Thank you.

MR. CHAIRMAN: Myrna Bowman.

MS. M. BOWMAN: Good morning. I appear as a private person and not on behalf of any group. I would like, however, to commence by admitting that I am, indeed, a member of the Family Law Section of the Bar Association who presented a brief and, in general, I support the brief that they presented.

I have, however, some specific sections that I wish to comment on. I'd like to begin, if I may, with The Child Welfare Act and with Section 1.5, which is the section providing for application for access by a non-parent, whereas the parents are separated.

I'm speaking in opposition to that proposal, which I think is one capable of generating a considerable amount of mischief. I work a good deal with parents who are separated, and some of them are custodial parents, some of them are non-custodial parents; but one of the things that is borne in upon anyone who is engaged in that type of work is the enormous difficulties that are faced by a person who is a single parent.

They have usually considerable financial difficulties. They have the responsibility of working in almost all cases, as well as looking after the home and the child or children. They have to worry about day care and other child care problems. They have the stress of coping alone with their own emotional difficulties arising out of the separation, as well as that of their children, and the additional and often very difficult problem of trying to deal in an appropriate way with the rights and the relationship of the other natural parent who will probably have access.

These are enormous stresses for any single parent, and it's enough, I suggest, for them to cope with without the Legislature imposing upon them this added potential burden of applications by other parties. The amendment does not restrict the nature of the people who may make these applications. They can be other relatives; they may be neighbours; they may be almost anybody who thinks they ought to have a relationship with the child. The most common source of such applications, presumably, would be other relatives.

Now, when parents live together, they have the right to exclude from their family circle and from association with their children anybody whom they consider unsuitable for whatever reason, either because of personal animosity between the parents and the other relatives, or for no reason at all. It's entirely within the discretion of those people as long as they live together. When people have separated, the courts have either determined on a contested basis that one party is the most appropriate custodial parent, or the other parent has agreed that that is the case.

I am submitting to you that it is an unwarranted interference with the authority and the discretion of that custodial parent to permit other people to intrude into that family circle by way of access to the child if the custodial parent sees fit to refuse that type of access for whatever reasons he or she may have, and those reasons may be very subtle reasons but nevertheless important.

The common situations that I have seen where other relatives are excluded have been where they have had the poor judgment to interfere in the situation at the time of separation in a way that was perceived to be either detrimental to the child or destructive of the relationship between the child and the custodial parent, and they are things that are often difficult to establish in court; but the kinds of things that the custodial parent knows, which may be difficult to prove and which originate often through the child himself or herself, are, for example, a grandparent or an aunt who is putting down the custodial parent, who is pumping the child for information, who is using the access as a means by which a parent who has been specifically denied access by the court may have the opportunity that the court has said "was not in the child's interest to visit with him."

There are many, many other kinds of ways in which relatives can interfere in a situation which is already very difficult, and it's my belief that it would be destructive and unwise for the Legislature to afford other people the opportunity to interfere in a situation where the custodial parent already has more to handle than most of us could manage. I suggest that people who deny their relatives the opportunity to see children generally do so for good reasons; and if they are fit to have custody of the child, they should be fit to determine with which of their family and friends the child will associate, just as you and I are free to do.

The next section I wanted to comment upon was Section 12.(5), which is the section permitting maintenance beyond the age of 18. I agree with the submission that was made on behalf of the Family Law Section by Mr. Fishman that although no one who deals in this area would, I think, be opposed to the provision of maintenance beyond the age of 18, the tests which are proposed are unrealistic and, I think, unworkable.

The test proposed is that the court may provide the maintenance order if, in effect, the parent would have

provided that maintenance had the parties remained together. How, I ask you, is a court going to know; and what reasonable standard is it, where parties have separated perhaps when a child is four years old, if 14 years later an application is made to continue the maintenance, whether that father, because it's usually the father who's paying, would have supported the child had they remained together? The whole circumstance is different now. Had they remained together, there probably would have been quite a different relationship between the father and child than there presently is. Perhaps the mother would not - certainly, the mother would not have had the opportunity to remarry a millionaire; the father would not have had the opportunity to marry someone else and have three or four more children whom he's supporting. The whole test is an unreasonable one.

In fact, I have a matter that I've been dealing with recently, which I think is a demonstration, though an unusual one, of just how unrealistic it is. I act in a case where there is a father who is probably the rottenest parent I've ever had the misfortune to encounter. He has never done anything for his children that he could possibly have avoided doing, and indeed he's done a lot of things that he shouldn't have done including abuse them. Had they remained in his custody and care as a joint parent to the age of 18, he would never have done a thing for them. Is that some reason why, having abused them and mistreated them during the rest of their life, he should not be able to be compelled, if he's got the means, to support them while they complete their education after 18?

The standard is simply, I'm suggesting to you, not a reasonable one and that the proposal made by Mr. Fishman on behalf of the section is by far preferable both from the point of view of consistency and realism, that the standard should be adapted from the wording in The Divorce Act which permits the court to order maintenance if the child is over the given age but unable, by reason of illness, disability or other factors, in which the courts have included educational reasons, to withdraw himself from the support of the custodial parent.

I also believe, as I think do most lawyers, that the child must be resident with one of the parents in order to obtain this type of relief. We do not wish to see a situation develop where a child can compel a parent to maintain him in a separate establishment away from any of his family. So that is my point in respect of that particular section.

I want to speak on Section 1.1 of The Child Welfare Act and also of The Family Maintenance Act which is identical, and that is on the best interest tests. I, of course, do not quarrel with the best interest test per se. My criticism of this particular version of it is the restriction added to the end of that section, "Regardless of the wishes or interests of any other party to the proceedings." The best interest test, I think, is one that has stood the test of time. It's well understood in the legal community and, I think, to a very large extent in the rest of the interested community at large. There is a saying which I think legislators should bear in mind: "If it ain't broke, don't fix it."

This test works well and I think does not need to be fixed at all. The more you tinker with something like this, the more trouble that you will make. I see nothing beneficial to be gained by adding on the phrases that I've quoted and, in fact, I see mischief to be made in that way.

When I look through these amendments and through the acts in general, I see that everybody's got rights and everybody wants more rights but parents. The Director of Child Welfare's got rights; the child's got rights; third parties are apparently to have rights to come in and have visiting and whatnot, and the courts going to have the right to have you examined against your will by a psychiatrist; child-care agencies have rights; and I understood Mr. Beaulieu and Mr. Savino to be suggesting that the community may have rights in a child by reason of its ethnic or racial origins; everybody but us parents.

Well I think we do have rights. I'm a parent and I think I've got rights, and I would not thank you to diminish them in any respect. I think that is the way that this section is almost certain to be interpreted if it is seen to be, as it is, a restriction or a caveat upon the general best interest test.

Parents' rights, of course, are subordinate to the interests of the child, but that doesn't mean they don't exist, and I do not think there is any reason to be diminishing those rights, whatever they may be. It is difficult enough to raise children these days without getting a gratuitous poke in the eye from the legislation.

Those are my comments on The Child Welfare Act. I don't know whether you wish to ask me anything about that or not.

MR. CHAIRMAN: Any questions? Mr. Penner.

HON. R. PENNER: With respect to The Child Welfare Act and the point that you made with respect to 1.5, am I wrong in my assumption that the power which is statutorily defined is now an inherent power of the Superior Court, Court of Queen's Bench?

MS. M. BOWMAN: Some of the judges think that is within their jurisdiction. It is very very rarely exercised and some of them don't feel that way. I certainly would not want to encourage it, in any event.

HON. R. PENNER: Do you know, Ms. Bowman, whether or not decisions of trial judges exercising or purporting to exercise that inherent power have ever gone to an appeal decision in Manitoba?

MS. M. BOWMAN: Not to my knowledge, but that, of course, is not exhaustive.

HON. R. PENNER: In any event, your second point is that you don't want to encourage it.

MS. M. BOWMAN: That's right.

HON. R. PENNER: I agree, incidentally, with your obiter remark that that is not exhaustive of the matter, but has gone to the Court of Appeal.

With respect to your comment on best interests and the words "regardless of the wishes or interests of any other party to the proceedings," there are in fact similar words in the uniform Child Custody Enforcement and that, in effect, is where they were taken from. But having

said that, and that's why they're there, I can simply say, we are prepared to look at the removal of those words. I'm not so sure that they necessarily add anything, and they may perhaps detract from the best interest test.

Those are the only comments that I have.

MS. M. PHILLIPS: Thank you, Mr. Chairperson. Ms. Bowman, firstly your litany of single parenthood at the beginning sounded like the story of my life and was quite familiar to me. When you were talking about access, I was a bit confused on whether you were talking about 1.5 in 66 or whether that extended to 14(4) in 65, in The Family Maintenance Act, about access of the non-custodial parent to certain records, etc., etc.

MS. M. BOWMAN: Oh no, I have no quarrel with the access of the non-custodial parent either to the child himself or to any information about the child. I think that's a good thing and that was, of course, something that the section did endorse.

MS. M. PHILLIPS: So you're mostly concerned about other relatives, not the non-custodial parent?

MS. M. BOWMAN: That's correct.

MS. M. PHILLIPS: . . . or other individuals. But under 66, that's in a situation where the child has been apprehended?

MS. M. BOWMAN: It would apply to any situation, as far as I can make out, whether the child was in the custody of one parent or whether it had been apprehended by an agency. Where there has been an apprehension by an agency, there are particular provisions for access by the natural parents which I, like the rest of the people who have presented, certainly agree with.

MS. M. PHILLIPS: Okay. I think that's clarified for me. Thank you.

MS. M. BOWMAN: You referred me particularly to the section in The Family Maintenance Act, and I do share the concern that Mr. Fishman was expressing that the wording might be well tightened up so that it will not be interpreted that the right to obtain existing information about a child would also permit a parent who did not have custody to go and take the child to the psychiatrist and then get the report. It may be that some minor adjustment in the wording could overcome that problem.

Shall I proceed then with The Family Maintenance Act?

MR. CHAIRMAN: Yes, please. One moment, Mr. Mercier.

MR. G. MERCIER: Just one brief question, Ms. Bowman, with respect to Section 1.5, do you support the inclusion of that section with the amendment that Mr. Fishman suggested, to change the word "or" to "and" in the third line?

MS. M. BOWMAN: No, I don't, and indeed, that would make it perhaps less objectionable but, nevertheless, it would still be offensive, and I think that Mr. Fishman was making the same point, that the whole thing ought to be abandoned although that would make it slightly less offensive.

MR. G. MERCIER: I got the impression from Mr. Fishman that he was suggesting it was okay with that one change from "or" to "and," but also to add some wording that would indicate that it would be an exceptional situation.

MS. M. BOWMAN: Well, I've been practising in this area for about 20 years now, and I can't think of any situation that's so exceptional that I would have thought that was an appropriate section to have in the act, but as I said, that's only one person's opinion, and I just don't find that an acceptable restriction to place upon the raising of a child by a person who's already got enough difficulties raising a child alone.

MR. G. MERCIER: The case that is raised by many people is the case of the grandparent who has had access to a grandchild - considerable access - and developed a real relationship with a grandchild. Assuming that it's not the kind of case that you were talking about before where there has been interference in the separation and that sort of thing, would you not be of the view that a grandparent who has developed a real relationship with grandchildren and who, after a separation is denied access, should be allowed to apply under some type of section?

