Legislative Assembly of Manitoba

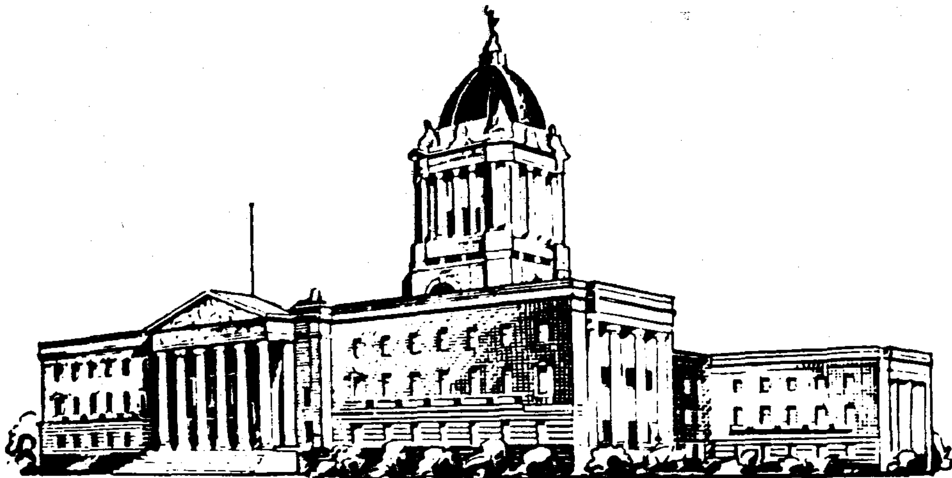
HEARINGS OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



TUESDAY, November 16, 1976, 10:00 a.m.

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TIME: 10:00 a.m.

Chairman: Mr. D. James Walding

MR. CHAIRMAN: Order please. Gentlemen we have a quorum. There are two items I'd just like to get cleared up before we get under way and first is that I have received a written resignation from this committee from Mr. Malinowski. Would someone prepare to move its acceptance. —(Interjection)— So moved. Is it agreed? (Agreed). By the way the resignation is dated November 4th, the date when Mr. Malinowski could not attend. I assume the resignation is to be retroactive to that date. It was the intention of the committee to appoint Mr. Cherniack in Mr. Malinowski's place. Is there a mover? So moved, Mr. Barrow. Is it agreed? Agreed and so ordered.

One thing I would like to get clear before we go on. We had a motion at the end of the last meeting to record the proceedings of the committee and transcribe them. Is it my understanding that that was to be from this meeting forward or only for the public hearings? Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, as the neophyte in this group, I think this meeting will be really important to us to be able to . . . You know I don't want to make copious notes. I think it would be very useful if we have this recorded and come back, so I for one would urge that this meeting be included in the transcript.

MR. CHAIRMAN: That was my understanding of the motion. It is that agreed then?

MR. GRAHAM: Mr. Chairman, just to clarify it then, perhaps it would be in order to have a motion that all meetings be transcribed.

MR. CHAIRMAN: So moved by Mr. Graham. Is that agreed? Agreed and so ordered.

The purpose of today's meeting was to hear the Chairman of the Law Reform Commission who has been asked and has agreed to appear before the committee and give us a brief report on what the Law Reform Commission has found and has reported. I assume all members have received a copy and presumably read it. I then call on Mr. Frank Muldoon the Chairman of the Law Reform Commission. Mr. Muldoon.

MR. FRANCIS MULDOON: Mr. Chairman, on that same assumption which we may find wears a little thin as we go on, that every member of the committee has read the report from cover to cover and I say it may wear a little thin because I've read it from cover to cover several times and I still have to reread it to grasp all the implications which are contained in the report, I'll proceed.

The report is founded on a principle with which the Commission began its studies into the subject of Family Law and in particular these two major aspects of Family Law, and that is while there is a difference indeed between men and women and some of my colleagues say thank God that there is, yet we proceed on the basis that there ought to be an equality of civil rights between men and women. It's a long time since the Council of Christendom debated whether women have souls our not and I think we've come a long way since then.

Now when one says equality of civil rights that raises yet another problem because there are instances where equality is not only accorded to people but it may indeed be inflicted upon people. I could think of all sorts of arrangements, complications not of nature but of manufacture in which you would set up a new system for me to proceed through and you would make me equal with everyone else who proceeds through but if I don't need the system in the first place, then while I'm getting equality, it's not something I need, it's an infliction of equality. So in the Commission's thinking the idea was that where marriages are working out well, where they're goin'(along swimmingly, it would be officious of the Legislature to intrude, to intervene with the enactment of laws which are not needed. So that in some ways — and I think you will hear this in your public hearings, some of the people who will appear before you, — I've had previews here and there of the people who will be appearing before you — will probably say this darn Law Reform Commission's report is crisis orientated, why doesn't it set out what the norms of a good marriage are instead of just dealing with the crisis? And we say, the Commission's view was that those who are enjoying a good marriage don't need any intervention thank you on the part of the law or the authorities to maintain their good marriage. The Commission considered that view because it was presented to us in our public hearings as we went around the province, that why don't you set out the charter of what a good marriage amounts to be. And our view of that was that you're getting on very dangerous ground because that's almost like asking the Legislature to give us a State catechism of what marriage might be and we think that's not the part of the Legislature either. We tried in making our recommendations to come to conclusions which would, when needed, provide an equality of rights and obligations too between parties to a marriage — especially between parties to a marriage. We can deal with common-law arrangements as we did later on — but equality when needed but without inflicting equality on people who may want to dispose of their affairs in other ways. And that's why basically the recommendations would come into effect if enacted into law upon need, upon crisis, upon someone saying now I'm being denied a civil right by my spouse, now my spouse I should be able to call on to meet his or her obligations, that's when I need the law, not when we're getting along nicely. And that's the basic view I think of the Commission and you'll find that reflected generally speaking in both Part I The Support Obligation and Part II Property Disposition.

I don't know whether I could or should ramble on according to what my perceptions of what you want to hear are but rather should I be responsive to your perceptions. Let me start with one thing though! I brought a little handout here because some women's organizations have been phoning the Commission since we issued

our report, just to clear up one of the implications in the report, and that is when this Standard Marital Regime recommended under Part II Property Disposition would come into effect and how it would be terminated and whether it would relate to termination of the marriage by death or not. In that regard I can say this, that had the Commission followed out and expressed every implication of our recommendations, had we assumed that no one knew any of the present law, I suppose our report instead of going to 120 pages might well have gone to 2,000 pages. It might have been an encyclopedia of Family Law and not a report containing recommendations for the reform of Family Law. So that here's one example where I had a few calls and responded to them, and I'm pleased to give you — I have the permission of the persons to whom these letters were addressed to give them to you — which clears up one implication not specifically spelled out in so many words in the report—if I could hand that to Mr. Anstett— that could be considered as a supplementary to whatever transcript is prepared of these proceedings, Mr. Chairman.

MR. PAWLEY: I wonder, Mr. Chairman, through you to Mr. Muldoon, it would be of some interest I think maybe to initiate discussion, to review, if Mr. Muldoon has had an opportunity, the proposed Family Law Bill in Ontario and where it concurs with the recommendations of the Manitoba Law Reform Commission, where there are areas of difference. For instance I notice that in Ontario in the final analysis considerable discretion is being left to the courts.

MR. MULDOON: Yes.

MR. PAWLEY: That is an area where I think we'regoing to have to