MS. M. BOWMAN: No, I don't, because I bear in mind that a grandparent is also a mother-in-law or a father-in-law, and it's almost inevitably the case that if access is denied after the separation there is good reason for it. The parents when they live together could deny that access if they saw fit, for no reason. Why should the person who's got all the responsibility on her own shoulders or his own shoulders now have the court interfering in a very personal family relationship? They may know a lot more, and they almost inevitably know a whole lot more about the effect of the access on the child, what kind of input that person is going to have into the child, whether they are going to be blaming the other parent for the separation, whether they're going to be inciting the child to think that the parties will reconcile when they won't, whether they're going to be telling the child that the other party is going to be applying for custody. All kinds of these things go on and they're almost impossible for the custodial parent to prove in court. Now, this person has already had to deal with his or her spouse in ironing out the separation. If the father or mother who doesn't have custody has access, they've got every right to take that child if they so desire to visit with their family members, and that's adequate in my opinion.

MR. G. MERCIER: I don't want to extend this too long and get into a debate, but sometimes, it may well be the custodial parents who are denied access. Those situations occur. You seem to be making the argument that the custodial parent is entirely without fault and will make faultless decisions. Now, I have a great deal of respect for anybody who has custody of children,

but sometimes they don't always make all of the right decisions too.

MS. M. BOWMAN: Of course they don't always make the right decisions, nor do judges, nor the rest of us, but they've got the responsibility. They've been found to be a proper person to look after this child and they should have the same authority that they would have had, had the parties remained together, that's all I'm saying.

Proceeding then to The Family Maintenance Act, I wanted to deal with Section 2(3), the extension of the right to maintenance after a period of cohabitation. I may be spitting in the wind on this, but I'm speaking in opposition to that section as well. And being an elderly person now, I can recall the kind of situations - you see these gray hairs - the situation that prevailed prior to 1968 when parties would live common law sometimes till they had grandchildren, because they had no other choice. There was no divorce available to them, but since 1968 that has not been the case and anybody who wishes to be divorced and free to marry can do so within a period of about five years, maximum, and mostly within about three to four years. Indeed, if the newspapers are to be believed, that period will shortly be decreased to about one year of separation before a party is entitled to obtain a divorce.

That being the case, it seems to me, that we have to look again at the justification for granting maintenance to parties who have chosen not to be married, because if they are not married now and live together, it is through choice if they are living together for a substantial period of time.

I think people should have the freedom to make choices, whether they are wise or unwise choices, and they also have the obligation to accept the consequences of making those choices. One of the things that is very widely known in our community about the legal system is that people who are married have obligations of support and people who are not, don't.

The institution of marriage has always had a special status in our society and one of the things that I do not like about the type of amendment they are having now is that they are in effect reducing choices to people by saying that whether you want to be married or not you're going to be, even though you don't accept this obligation freely. In order to get the obligations and responsibilities that go with marriage visited upon you, you have to freely undertake and formally signify your willingness to accept those obligations, whereas the common-law relationship develops in an informal way and very frequently these days amongst people who specifically reject the idea of legal ties and legal obligations between them. They don't want that and that's why they don't get married. They should have the right to make that choice. If a woman is foolish enough to put herself in the position of living with someone to whom she is not married and making herself financially dependent upon him, then as a free person, as an adult person, she should accept the responsibility for that choice if it turns out to be an unwise one.

It seems to me that this amendment, in effect, demeans women in that it seems to further the concept that they are dependent, that they shouldn't be expected to be responsible for themselves and for the decisions that they make; yet demeans the men who are usually the ones called upon to pay by forcing them to take upon themselves an obligation that they didn't usually realize that they were going to have and that they would specifically have rejected had they had anyone ask them, and it demeans the institution of marriage by blurring the distinction that has always existed between that status and the status of people who have chosen another way of life.

There is a justification which remains, I think, for the provision that we've had in our law for many years, and we were a very progressive province for having it 40 years ago, whereby where there is a child involved, the maintenance obligation arises, and I certainly don't suggest that should be interfered with. I think it is an unnecessary interference in people's personal affairs and almost an insult to the adult responsibility of women to suggest that they should be treated in the way contemplated in this act. I recognize that it is so worded as to apply to both men and women, but we all know who is most likely to be financially dependent in any such relationship.

I certainly do not agree with the suggestions of others who wish to do away with the time limit and who suggest that it should be available almost at any time and to both parties. I note - and this is, I think, an example of what I was saying as to blurring the distinctions - each of the people who spoke on that vein spoke of these people as spouses. Well they're not. That's the whole thing. They chose not to be, and I'm not faulting them for that, I just think they should have the right to make that choice.

I wanted to speak also very briefly on Section 8(6), because it was discussed during Mr. Fishman's presentation and one other - maintenance ceasing upon marriage. I agree with the submission that this section should not be enacted because there are circumstances wherein it would work an injustice and, it seems to me, far too arbitrary a thing to do. There is case law and, indeed, the Manitoba Court of Appeal in an obiter comment recently, indicated they accepted that view where maintenance would continue after remarriage.

Now, of course, if the parties are both within the jurisdiction and fight it out at the time, there's no problem, but I have certainly seen instances where, for example, a woman may have a maintenance order in Manitoba under The Family Maintenance Act; the husband in British Columbia may ask for a divorce. If she is not a sufficiently sophisticated person or doesn't act in time, the divorce will probably proceed in British Columbia and result in a decree of divorce which does not contain any maintenance.

In that situation, the case law indicates the maintenance obligation under the provincial legislation will continue in force. That is all very well, but if you enact this section, she'll be cut off automatically if there's a remarriage. I think that is certainly not what ought to happen automatically.

There's also the situation where, of course, the maintenance arrangement is more generous than it otherwise would be, to take account of a property consideration, and it's paid over a particular period of time. Again, it ought not to be cut off by reason of a subsequent marriage, where that wasn't the intent of the parties. I think that it's possible, by use of the court rules, to simplify the procedure by which, in the majority

of cases, the maintenance order can and should be terminated upon remarriage.

Those are all the things that I wanted to speak to you about in respect of The Family Maintenance Act.

MS. M. PHILLIPS: Yes, thank you, Mr. Chairperson. Ms. Bowman, in your comments on those two sections, 2(3) and 8(6), in one instance, in 2(3), you are suggesting that there would not be circumstances where the maintenance should be continued because these people are free adults and they've made a free choice and they must accept that responsibility.

On 8(6), you're saying, and if I can quote, "If she is not a sufficiently sophisticated person," I think were your words, that there are some circumstances where, even upon remarriage, that maintenance should continue. To me, that seems a bit contradictory that there should be flexibility in the one, where a free adult makes a free choice to remarry and looks at the financial circumstances, etc., etc.; but in the other, because you say it would blur the distinction between making a decision to marry and not to marry, that under no circumstances should that maintenance continue. I'm a bit confused about that.

What if, in the first case, the person was not a sufficiently sophisticated person and say, for instance, as an example, halfway through that common-law relationship, circumstances changed in that she was invalided or was ill and not able to go to out to work and, a year later, after living together seven or eight or ten years or whatever, the fellow left and she was substantially dependent? It seems to me your argument is a bit unfair in those circumstances, and a bit overly generous in the other.

MS. M. BOWMAN: Well, I obviously don't agree with that. I certainly can't say to you that without 2(3), there will never be a case where you and I might not say, gee, that's really not fair that this poor lady got abandoned after a certain length of time. There are hard choices to be made in life, and when people make a choice, sometimes the results are worse than they expected; but what you are doing here is imposing an obligation on someone who did not freely undertake it. In terms of lack of sophistication, I think one of things that is almost universally understood in the community is that husbands and wives have a maintenance obligation, and that's one of the things that often, in fact, induces people not to marry is because they don't want that.

Now, in the other case, you've got a person who made the choice to marry, who has a legal right, and what this section is doing is abolishing it entirely without giving her a hearing or an opportunity to offer the reason why her legal rights should not be terminated. The case law has indicated that there are circumstances in which that right will continue. So I see a distinction there and if I haven't made it clear to you, I'm sorry; but I see it.

MR. G. MERCIER: Ms. Bowman, I appreciate everything you and others have said with respect to Section 2(3). There's only one concern I have. If a person becomes substantially dependent upon another person in a common-law relationship, and the relationship they have terminates and the person who is substantially dependent goes on social assistance, that is throwing upon the taxpayers that financial responsibility rather than upon the other partner to the relationship.

Would you not agree that, in those circumstances, the person to whom one has become substantially financially dependent should have some financial responsibility in that area rather than the taxpayers?

MS. M. BOWMAN: Well, the taxpayers, of course, might well have been responsible for that person throughout the whole period had they not lived in a common-law relationship.

MR. G. MERCIER: Yes, that's possible.

MS. M. BOWMAN: I don't think that we should predicate the creation of this kind of liability upon a need to save a few tax dollars. I think that no one can predict why, or for what reason, a person may become dependent on social assistance. That, to me, does not justify the imposition of an enormous and long-term liability on a person who has specifically said, hey, I don't want any of that legal stuff; and the other party may also have said the same thing at the time, but then changed his or mind as time went by.

MR. CHAIRMAN: Thank you, Ms. Bowman.

MS. M. BOWMAN: The Martial Property Act then - I wanted to speak to Section 13(2) of that act.

A MEMBER: Sorry, what sections?

MS. M. BOWMAN: 13(2) - the amendment to 13(2) - to reword it, and I take it that the rewording was intended as a housekeeping amendment, which would tidy up the references to values being divided as opposed to assets being divided.

When I read it, I felt very unhappy about it and it took me a while to formulate why I didn't like it, and I think I know now. The former section talked of the division in equal shares, or such other sharers as the court might determine on a consideration given. The new one talks about amounts being altered rather than shares being altered.

I think the reason that I feel very unhappy about this wording is this: That when you are altering a proportion, whether it be from 50-50 to 70-30, or some other amount, you are almost obliged to develop a logical principle, based on the considerations in the statute, as to why you are making that variation; but that it may be a subtle distinction. It seems to me altogether too easy to allow the court simply to tinker with actual dollar amounts.

I would much prefer to see the present wording retained, or some variation of it that did not encourage or invite the court to tinker with amounts, but to deal with proportions and with principles upon which a division should be equal or unequal.

Then, as I looked at it again, still not liking it, I saw something else that I think must be an oversight in the wording; because the amendment says, the amount shown by the accounting to be payable by one to the other may be reduced if the court is satisfied that a

complete equalization would be inequitable, and what not. Well, surely to goodness, you didn't mean only to have it reduced. Surely, there should be the option also to have it increased. I suggest that you look again and see whether there cannot be a method of changing the wording so that it is not an amount, but a proportion or a share that is being altered so as to discourage tinkering.

The other section that I wanted to speak to is the amendment to Section 13(3), and this is probably the worst amendment that is in this package, in my view, in terms of its potential for accomplishing mischief. I take it that the purpose of the section was to reduce the element of conduct to the bare minimum in terms of property considerations, and that has been the thrust of the legislation and of the whole reform of family law over the last number of years. Unfortunately, I am absolutely sure in my mind that the result will be precisely the opposite of what is intended.

The latter portion of the section, the portion saying, "or has otherwise been substantially detrimental to the financial standing of one or both spouses" is an invitation to any resourceful lawyer and any hostile litigant - and goodness knows, we have lots of both - to drag into the courtroom the whole issue of conduct. Now, the courts are having difficulty restraining them from doing that as it is.

Most of the judges are now tending to accept the principle of the legislation and saying, I don't want to know about conduct; although, if it has a direct bearing on the financial circumstances, I think that the other sections of 13(2) are more than sufficient to allow the court to do that if it's genuinely a financial issue. This, however, will allow people to come along with the argument that, well, if my wife hadn't been such a miserable nagging you-know-what, I would have been able to earn a whole lot more money; or if my husband wasn't out fooling around with his secretary all the time, I would have been able to go back to school and I wouldn't have had so much on my mind and I would now be a neurosurgeon or whatever. There's just an endless possibility created by this section for parties . . .

HON. R. PENNER: Or a member of the Legislature.

MS. M. BOWMAN: Pardon?

HON. R. PENNER: Or a member of the Legislature.

MS. M. BOWMAN: Well, I don't think I have to elaborate on the possibilities, but they are literally endless for people to get in by the back door which you thought you had closed the front door upon, and I suggest that you delete that and stop at dissipation. If you're not prepared to do that, I suggest you forget the whole section.

There were two additional proposals that the Family Law Section formulated and to which Mr. Fishman referred, and I don't know whether he had given you copies of those proposals or not. I have a copy of the actual wording that was approved by the section if you'd like to have it. I'm wanting to speak in support of those and explain to you a little further why I endorsed them.

The first one is to add 19(3) to direct that the court shall direct interest to be paid upon all or part of the amount shown by an accounting, to be owing from the date of valuation to the date of payment at such rate as the court deems reasonable, unless the court finds that such payment would be clearly inequitable, having regard to the circumstances.

The present section only permits the court to order interest where there's been unreasonable delay. Unfortunately, in marital property and other domestic litigation, even if people are not doing anything in particular to delay it, it can be two years and more before a case comes on for trial in the normal course of events. If a large or a substantial sum is payable by one to the other, the one on the receiving end has lost interest for all of that period of time; and the one who retains the asset, of course, has the benefit of that interest for the whole period of time. That is also, of course, a factor which encourages those who forsee they're going to be the paying party to certainly not do anything to advance the litigation more rapidly. There are cases where, of course, it wouldn't be fair to order the interest, but the proposal provides that the court would have that option not to order it if it wasn't fair.

The other proposal is that where there has been an application under The Marital Property Act, a party could file a Certificate of Lis Pendens in the Land Titles Office, which would prevent the disposal of, or mortgaging of a real property asset without the written consent of the other party or an order of the court. The purpose of doing that is to deal with the situation which has arisen in some cases where a party disposes of assets following the commencement of litigation, and either uses the funds, and, of course, by that time he may not be subject to the dissipation business or, in any event, has them in a place where they cannot be located.

I can give you a very specific example that occured in a case of which I have knowledge, where a farmer disposed of three-quarters of a section of land during the course of litigation; the wife had no means of knowing that he was going to do it and thereby couldn't apply for any order that would prevent him doing it, and he simply doesn't know what happened to the money, it's just all gone. Well, of course, he wanted to have his judgment reduced because he didn't have it anymore, and the court wouldn't hear that. He's got the judgment all right. The wife has got the judgment for the full amount she should have had, but there's nothing there to collect against. That's the problem. I'm submitting that once there is litigation in progress, that there is an obligation upon one party not to dispose of assets in an unreasonable fashion.

Indeed, in a recent judgement, Mr. Justice Scollin went so far as to say that after the husband becomes aware that there's a claim by the wife, or vice versa, that he's under a fiduciary duty to protect and preserve the assets to the extent of her potential claim. So I do not think that the proposal would unduly fetter the activities of people who were conducting their affairs in an ordinary and businesslike manner, and I submit that they would be of considerable assistance to those of us who, from time to time, encounter a rounder who is trying to beat the system, dispose of his assets and avoid having to pay what the court finds ultimately to be due and owing to the other spouse.

Those are my comments on this statute, if anyone has any questions for me.

HON. R. PENNER: With respect to 13(3), you've reinforced a point made by Mr. Fishman. I may say, this is not gratuitous that the concern has come across somewhat clearer in your presentation than I perceived it when first made; and I simply say that I'm inclined to agree that something perhaps has to be done there with respect to those last words, because it was not the intention, obviously, to reintroduce conduct through the back door. If, as you argue, those words might have that effect, then it is a matter of some concern. So we'll be looking at that from the point of view of amendment.

With respect to the last point that you've made, I haven't yet had an advantage of seeing the actual wording. There is a problem of bringing in something totally new at committee stage, and would have to have normally the concurrence of all concerned; but I can tell you that we have been looking at a proposal from the Law Reform Commission with respect to prejudgment interest. There may be legislation on that in the next Session, and I see no reason why, in principle, it shouldn't apply to this kind of a judgment as to any other kind of judgment. If we're not able to deal with that proposal in this Session, then it certainly will be given very serious consideration for the next.

MS. S. BOWMAN: Thank you.

MS. M. PHILLIPS: Thank you, Mr. Chairperson. Ms. Bowman, I don't know if this is in order, but I feel that I am still not clear on the situation about the five-year common law substantially dependent business. I would just like to ask your opinion of another kind of situation.

It seemed from your case that, I think, you were talking about where this adult allows herself to become dependent. My experience in the real world points out a lot of cases where that person is almost demanded to be dependent in that the common-law spouse says as long as I am supporting you, you will not go out to work, I make enough money to look after us - that whole usual argument that a lot of people in society fall into.

It also seems to me that there are a lot of other emotional reasons why a couple would choose a common-law relationship, apart from whether they don't want to assume the financial obligations or they are not free to marry; that there are a lot of emotional reasons why people choose a common-law relationship that don't make any sense, in fact, on those two circumstances.

It just seems to me that there are enough circumstances there that where someone is, whether it's their own free choice or whether it's the choice of staying in that relationship and being dependent, that would warrant a judge to look at that and say, this person is substantially dependent and maintenant and should be awarded some maintenance.

MS. M. BOWMAN: It seems to me that you're getting onto a very slippery slope when you do that, because there is no logical justification then for saying that should apply only to a situation of a man and a woman. What about two men or two women who live together for many years and one of them becomes financially dependent? Will you impose a lifelong obligation of maintenance upon one of them if that relation ends? What about two sisters, or two brothers, or a sister and brother who live together? It seems to me that you're going very far afield if you start using that as the justification for imposing a kind of obligation which, to this point, really has only devolved upon someone who said, yes, I'll accept that obligation.

Now, I agree with you that there are very foolish people who go out and make a dumb decision to live with somebody, let them tell them how to live their life and become financially dependent upon them. As long as the Legislature says, never mind, lady, we're going to look after you no matter what kind of a stupid choice you make, you're not ever going to have to take the consequences of what you do - then I think that is encouraging that type of thinking. I don't think there are very many women who get themselves into that position who don't know at the time that there is not a legal obligation upon that man to look after them if, in fact, the relationship falls apart.

MR. CHAIRMAN: Thank you, Ms. Bowman.

Mr. Mercier, please.

MR. G. MERCIER: Ms. Bowman, on Section 13(3), is it your position and that of the Family Law Subsection that a preferable course of action would simply be to leave this section as it is?

MS. M. BOWMAN: My own preference, and I think this section would agree, my first choice would be to stop it after "dissipation." Alternatively, if that is not acceptable, we would prefer to see nothing at all, but I think it would be useful to have it deleting everything after the word "dissipation."

MR. G. MERCIER: Just to clarify this, Ms. Bowman, do you see any necessity to add Subsection (3) at all?

MS. M. BOWMAN: I think that it would be useful, yes, because there is still an unfortunate tendency on the part of many litigants to try and drag conduct in. While the courts may try and restrict them, I think it would be useful to have a specific restriction in the legislation.

May I say one thing further before I leave which is not directed to this but to the amendments to The Pension Benefits Act? Ms. Phillips referred us to them on Tuesday evening and I just saw someone else's copy, so I can't comment on it. It wouldn't be in order, but I have some concerns as to how these changes are going to be accomplished. They are very complex matters, and I would earnestly urge the government to defer enacting those until there has been opportunity for comment from not only the legal profession, but from unions and employers and whomever else who may, whether they agree with the approach or not, have a lot of useful things to say as to how to do it and things that may have been overlooked.

It's not an easy thing to come to grips with, and most organizations have difficulty in doing that through the summer months. I certainly had some concerns with the little bit that I saw, and I would sure like the

opportunity to come back here at a later date in the fall when we've discussed it thoroughly and have . . .

A MEMBER: It's all right. We'll be here.

MS. M. BOWMAN: Still? Thank you very much. I'm sorry, I took so long.

MR. CHAIRMAN: You're welcome. Thank you.
Carol Zoerbey.

MS. C. ZOERBE: My name is Carol Zoerbe, not Zoerbey.

MR. CHAIRMAN: Sorry.

MS. C. ZOERBE: That's fine. I am here as one of these people you are arguing about. I am a mother without custody. Well, not exactly, I have joint custody, but it's not working out very well, so I would like to address Bill 65 and Bill 66.

Under Section 11.2 that states that the person is the child of the natural parents, we support that.

Under Bill 66, Section 11.2(2), it talks about the effect of adoption, and we are opposed to adoption because it gives preference to adoptive versus natural parents in all matters. It also is used to terminate natural, kindred relationships by vindictive spouses and/or guardians of the child.

I have experienced that personally and so have other women who belong to our association. We have had custody of our children for anywhere from four to five to 10 to 15 years. In the event of a divorce when we were no longer useful to our spouses, we lose custody of our children for economic or health or physical reasons. The court sees fit to take away custody at that time. Then if we happen to have $10,000 or $15,000 to go for legal access, we may get it. We may not.

I am feeling very nervous right now, because I am the only person so far who has come to say what it feels like to be on the other side of it all.

A MEMBER: Maybe a glass of water would help.

MS. C. ZOERBE: No, that's fine. Thank you, I'll be all right.

We also appreciate under Section 11.2(4), the abolition of distinction between illegitimate and legitimate children to the right of support and to the right of kindred relationships. But again I would feel that adoption is in opposition to this.

Some of the members of our group were very young at the time of the birth of their child, and they consented to adoption without the maturity that they now have and without the ability they would have at this time to parent to their child. They have lost forever that right. We feel that is an injustice. It's punitive towards the child; it's punitive towards the parent.

Also under Section 11.4(a) and (b), it says that this act will not affect an instrument that's in force or any disposition of property. While the disposition of property is important to us, our primary concern is the right to be with our children and the right to know our children. It would help to have some of the property settlements so that we could do that, but that's by the by.

Anyway, we are opposed to that because without some retroactive action through these legislations, it leaves our children and ourselves to continue to be the victims of the injustices that have occurred in the past and it also leaves children condemned to former attitudes and penalties imposed by less informed and less thoughtful judiciaries.

I think that we have now looked at what adoption does to children. We've have groups of parents who are adoptive parents, who are asking for help. How do we deal with these children we've adopted who resent us and reject us, because they want to know who their natural parent is and they want to know something about their natural parents. So it has not been helpful to the adoptive parent either, that access has been severed to the natural parent. It's been seen as the thing to do and the right thing to do to provide for the child, because once a child is adopted, society has no longer an obligation, financially. But in the long run the child and the parents have all been hurt, both the adoptive parent and the natural parent.

Under Section 11.6(2) it speaks that the Director of Child Welfare may bring application on for hearing where, and it goes on to say, the mother of the child has sought the aid and is considering surrendering the child for adoption.

We already stated our opposition to adoption, but I'd like to add here, that were duress is evident, it would appear that justice and compassion for the future of the child presupposes the eventual ability of the natural parent to assume, at least, some care for that child. Foster homes or agents, educational programs, employment opportunities, are all important aspects of any person's ability to offer support to the children of the community.

Under Bill 65, Part II, Section 11.2(1) and (4), there is evidence that this committee seeks to bring greater awareness of the community of the responsibility inherent in bearing a child to both men and women, regardless of their marital status at the birth of the child.

It would seem then, that if someone bears a child at the age of 12 or 13 or 14, while we recognize they cannot care for that child in a full care, why can they not have access to the child with the aid of the foster parent? They could babysit the child, just as they would the neighbour's child. They could mow the lawn. They could do things in the home where the child lives to be supportive of the child. There are practical ways that this could be done.

It has never been exercised or practised. We've just simply severed the child forever. I think that to give even a youthful, an extremely youthful parent of 12 or 13, some kind of responsibility for this child that they have borne, whether it's babysitting or running a paper route to buy the pablum - who cares? - and allow them to continue contact; it not only gives them the sense that they are responsible for a child, it might cut down on repetitive pregnancies during teenage years and it could become like a Big Sister association between that immature person and their child and likewise for the father of that child. There's no reason why - this notion that we can't be responsible for ourself is silly. I looked after my own brothers and sisters when I was 10 and 12 years old. If I had given birth, as some people do at that age, there's no reason why they can't assume

some responsibility for that child, not to interfere with their education, not to interfere with their own social development, but some responsibility and some recognition that they're an okay person, that they aren't bad and they have to lose their child forever.

Under Section 14.1, it speaks of the joint rights of parents and I would refer that back to Section 11.2(1) and Section 11.2(4) again, which delineates that the responsibility is to be shared, regardless of the marital status at the time of birth. Therefore, I feel that the right for input in custody and control of the child is dependent upon the support of the child, not the habitation arrangements of the parents, either before, during, or after the birth of the child.

If an unmarried couple choose to not live together, but both choose to support the child that they bear, or are ordered to do so by the court under these provisions, then it seems to me that the person who gives support should have the same right, whether they're living with one another or not, to have some say as to what happens to the child.

Now, I have heard a great deal of argument against this, that the so-called custody parent is going to be harassed and troubled and everything by the person who isn't living there full-time. The only time that the custody parent might be harassed - as they choose to see it - is when they act to sever the relationship between the child and its other parent or relationships, or they might be harassed when they take action against the non-resident parent and their view of harassment is anything from asking a question such as, well, how are the kids doing in school this week - like that's harassing them, believe me - I've experienced it.

I've been told I'm harassing because I want to know how my kids are doing at school. I've been told that I'm harassing because I finally went into court and said, look, I want to see my children and I want to know what's happening to them. I'm harassing because I'm asking questions about the welfare of my children and he comes into court and says you're harassing me. All I want to know is what's happening to my kids, where are they, what are they doing, as any normal caring parent would. Having had full control and custody of my children for the first ten years of their lives, I feel entitled now to know what they're doing. The fact that he no longer lives with me is fine, but I have a right to know, and so do other parents who are being denied these rights and fathers are included in that, because primarily they don't get custody.

Basically under the subsections of 14, we're really pleased to see those steps that are being taken, that grant the parent who has been denied custody the right to know what's happening to their children by asking for school reports, physical, medical reports, these kinds of things. We see that as a very positive step towards allowing parents to know what's happening.

That's all I have to say on that one and then under Bill 66, some things are related to the things I've already said. But under Section 1.5(1) where it says that the application for access - now I've heard that argued against too, because it might be used as a harassment and I would make the same argument - it would not be an harassment where the people are concerned for the children and allow them access. But I think grandparents - my own parents are some of those grandparents - have a right to access to the grandchildren and to see that the order is not effective while the child is living with both parents, I object to that, because where the parent is an adoptive parent, again, we are faced with the same kind of thing, or where the parent is opposed to the child's relationship with kindred relationships, it could be that the child has had a very good relationship with kindred relations. Then 10 years down the road they get angry at a parent or an aunt and or an uncle and say you're never going to see the kids again. Why should the child pay for the parent's inability to get along with a kindred relationship, either currently or from a former marriage, or common-law relationship. That's that parent's problem. They shouldn't impose it on the child.

Under Section 15, again it talks about the voluntary surrender of guardianship and we've already outlined our concerns about just how voluntary it is when you're under economic or physical duress at the time that you surrender your child. Anyone who has adequate resources does not surrender their child. Anyone who does surrender their child, we can assume they do not have adequate resources and are therefore penalized by their lack of resources. They are also penalized by society's unwillingness to look at other ways for the child to give at least some practical support as outlined earlier, where the child could become a Big Sister or Big Brother, do some babysitting or whatever to continue it.

I think also that there has been a lot of social pressure to do the right thing and give up the child to a good home. It is our feeling that a genuinely good home would not seek adoption for the child's best interests when it means severance of the child from all further contact with natural kindred relationships. We feel it is unfair to expect a child to fulfill adult expectations that are evidenced in attempts by adoptive parents to save a child from its natural parent's misfortune, be that poverty, ill health, poor parental skills or youthfulness of the parent.

I guess I can only look at my own example again where for a period of time I have been attending university and during that time the children have been in their father's household this primary time. You have never seen such a martyr in all your life as someone who finally accepts responsibility for a couple of years.

We do accept that the availability of practical options in foster care, education and employment opportunities for the natural parent are paramount for the best interests of the child and society in general. We make no age restrictions on the woman who needs that kind of support; whether you're 12 or you're 20 or you're 40, it's the same thing. The reason you can't care for your child is a lack of resources, not a lack of willingness or lack of love or lack of concern for the child.

For fathers, they're not here - usually they aren't - but I'm sure that for fathers who also lost the right to custody rights of their child through separation or divorce, we are not coming here asking that women be given these rights. We are asking here that parents be given these rights to continue, where there is a willingness to care for the child and support the child or whether there's an order to.

Under Section 101(1)(a)(i) and (ii), we are opposed to adoption of the child where that action serves to favour the resident parent and successive spouse or spouses. The notion that if your former spouse has the

child in resident and does so for a period of time and remarries that person can apply to adopt your child; and then three or four years down the road they could divorce and remarry again and that person could apply to adopt your child, to me it seems that giving all power to the resident custody parent against and opposed to the other parent. We all know the child can only live in one home. If I could clone them, I would. I'd love to have them with me every day; that's not possible. I accept that it's not possible, but I do not accept that I am a bad parent because they live somewhere else most of the time. I do not accept that I should have no right to say how my children are raised or what happens to them because I don't live with them every day at this point in time. Were the shoe on the other foot, I would have to accept the responsibility to share with the other parent knowledge of what the children are doing and share with that parent the responsibility for how the child will be raised.

We give up our rights as spouses. We do not give up our right - we don't divorce our children. We divorce the person we were married to; we don't divorce our children.

With the adoption of orphan children, well, it seems to me that since adoption serves to legalize responsibility for the child and grant ownership of the child, it is apparent that ownership is the issue for the orphan child. Responsibility for that child could be separately designated under Orders of Guardianship. Granting the child the right to claim the family as his or her own at a mature age might at least allow the child the same right as the parent in owning within the adoptive framework. Granting the child the right to claim the family versus the family's right to own the child following adoption at an immature age might also serve to protect the child's right to expect support from his or her guardians in searching for the identity of his or her natural kindred relationships.

It might also serve to reduce the hostility that adoptive parents face when confronted by an adolescent adoptee who is feeling betrayed by the loss of his or her right to community with the natural parents and the extended kinwork of the natural parent.

Thank you.

MR. CHAIRMAN: Are there any questions?

Mr. Penner.

HON. R. PENNER: I just wanted to thank Ms. Zoerbe, if I'm pronouncing it right I hope . . .

MS. C. ZOERBE: Yes, that's right.

HON. R. PENNER: . . . for a very, thoughtful presentation. There are concerns that you have raised that present some difficulties in the adoption area, not so much where there is an adoption following divorce and remarriage where there is already a situation where the children are aware of the two sets of (parents) as it were. I put parents in brackets. There the visiting questions, one can agree in principle and indeed with full visiting privileges and contact.

Problems arise in adoption where the child has been given up for adoption right at birth.

MS. C. ZOERBE: I recognize that, sir.

HON. R. PENNER: Were you suggesting some provision for access in those situations?

MS. C. ZOERBE: Yes, I am. I feel that adoption occurs in those instances mostly because of the immaturity of the individual giving birth, or the lack of some kind of economic base under which to raise the child, or it would result in some kind of social consequence later to the mother or the parent. I know that it means practical difficulties to change our attitudes and to implement a different system, but it does seem to me that when one looks at the feelings that are expressed by persons who are adults now who've been adopted, and they will say, well, gee, I really wish I knew who my parents were. I really wish I knew who I was, where I belong.

My own children now at this point are 12 and 14 years old, and are suddenly being told that I am no longer their mother; that this woman who has moved in in the last year to take my place in the home is their mother. It's a ridiculous situation, to put it mildly, but it does occur, and it occurs in reverse when it's the father. It is an unfair imposition, and it occurs because we have taken this position that whoever lives there will have primary rights. The parent who lives out of the home will have no rights, except maybe to visit on Saturday if they're lucky.

If we do away with the right to adopt on the basis of where the child lives - I mean there has to be some other kind of criteria, I think. If you remarried and the person wishes to adopt your child so they can complete the family, they call it - the child has a complete family, the child has two parents. The parents may be in conflict. They may not both live in the home, but the child does have two parents. It seems that the new spouse wants to usurp or take over or whatever, and then the child is left in conflict - who is my parent? The law says, well, the one who lives with you will be your parent.

That doesn't fit the emotional or the psychological needs of the child or of the parent who has been told you're no longer a parent. You no longer can expect to be in association with your child as you were.

MR. G. MERCIER: Are you aware that the amendments to The Child Welfare Act will repeal existing Section 116(1) of The Child Welfare Act and, speaking on behalf of the opposition, we amended this section and I brought forward the bill in 1980, whereby under the existing Section 116(1) where there is this situation in a new marriage where the person who has custody with their new spouse apply for adoption of the children, prior to our amendment in 1980, the effect of that adoption was to cancel all rights to the other natural parents, all rights of visitation, all rights as a parent.

We amended that section to allow the judge at the time of the adoption by the custodial spouse and his or her new spouse when they applied for adoption, that the other natural parent who didn't have custody would have the right to apply for access, so that even though the person who had custody of the children and his or her new spouse adopted the children, the other natural parent had a right to apply for access to the children. But that act that we have before us will repeal that section.

MS. C. ZOERBE: In what way? I'm not a legal person, so I haven't . . .

MR. G. MERCIER: Yes, we are trying to - I'm getting an explanation of what the government is doing at the time . . .

MS. C. ZOERBE: Okay.

MR. G. MERCIER: . . . but the repealing of one section and then saying that Section 1.5(1) will be the subsitute clause for that. Unfortunately, we've heard a lot of objections to this Clause 1.5(1), but I suppose, to put it in a nutshell then, you are in favour of continuing the right as it is under the existing Child Welfare Act provisions of where there is an adoption take place, that the other natural parent should retain the right of access to the child?

MS. C. ZOERBE: I would be opposed to adoption where both natural parents are alive, and that a guardianship order be granted to a resident spouse to take care of matters like seeking medical aid, or whatever it is they hope to do under the custody of the child. It doesn't seem to me that when someone marrries and moves in, that they need to become the parent. They can become a guardian. There must be some other way to delineate responsibility or ways to offer that person that they can seek medical aid or whatever it is that's required for the child, and have the right to do that without taking away the natural parents' rights. The fact that you lose your rights as a parent on divorce by these sole custody orders is bad enough; then to have your child taken away in adoption is like a double whammy, for what?

MR. CHAIRMAN: Thank you, Ms. Zoerbe.

MS. C. ZOERBE: You're welcome.

MR. CHAIRMAN: Maxine Hamilton.

MS. M. HAMILTON: I'm appearing on behalf of the NDP Status of Women Committee. However, I'm going to be restricting my comments to only parts of the bill. We haven't discussed the entirety of the bills as a committee. We have in fact, in the past, though, discussed many principles of law, and I'll be restricting my comments to those principles of law that apply to things that we have previously discussed in principle.

Under Bill 65, I would like to indicate that there are areas that we see as very positive; the extended removal of fault in Section 2(2) of the act, for example; and, secondly, that's in Section 5, the protection for the long-term non-marital relation of partners, I see that in society the law is - people who are well-knowledgeable can always protect themselves. It seems to me that it's exactly those people who are unsophisticated who do not follow the usual patterns of society . . .

HON. R. PENNER: Excuse me, you're considering Bill 65?

MS. M. HAMILTON: I believe so.

HON. R. PENNER: And what section?

MS. M. HAMILTON: Section 5.

HON. R. PENNER: Oh yes, yes. Thank you.

MS. M. HAMILTON: The most vulnerable of our citizens are those who are, in fact, in the most need of protection.

Under Section 8, and I don't know whether I'm pronouncing this correctly because I've never seen the term before, but I believe I understand it, the "dum costa clauses"?

HON. R. PENNER: I think "dum casta" is better than "dum costa."

MS. M. HAMILTON: Okay. Well, they're certainly dumb in any case.

In Section 11.2(4), the very important matter of the abolition of a legal distinction between the legitimate and the illegitimate child.

In Section 12.15, child support beyond 18 where appropriate - it may be that the definition needs to be clarified further. However, the principle is important.

In Section 14.1, I believe (4), the right of the non-custodial parent to access to a child's records, it's again an important continuing link between a parent and child. We have not discussed, although I was certainly interested in the concerns that were raised about the automatic cessation of maintenance on remarriage. Again, I can't comment on the committee's feelings. It seems to me that in most instances, maintenance would cease, and I believe that applies to only Section 8 of the act. I would be concerned if it were to apply also to child maintenance. However, with spousal maintenance, it would normally cease. It may be that there may be need for some amendment to allow for exceptional circumstances.

What is not there, I'd like to refer to, and it applies to Section 5(1) of the act, and again, this does not apply itself to the wording of the act, but rather on an observation that has been made of the settlements that have been made in the past. In this section, what is reasonable appears to be being interpreted in a manner that is not necessarily what the legislation intended when it was introduced, and either a new definition of reasonable needs to be made, or a more specific direction given on how maintenance awards should be made.

There was a study done of all court settlements between the coming into force of the act in the spring of 1981 done by the Coalition of Family Law, Alice Steinbart, I believe, and it demonstrated that, for the most part, this section appears that it's being interpreted as meaning that the husband almost invariably has the bulk of the total family income and the wife much less. This was despite the fact that in most instances the former wife was left with children to care for. Is it reasonable that one spouse, with no children to support, should have 60 to 80 percent of the total family income; and that the other spouse, with children to support, somewhere between 20 percent and 40 percent?

Now, again, I'm not going to suggest wordings to the act, but rather a hope that we're going to have a

continuing review, and that the continuing review would include, I think, an attempt perhaps by the Attorney-General's Department to take a long-view look at a statistical sample of what is actually happening with the court settlements. I don't know of any means by which any observation can be made of the out-of-court settlements, but in any case that should be under continued review.

The sample that went from the coming into force of the act in the spring of 1981 was admittedly a small sample; yet, with the exception of one case, it appears that the judicial interpretation is almost invariably putting a large proportion of the settlements in the husband's favour in terms of how much money he is ultimatley left with vis-a-vis how much money the wife and children together are left with for support.

The other observation I have is not a personal observation but rather a reportage of some converations that I've had with lawyers who seem to indicate to me that the enforcement section is not necessarily working as smoothly as we had hoped, that there are apparently some long delays. Again since I am not a practising lawyer that's simply to draw those observations to your attention so that can be looked into. I can't comment on personal experience in that respect.

That ends my comments on those particular bills.

HON. R. PENNER: Very briefly I can assure you that the provision that concerned you 8(6) does not apply to maintenance. It specifically refers to Clause 8.1(a) of the original . . .

MS. M. HAMILTON: I assumed that was probably the case but not being a lawyer I'm always certain of how to interpret the bills.

HON. R. PENNER: Most lawyers aren't either. With respect to the continuing review, yes, certainly there's a second stage of the Carr recommendations dealing with the consolidation of these various bills in a somewhat more comprehensible way is being looked at. But in any event with the coming into existence of the Unified family court, the Family Division of the Court of Queen's Bench, there certainly will be the much-increased possibility of monitoring, collecting statistics, reviewing and providing a new dimension to family law matters that begins to address what is actually happening through a system of that kind. There will be, in a sense, continuing evaluation.

MS. M. HAMILTON: I really have very few comments on the other bills, and again rather than addressing the detail of them I wanted to speak to one or two main principles.

Again I'm looking at the possibility of continued review. The Carr Report did not really look at the whole area of instant sharing, and I know that the bills in 1977, for example, had instant sharing at least in the area of family assets, and I hope that we have not closed the door entirely to the whole concept of an instant and immediate sharing, or community property with joint management.

Other than that, that was my only comment on that bill.

HON. R. PENNER: The door is never closed entirely.

MS. M. HAMILTON: Any other comment? Thank you.

MR. CHAIRMAN: Thank you, Maxine Hamilton.

Donald Lugtig.

MR. D. LUGTIG: Good morning, Mr. Chairman, members of the committee.

I appear here on behalf of the Manitoba Association of Social Workers, and our comments are related to mainly Bill 65, although we'd like to draw in a couple of points on Bill 65 that are not in our written brief.

Our points, to be as brief as possible, relate mainly to the title of The Family Maintenance Act, the matter of mediation counselling as distinct from reconciliation counselling, the expansion of the best interest of the child provisions in The Family Maintenance Act, the principle of some kind of mechanism for child advocacy to be placed in the Family Maintenance Act, and perhaps the taking out in certain sections of The Family Maintenance Act of a possible negative, or adversarial tone.

Back in the 1977, representatives of our association addressed a similar Law Amendments Committee on The Family Maintenance Act. At that time, we suggested that the name of the statute be "The Family Relations Act." It was felt that such a title more accurately reflects the content of the legislation. In September 1982, we submitted a brief to the Attorney-General in response to the Carr Report on Family Law in which we once again supported a change of the name of the statute. At this time, we again request your committee to give serious consideration to this matter of giving the statute a more appropriate title. I just want to mention in that connection that Judge Carr's Report did refer to The Family Relations Act as a possible title and some of the changes that have been suggested for this act are matters of family relationships which we generally support.

Of more importance than that however, we are concerned about the whole matter of looking at the act with a view of taking out as much as possible adversarial kinds of connotations.

Judge Carr's Report, and our previous submission to the Attorney-General, encouraged the recognition of mediation services attached to the Family Court. The current Family Maintenance Act in Section 9(1) states that a judge may adjourn proceedings and direct parties for counselling with a view to reconciliation. From the outset, we have regarded this section as inappropriate because of the timing, and of little real use to the courts or families in conflict. It has been quite inadequate in encouraging the use of social services for separation counselling or mediation around issues of child custody and access. This section of the statute should be changed in our view, and expanded to allow for the direction of parties by the judge for mediation counselling.

Examples of such provisions in provincial statutes are contained in the 1980 statute of New Brunswick, Section 131 of The Child and Family Relations Act. Similar provisions are also contained in parallel legislation in British Columbia, Saskatchewan and Ontario. We note however, that in the recently released

Bill 97 of Manitoba, an Act to amend The Court of Queen's Bench Act, provisions have been included there for referral to conciliation officers and to investigators. We feel that this is a very positive move. We are wondering if we can assume that by defining the duties of a conciliation office and family investigator in The Queen's Bench Act that such social service personnel may be called upon to intervene in cases not only under The Family Maintenance Act, but also under other legislation such as The Child Welfare Act, and Divorce Act.

If this is indeed the intention of the legislators then perhaps it is not too serious a shortcoming on the part of Bill 65 that such provisions are not spelled out in The Family Maintenance Act.

We are pleased that the proposed changes expand upon the concept of ensuring that in decision making about children, the "best interests" test is paramount. The proposed amendments, in our judgment, do not go far enough however. It is not enough to say that the best interests of the child shall be the paramount consideration. There should be some spelling out in the legislation of that intent, some factors or criteria for judging best interests need to be articulated.

I would note in The Child Welfare Act that there is such an articulation and spelling out of those, however, these would not in our judgment be the same as could be used in The Family Maintenance Act.

There are questions of custody between marital partners and so on that may not be really fully addressed by the best interest spelling out, as it exists in The Child Welfare Act.

I'm assuming that you all have this before you and I don't want to bore you with reading through those, unless you'd want me to, but just to note that those are on record and we'd like to see, if at all possible, that kind of an extension be placed in The Family Maintenance Act, as it now is in The Child Welfare Act.

Going on then, regarding other points, one of the issues we thought would be addressed in the amendments to The Family Maintenance Act, and I'm not sure about The Court of Queen's Bench Act, is that of legal representation for children who are subjects of a custody dispute. Section 25(7) of the current Child Welfare Act provides that in proceedings under the child protection section, the judge may order that the legal counsel be provided to represent the best interests of the child. We feel that some similar form of parellel provision be included in The Family Maintenance Act. It would be appropriately situated in the section following that on defining the "best interests."

Sometimes the matters of dispute are so difficult and sometimes the way that affects the child may be so difficult that, in fact, the child really does need representations to make sure that his views and interests are known. I'm sure that they would be considered by a court, but I think they should be put forward sometimes by the child and the judge may, in fact, want that to take place.

We are generally happy with effort to remove the distinction between children of married and unmarried parents and our main concern in our brief on this matter was that this did not interfere with the long-term best interests of the child or hinder permanent planning for the child. I think on the whole, the two bills before you do that.

There is a concern that I find there. While The Family Maintenance Act, Section 11.6(1) and The Child Welfare, 15.5, I think it is, and 83.5 of The Child Welfare Act all dovetail to give the father the right to apply for a declaration of paternity, as it were, and also limit the proceedings for adoption in those instances, it does state there that the child cannot be placed for adoption, where the man is delared to be - where the court - in the situation the child can't be placed for adoption until the dismissal of the man's application is appealed, as far as it can be appealed. That seems to be, in our judgment, a placing of an unnecessary burden on the child and I'm sure that we don't want to recommend restricting an applicant's rights.

On the other hand, it could be possible that a person could have applied and that a court made a dismissal of that and then he appealed this dismissal and it went all the way to the Supreme Court and it eventually was dismissed. In the meantime the child sits in limbo and cannot be placed for adoption and that could take quite a considerable length of time and the child might be two or three years old by the time that whole proceeding takes place for an action, which in the end, may resolve in the person not being declared the father. I'm wondering if that is the intent of the drafters of the bill and I'm wondering if that might be reconsidered and perhaps reworded to limit the matter of appeals of dismissal.

Moving on then to the current Part II of The Family Maintenance Act, Sections 12 to 15 deal with child support. If the proposed amendments are passed, this part will also include the sections of the act that deal with custody orders. This is merely a question of wording or the tone of wording. The proposed new Section 14 is quite good, in our judgment, except for one flaw. Bill 65 suggests in 14.1(2)(d) "the parent who is not given custody of the child has access," and in 14.1.(4) "the parent who is denied custody of a child retains rights to records," and so on.

We strongly suggest that the wording be changed to read in both clauses "the non-custodial parent." This takes away from the blatant adversarial tone of the section. The spirit of custody provisions should be to convey a conciliatory tone of co-operation, not conflict. In such instances, proper wording means a lot to people and we want to get away from thinking about decisions affecting families in terms of "winners" or "losers." This will be more consistent with the intent of the drafters of the amendments where they correctly define joint rights of parents in the preceding subsection. The tone of the statute ought to be consistent, so this section on custody provisions needs considerable refining before it becomes law. Also we suggest that the new Section 14.1(3) "evidence re conduct of parent" could go in the section on best interests of the child as it does in the Ontario legislation quoted earlier.

Just to conclude, our main points are that we would like to see you consider changing the name of the act. We would like, if possible, to see a section regarding mediation counselling or conciliation in this act if The Court of Queen's Bench Act doesn't, in effect, direct this act or supersede it or control it.

We'd also like to see the definite guidelines on the best interests of the child placed in the act and we suggest the Ontario law as a possible model. We'd like

to see some provision for child advocacy in the bill, and finally, we would like to see those parts of the bill that might have an adversarial tone, be reworded so that those are removed.

I think, Mr. Chairman, that was all the comments that I had on this.

MR. CHAIRMAN: Thank you. Mr. Penner.

HON. R. PENNER: Just very briefly. Yes, the proposed Family Division of the Court of Queen's Bench, Bill 97, Sections 52(4)(5) are wide enough, in fact, do cover all statutes including the FMA.

With respect to the best interests criteria, there have been a number of submissions, mostly, of course, in support of the question of best interests, but suggesting criteria. I believe, however, that a submission was made that perhaps this ought to be left until after the Kimelman Report is something that commends itself to us and we'll look at that. I may say in general, probably positively, but we think Judge Kimelman should report before we seek to see what criteria we'd want to set out if we do that.

With respect to your concern that there could be a father's action to contest an adoption placement that would leave the child in limbo for a considerable period of time, I am advised that - and I think that is right - on Page 7 of the FMA Bill 65, the power that is given to the Director of Child Welfare to expedite a hearing is designed to deal with that possibility. But we'll take a look at the wording to make sure that it meets the concern.

MR. D. LUGTIG: Okay, thank you very much.

Could I just comment then a bit on The Child Welfare Act, a small concern? I don't know if I am at liberty to do that. Am I at liberty to make . . .

MR. CHAIRMAN: Proceed.

MR. D. LUGTIG: Just a small point that was raised earlier on Section 17, and I just do that out of concern of a person that's had some experience in child welfare and not to suggest giving social workers who are the main ones who do child welfare work more power than they should have. But just to comment that there are situations where it isn't really practical, even if it were desirable, to have peace officers apprehend children.

I have been in a number of those situations, particularly in rural areas in the bush where a social worker comes on a situation that there wouldn't be a police officer in 200 miles or 50 miles. It would be totally impractical and unwise to limit this section to that in my judgment. It's not a question of trying to get more power. It's a question of being able to do the job that the act - that was the only part.

MR. CHAIRMAN: Thank you, Mr. Lugtig.

MR. D. LUGTIG: Thank you very much.

MR. CHAIRMAN: Joel Morasutti.

Teachers' Society, Murray Smith, Dave Lerner and Donna Lucas.

MR. M. SMITH: Mr. Chairperson, in the absence of Dr. Linda Asper, our President, I am appearing on behalf of the Manitoba Teachers' Society. I am Murray Smith, a teacher in the Winnipeg School Division and first Vice-President of the society. My colleagues are David Lerner, who teaches in the Assiniboine South School Division and is a member of our provincial executive; and Donna Lucas, who has been a teacher in the Winnipeg School Division and is currently a staff officer with the society.

The Manitoba Teachers' Society welcomes this opportunity to appear before this committee of the Legislature to present its opinions regarding Bill 66.

The Report on the State of Family Law in Manitoba prepared by Judge Robert Carr for the Attorney-General in 1982 stated, "Children are Manitoba's most valuable resource. They are an investment upon which our future depends." The Teachers' Society strongly endorses these observations.

Teachers have the responsibility to provide educational services of the highest quality to the young people of our province. Teachers also share with the community at large a concern for the well-being of children and youth. It is therefore the policy of the society that:

1. The fundamental aim of education is the physical, intellectual, emotional, social, aesthetic and moral development of individuals into people who realize self-respect, self-fulfillment and their relevance in society.

2. All children or students have the right to an education which is appropriate to their specific needs.

3. All children or students have the right to adequate health care, nutrition, adult support and protection.

4. Educators have a responsibility to establish mutually supportive relationships with parents and the community to promote the education of children.

I should add that our society has also been much involved with the interdepartmental, interorganizational committee on juvenile justice, and David Lerner has been the society's representative on this committee.

It is from this perspective that the Manitoba Teachers' Society offers the following comments regarding the amendments of The Child Welfare Act of Manitoba in sections identified as follows: First, The Protection of the Educational Rights of Young People taken into Care; then The Need to Co-ordinate the Delivery of Community Child Care Services and Public Educational Services, with the sub-heads, Integration of Planning and Program Delivery, Notification of Apprehension, Needs Assessment, The Age of Majority Dichotomy; then The Right of the Young Person to be heard and represented; then The Implementation of The Young Offenders' Act in Manitoba; and finally The Proposed Child and Family Services Act of Manitoba.

Under the first heading, Bill 66 in its first section will amend The Child Welfare Act to ensure, "In all proceedings under this act, other than proceedings under Part III to determine whether a child is in need of protection, the best interests of the child shall be the paramount consideration of the court regardless of the wishes or interests of any other party to the proceedings."

We notice that there is a somewhat parallel wording in the amendments to The Family Maintenance Act, and we support both of these.

A series of definitions providing elaboration of the phrase, "best interests of the child" were previously entered into Section 1 of the act in '79. Among other

interpretations, the phrase is to mean the consideration of: the mental, emotional and physical needs of the child and the appropriate care of treatment to meet such needs; the child's mental, emotional and physical stages of development; the effect upon the child of any disruption of the child's sense of continuity and needs for permanency.

The Manitoba Teachers' Society notes that Bill 66 clearly establishes the best interests of the child to be the paramount consideration in any decision by the courts. Under the provisions of The Child Welfare Act, care is to be taken to serve the psychological needs as well as the physical needs of the young person. However, according to these associated definitions, the best interests of the child do not involve the protection of the educational rights of the young person taken into care.

The society suggests that the references in Article (iv) to the effect upon the child of any disruption in the child's sense of continuity should be regarded as applying not only to the environment of the family but equally to one of the focal points in the lives of young persons, namely, the continuing attendance of school. Yet The Child Welfare Act as amended by this bill will remain silent regarding the responsibility to provide for the educational needs of children and youth taken into care.

Perhaps I should pause to stress that we are well aware that sections of The Public Schools Act require that the parent or other adult in charge of the child shall ensure that the child attend school. We are not talking about mere attendance in school, we're talking about responsibility for an educational program appropriate to the child's needs.

By contrast with the situation in Manitoba, The Children's Law Reform Act of 1981 in the Province of Ontario designated the following Section 27: "A person entitled to custody of a child has the rights and responsibilities in respect of the child to direct the education in the best interests of the child." This Ontario legislation recognizes the best interests of the child to bear an association with access to education.

Similarly, The Child and Family Services Act of the Province of New Brunswick states as follows under Section 45: "Where the child is in care under a guardianship agreement, the Minister shall provide care for the child that will meet his educational needs." Once again, there is a recognition of the need to protect the educational rights of young persons while they are under the care of an agency or the courts.

The Teachers' Society is concerned about any situation which could arise to interfere with the access of the young person to educational services and interrupt valuable instructional time. Teachers are aware of cases in which the education of young people has been severely disrupted through apprehension. Circumstances involving the breakdown of family relations and the placing of children under care are traumatic for these children. The future of the young person can be placed in further jeopardy if access to education is not sustained.

Wardship should not represent a state of limbo for the young person in which the supportive and nurturing conditions necessary to encourage educational development are absent. There is need for flexibility in the placement of young persons under care in order to foster an environment which is conducive to the educational growth of each particular young person. It is essential that every possible effort be made to ensure that the entitlement to educational services appropriate for the child be protected while the child is under the care of a child care agency or the court.

Second point: The Review of Child Welfare Policies, Programs and Services in Manitoba - A Report to the Minister of Health and Social Development, more generally known as the Ryant Report, after Dr. Ryant, of July, 1975, drew attention to the need for closer integration of child care services and public school services in Manitoba. This is an area with which the Juvenile Justice Committee dealt in detail.

"The relationships between the child welfare system and the educational system are not uniformly well developed. Consequently, there are expectations held by each of the other which are frequently disappointed. Children often are left with needs unattended because each system is expecting the other will take action. The fragmented jurisdictions between them, the separate funding base, and the differences in philosophy make for difficulties in mobilizing two separate, but related, sets of resources on behalf of the children.

"There is need for closer co-operation between the child caring agencies making the placements and the school divisions which must provide the education."

That report presented two specific recommendations calling for the enhanced co-ordination of community child care services and public educational services.

First: "Better relationships should be built between child caring agencies and the school divisions within their catchment area, with special reference to serving special needs children and those who are in receipt of child welfare services.

"The Department of Education should implement the mandatory legislation for special needs children in a fashion that provides co-ordination and linkage to the child and family service system."

Despite these recommendations, child care services and public education services, while sharing the best intentions for the well-being of the child, often continue to operate remote from one another. The lines of communication regarding planning and development of programming appropriate to the needs of the young person are not well co-ordinated between child care agencies and public schools. The circumstances being encountered by the young person are often unknown to school personnel. For example, as young persons are transferred from one school to another and then perhaps transferred once again during the school year, records indicating educational needs at that point in time are not readily made available to teachers, and the educational program of the student becomes disjoint. In some instances, even the whereabouts of young persons taken into care or apprehended are unknown to educational personnel for periods of time.

The Teachers' Society believes that there is an obligation on the part of all public service sectors to provide linkages in the life of the young person. While adults can assume personal responsibility for integrating the public services they require, and indeed they often find that difficult enough, children cannot. Integration of programs and services must be undertaken on their behalf.

Social, family and economic problems besetting young persons can create educational problems.

Divergent efforts to resolve these problems separately can lead to the increasingly expensive duplication of some services while other needs remain unaddressed. It is the belief of our society that many services for children and youth are best delivered in common to avoid overlapping jurisdictions between various public service sectors. Enhanced integration of community child care services with public school services could work to minimize disruption in the education of young persons.

There is need for planning and program linkages involving the Department of Community Services and child care agencies with the Child Care and Development Branch of the Department of Education and the special education co-ordinators of each school division and district. There should be a closer working relationship among the special education teachers, the resource teachers, and the social workers employed by school divisions and the child care workers and social workers of child care agencies, in order to provide a continuum of service delivery for young people. There is a need to co-ordinate school-based teams involving parents and guardians with public school personnel and child care workers to plan and to provide meaningful packages of services for young children in need.

Section 24 of the bill, Parents to be notified of apprehension, requires:

"A child caring agency, upon notification that a child has been apprehended and brought to a place of safety, shall forthwith, if possible, notify the parents or guardian of the apprehension of the child . . . "

The Teachers' Society notes that in the amended Child Welfare Act there will be no requirement for the public school at which the young person is enrolled to be notified of the young person having been taken into care or custody. The society suggests Section 24 be revised to include such a provision.

In Section 1.3, Examinations of child:

"at any time prior to or in the course of a hearing under this act of any other act affecting a child, a judge may order a psychological, psychiatric, social, medical or other examination of the child be made and that the results be submitted in evidence."

By comparison, The Children's Law Reform Amendment Act of 1981 in Ontario introduced this authority:

"The court before which an application is brought in respect of custody or access to a child may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child."

So you see a variation exists in the tone of the intentions of the Manitoba and the Ontario legislation. The latter is more precise in seeking to identify the recognized needs of the child and in having these needs met. The references in Bill 66 appear to be targeted toward the collection of evidence and perhaps some clarification of intent is required.

As well, it should be noted that public schools conduct needs assessments of students and such information prepared over a longer period of observation could be a useful source in profiling the needs of a young person.

On the Age of Majority: The passage of The Age of Majority Act by Manitoba in 1970 created a dichotomy regarding the age range of young persons recognized as being eligible for public sector services. The Child Welfare Act and The Social Services Administration Act recognize the age of 18 years as the attainment of adulthood. Subsequently, young persons become ineligible for certain types of community services made available to minors. The Public Schools Act, however, recognizes person between the ages of 18 and 21 years inclusive as being eligible to receive public educational services. Considerable difficulty arises for those persons with special educations needs who, in order to continue in the public school program, require continued residential support in a group home setting and transportation assistance.

Specifically, students who require an intensive period of pre-vocational or vocational instruction to maximize their degree of independent functioning are at risk of being denied that chance because an appropriate comminty residence cannot be found. The effect is that the students most likely to be in need of extended services from the education system are the ones most likely to be deprived of them because they are the least likely to maintained in a juvenile residence.

By contrast, New Brunswick says:

"A guardianship order remains in effect until the child reaches the age of majority" and continues "Notwithstanding Subsection 4, on application of the Minister, the court may extend a guardianship order until the child reaches the age of 21 years where the child is enrolled in an educational program."

The policy of the Teachers' Society is as follows:

"The Society urges the Minister of Community Services and Corrections to provide legislation which would enable the Department of Community Services and Corrections to continue to provide support services beyond the age of 18 to those with special needs."

I should emphasize we are not talking only about financial support such as is provided under student social allowances but services such as counselling and advisory services, residential accommodation, etc.

Next section: The Manitoba Child Welfare Act presently contains limited references to the entitlement of the young person to be heard and to be represented by legal counsel at proceedings. Section 25(7), Right to legal counsel, pertains only to the court hearing following apprehension.

"The judge shall advise those persons affected by a hearing under this section that they have the right to be represented by legal counsel, and in the case of a child, if the judge is of the opinion that the child should be represented by counsel, he may order that legal counsel be provided to represent the interest of the child."

The next section - matters to be considered in ordering legal representation for child - contains stipulations regarding legal representation and applies only to child protection proceedings.

Section 33(2) - wishes of the child may be consulted - pertains to permanent guardianship.

"In considering an application under this section, the judge, if he deems it advisable, may consult the wishes of the child."

Bill 66 seeks to reinforce the requirement that the child be heard by stating, "The child's views with respect to the alternatives available to the judge shall be considered."

By contrast, the New Brunswick legislation is more explicit in the entitlement of the child to be heard and to be represented.

Under Section 6(1), in the exercise of any authority under this act given to any person to make a decision that affects a child, the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him, shall be given consideration in determining his interests and concerns; and the interests and concerns of the child shall be given consideration as distinct interests and concerns, separate from those of any other person.

Where the wishes of a child have not been or cannot be expressed, or the child is incapable of understanding the nature of the choices that may be available to him, the Minister shall make every effort to identify the child's interests and concerns, and shall give consideration to them as distinct interests and concerns separate from those of any other person.

Further, a person who is authorized under this act to make a decision that affects a child may, in order to comply with subsection (1), consult directly with the child; in which case he shall do so in camera, unless he determines that to do so would not be in the best interests of the child; and, in consulting with the child in camera, the person may exclude any person, including any party to a proceeding and his counsel, from participating in or observing the consultation.

In any matter or proceeding under this act affecting a child, whether before a court or any person having authority to make a decision that affects the child, the child has the right to be heard either on his own behalf, or through his parent or another responsible spokesperson.

While Bill 66 acts to strengthen the consideration of the views of the young person in proceedings, it has not acted on the recommendation that would permit the appointment of a legal advocate in any matter before the court involving the young person.

The Report on the State of Family Law in Manitoba, prepared by Judge Carr during 1982, noted that Manitoba does not have a child advocate program in operation, and that existing statutory provisions relating to this form of assistance are very limited.

Judge Carr stated: "It has been argued that without specific statutory provision, courts without inherent jurisdiction have no power to appoint counsel for the child and, accordingly, there is a statutory gap."

The Carr Report recommended that while more study would be needed prior to the introduction of a child advocate program in Manitoba, there should be provision in The Child Welfare Act allowing the court to appoint a child advocate in any matter and under any statute where the issue before the court involves the child.

MR. CHAIRMAN: Before you proceed, I have to have permission from the committee to complete this brief. Can we have that?

Mr. Kovnats.

MR. A. KOVNATS: Mr. Chairman, I would be happy to sit here till whatever time it would take to complete the brief. It's a very interesting brief, as I might mention to Murray. I do have some questions that I think would be of some assistance in presenting his brief, and it will take quite a bit more time than just what might be required just to present his brief. So, at this point, I think that it is after the normal finishing time of the committee, Mr. Chairman.

MR. CHAIRMAN: Well, this committee will be meeting again on Tuesday the 26th at 8:00 p.m. in Room 254. Do you wish to terminate now, or do you wish to have him at least read the brief and then have the question period afterwards?

Mr. Evans.

HON. L. EVANS: Mr. Chairman, I wasn't aware that Mr. Kovnats had a number of questions. We would be satisfied to have the brief read. I understand there is one other delegation who will be relatively short - oh, there are two delegates.

I was just going to make the point, if I might, if it sheds any light on how we're proceeding, the major review of The Child Welfare Act is scheduled for next year; and as the delegate, Mr. Smith, may realize, there is a large review committee at work. It is our intention to contact the Manitoba Teachers' Society, and it will be based on the brief to discuss some of your proposals in detail, the staff to discuss them in detail, because we do plan, as I indicated, a very major change in the act next year.

A lot of these suggestions don't necessarily fit now, because the intent now is really to bring in two or three suggestions from the Carr Report that were deemed to be more urgent and critical that we deal with them at this time, and the Attorney-General brought them in on that account.

But if there are going to be lots of questions and if there are two other delegations, it may be wise to meet again; although I'm prepared to stay here for a while longer. On the other hand, we have another meeting at 1 o'clock and it's nice to have lunch once in a while as well.

MR. CHAIRMAN: Any other comments?

Mr. Kovnats, you're next.

MR. A. KOVNATS: Mr. Chairman, really it is to the best interest of the Manitoba Teachers' Society to come back again and finish the brief and to answer some questions. At least, some of the questions that I'm prepared to ask would be to their best interest, and I would suggest that it is now past the hour of adjournment.

MS. M. PHILLIPS: Mr. Chairperson, I'd like to suggest that we stay until Mr. Smith finishes reading his brief into the record. That will give us time until Tuesday to digest his lengthy brief, and we can ask questions on Tuesday night if they don't mind coming back. I'd like to just let him finish reading the brief into the record now, and then adjourn.

MR. CHAIRMAN: Is that agreeable?

MR. A. KOVNATS: I'm prepared to go with the committee. It's just that . . .

MR. CHAIRMAN: Carry on, Mr. Smith. Let's cut it short.

MR. M. SMITH: Bill 66 has not sought to define a visible role for legal counsel, acting on behalf of the young person, to ensure legal rights are considered and upheld.

Other provincial jurisdictions have statutory protection for both the consideration of the wishes of the child and the appointment of legal counsel. The Province of British Columbia, for example, maintains a comprehensive process whereby the Attorney-General is authorized by The Family Relations Act to appoint a lawyer whose role it is to act in the best interests of the child and to intervene in proceedings involving the child in question.

In Ontario, in considering an application under this part, a court, where possible, shall take into consideration the views and preferences of the child to the extent that the child is able to express them. The court may interview the child to determine the views and preferences. The interview shall be recorded. The child is entitled to be advised by and to have his counsel, if any, present.

In addition, the proposed Children's Act in Ontario would ensure that a child in the care of an agency would be permitted to communicate with his or her lawyer without the consent of the agency.

The Teachers' Society suggests careful consideration be accorded the recommendation of the Carr Report regarding the availability of child advocacy services.

I appreciate the Honourable Mr. Evan's points that the major review is coming up. If some of our comments are grist to that mill, so much the better, and certainly we would be happy to take part in any considerations of drafting the major overhaul.

The implementation of The Young Offenders' Act - Bill 66 is silent regarding amendments to Part IV of the existing Child Welfare Act, and constituting Sections 42 to 45, inclusive. This is the part of The Child Welfare Act most directly influenced by the changes in federal legislation brought about by the replacement of The Juvenile Delinquents Act by The Young Offenders' Act.

The Young Offenders' Act received the final approval of Parliament and Royal Assent in July, 1982. While the act was initially scheduled to be proclaimed during 1983, it now appears it will not take effect until 1984, due to implementation problems occurring in certain other provinces.

The absence of amendments in Bill 66, which would reflect the provisions of The Young Offenders' Act of Canada in The Child Welfare Act of Manitoba, has created some uncertainty about the intentions of the Provincial Government to prepare the child care and juvenile corrections systems of our province for this introduction.

The next paragraph may appear a little ambivalent to you. We have now decided that it is not inaccurate; so we're quite prepared to have you read it.

The Young Offenders' Act does not cover all of the provincial legislation, and there will have to be steps taken. Young persons under the age of 12, who previously would have gone to Juvenile Court, will now be directly referred to child care agencies. The question arises as to the mode of intervention of child care agencies in such instances and the degree of preparation to be attained in our province by the time The Young Offenders Act takes effect.

The Teachers' Society anticipates changes in provincial legislation to adapt to these new circumstances and it is the hope of the society that such questions could be settled by action on the part of the government well in advance of the proclamation of The Young Offenders Act.

The Teachers' Society notes with approval that The Young Offenders Act does recognize the right of young persons to retain a lawyer at any stage of proceedings. Similar recognition will then have to accorded young persons in their dealings with provincial law.

The final section: The Manitoba Teachers' Society has noted the declared intention of the government to introduce a new Child and Family Services Act during the 1984 Session. In light of this overall revision in legislation, Bill 66 and The Child Welfare Act itself should be regarded as being transitional.

The society suggests that in designing The Child and Family Services Act, the rather strict orientation on custody and placement determination in The Child Welfare Act be discarded as inappropriate. Statutory statements of process should give way to statutory statements of purpose. Process is preferably detailed in the regulations authorized pursuant to the act.

There is need for a multidisciplinary approach to the writing of The Child and Family Services Act and to the restructuring of the matrix of services it is to provide. Interdepartmental planning should occur prior to the announcement of the new legislation to avoid fragmentation, duplication or gaps in the delivery of services at the community level, by both community agencies and the public schools.

In order to ensure that the needs of young people are observed and met, the new legislation should contain:

1. a Declaration of the Principles underlying the legislation;
2. a statement of the rights to services held by all young persons;
3. statement of the responsibility for the application of these rights to services, that is, that the rights of children to services are maintained.

The fundamental rights of children in care should be delineated in the legislation and protected from violation by a strong enforcement mechanism. Such rights should include:

1. the right to appropriate care and services;
2. the right to protection of the person;
3. the right to communicate and of access to due process;
4. the right to privacy and individualization;
5. the right to be informed of all rights and responsibilities.

In this context, The Child and Family Services Act of the Province of New Brunswick designates the rights of the young people to which the legislation applies in the preamble of the act.

> "Children have basic rights and fundamental freedoms no less than those of adults; a right to special safeguards and assistance in the preservation of those rights and freedoms; and a right to be heard in the course of and to participate in the processes that lead to decisions

that affect them and that they are capable of understanding.

"Children are entitled, in every instance where they have rights or freedoms which may be affected by this act, to be informed as what those rights and freedoms are where they are capable of understanding."

The New Brunswick legislation also contains two definitions of terms which would prove useful within our legislation.

"Community means a geographic unit of groups of persons sharing common interests within a geographic unit who provide or receive services on a collective basis.

"Protective care means a service which provides an immediate safeguard for a child's security and development."

The Teachers' Society recommends for consideration by the Provincial Government in its formulation of The Child and Family Services Act, both the Report of the British Columbia Royal Commission on Family and Children's Law of 1975 and The Children's Act currently scheduled for introduction in the form of legislation in Ontario. Both of theses works contain a number of proposals worthy of consideration.

The Teachers' Society would be willing to provide assistance with the efforts toward the creation of a Child and Family Services Act for Manitoba by providing comments and suggestions as requested. Through the co-operation of all sectors of the community responsible for providing services to young people, very effective legislation can be enacted.

Thus conclude the brief and I take it you would prefer to defer questions until Tuesday evening?

MR. CHAIRMAN: That's correct Mr. Smith. Tuesday at 8:00 p.m. in Room 254.

Mr. Evans.

HON. L. EVANS: Just briefly, I want to thank Mr. Smith for the interesting and thoughtful presentation and assure him again that his submission will be gone over in some detail, and we will be in touch with the Manitoba Teachers' Society with regard to the various recommendations and proposals and ideas submitted by the MTS.

MR. A. KOVNATS: Mr. Chairman, as far as I'm concerned, I do have some questions but it would be to the best interests of the Manitoba Teachers' Society and I will defer asking those questions and just pass it onto them, if it is the agreement of this committee not to bring them back next Tuesday.

I will give whatever information that I have to impart to them personally at another time rather than bring them back.

MR. CHAIRMAN: Well, there may be others of the committee that may want to ask questions as well, if Mr. Smith doesn't mind coming back.

MR. M. SMITH: I'm quite prepared to come back.

MR. CHAIRMAN: Thank you very much.

MR. M. SMITH: Could I take this opportunity though to add one comment on an unrelated matter? I would not dare to do so had Ms. Myrna Bowman not introduced the topic. But with respect to the amendments to The Pension Benefits Act, I would like to assure you that the Teachers' Society have already done a preliminary review of Bill 95, that we're supportive of the major features of the bill. Many of them are things which we urged on the Pension Commission of Manitoba. We shall be before the appropriate legislative committee to support the bill and to urge that it be implemented in this Session.

MR. CHAIRMAN: Thank you, Mr. Smith. The committee is adjourned until Tuesday night. This committee meets on Bill 60 at 8:00 p.m. tonight.

HON. L. EVANS: Tonight?

MR. CHAIRMAN: Well, yes.

HON. L. EVANS: Right - to hear other matters.

WRITTEN SUBMISSIONS:

To: Manitoba Legislature, Statutory Regulations and Orders Committee
Re: Amendments to Bill 65
From: Jerry D'Avignon, Winnipeg

Sirs and Madames:

Being a father involved in a custody battle is a cold, painful and fruitless attempt. I can testify to this, because I am a father fighting for what I consider to be a healthy relationship with my child, a relationship where we can once again share the father and child love that existed before separation.

Section 105 of our Child Welfare Act provides that married parents have joint custody of their children until a court orders otherwise. Yet, after separation, why should a court order any order other than joint custody as being in the best interest of a child, in all cases except exceptional cases?

As I understand joint custody, it should mean legal and physical custody to both parents in all matters concerning the child. What order other than joint custody could presume to be in the best interest of the child, yet shatters this same child's "world" and turns it into a traumatic experience whereby one parent becomes a "visitor"?

It appears to me that it has been admitted by all authorities that, "In the mind of a child, authority and love are interrelated and that the transformation of a mother or a father into a visitor is a traumatic experience for a child frequently attended by feelings of rejection and guilt." (Page 40 - A Report on the State of Family Law in Manitoba - Recommendation for Change by Judge Robert Carr, May, 1982.)

Firstly, joint custody should be the preferred order rather than sole custody, because having gone through the process myself, I could not get my request for joint custody a fair and equal hearing in view of my wife's request for sole custody.

Secondly, joint custody would enforce the status quo of joint custody during marriage and place the onus on the spouse objecting to joint custody to prove that an order other than joint custody would be in the best interest of the child. Unless a parent and child

relationship can be proven to be harmful by competent outside criteria, not the word of the other spouse, then joint custody should be the preferred order as a means to protecting a child's relationship with both parents.

Thirdly, joint custody assumes that both parents are equally fit parents until one is proven to be an unfit parent, whereas preference towards sole custody orders assumes one parent is more fit than the other.

Fourthly, joint custody would eliminate much of the adversarial process requiring each spouse to attack the other.

Fifthly, joint custody would focus on the best interest of the child, rather than concentrate on the wishes of the parents individually.

Sixthly, joint custody would encourage participation and legal rights of both spouses in the short and long-range aspects of their child.

The Family Maintenance Act and amendments in Bill 65 support the protection and maintenance of the rights of the spouse having sole custody, yet makes very little attempt to elevate those of the non-custodial spouse in the balance of power in separation and custody cases.

I, therefore, strongly recommend and fully support the recommendations by Judge Robert Carr in this "Report on the State of Family Law in Manitoba - Recommendations for Change" stated as follows:

"In the event both parents apply for custody of their child, there shall be a presumption that the best interest of the child will be served by the granting of an order of joint custody and the parent seeking an order other than joint custody shall have the burden of proving, on the balance of probability, that some other order is in the best interest of the child."

I further submit that this recommendation be an amendment to Bill 65 and The Family Maintenance Act in Section 14, Subsection 2(c).

Thank you.

Jerry D'Avignon

July 21, 1983

Statutory Regulation and Orders Committee
Room 255
Legislative Building
Winnipeg Manitoba

Attention: Mr. Fox

Dear Sirs:

Re: Bill 66 - An Act to amend The Child Welfare Act

Please be advised that I am the solicitor for The Children's Aid Society of Winnipeg. I attended the hearings of your committee on Tuesday, July 19, but time considerations did not allow for my representations to be made at that time. I am otherwise engaged today and have determined that it would be appropriate and expeditious for me to address your committee in writing.

On behalf of the Children's Aid Society of Winnipeg, I note that many of the proposed amendments in Bill 66 are responsive to suggestions that were made to the government and to Judge Carr last year after exhaustive consideration of The Child Welfare Act by the board of the agency. Specifically, The Children's Aid Society of Winnipeg recommended the following changes:

- Entry by force into a building or other place to seach or apprehend a child reasonably believed to be in need of protective guardianship should be possible without a warrant.
- Access by parents to their children for the purpose of visiting after apprehension both prior to a hearing and during a temporary order should be considered in the act.
- The courts should be permitted to order assessments of parties subsequent to a finding that a child is in need of protective guardianship.
- Representatives of the media should be permitted to attend and report upon child protection proceedings.
- The rights, duties, obligations and authority of parents and guardians should be considered and clarified.
- The rules of evidence in all Child Welfare Act proceedings should allow for the calling as a witness at the hearing an opposing party for the purpose of cross-examination.
- The rights of inheritance by children subject to permanent orders should be maintained.

Other amendments were proposed and I trust will be considered when a more thorough revision of the legislation is considered by government.

The provision to delete the present entitlement to examinations for discovery contained in Section 25(9) of the act is of considerable concern to the agency. Child Welfare Act proceedings are at least as important as any other type of civil litigation and the ordinary discovery process enabling parties to be fully informed as to the case they will have to meet should not be abridged or deleted without serious reason and serious consideration. The experience of the agency with Section 25(9), as it is presently enacted, is that it does not prolong or protract proceedings and, while not resorted to in the majority of cases, is a useful tool on many occasions and has the effect of compelling complete particulars when parties contemplate such examinations as an alternative.

It is the very strong recommendation of the Children's Aid Society of Winnipeg that the provisions for examinations for discovery be maintained in The Child Welfare Act.

I apologize to your committee for not being available to appear in person and respond to questions.

Your truly,
WALSH YARD GUTKIN & TADMAN
PAUL V. WALSH, Q.C.
cc: The Attorney-General,
Mr. Roland Penner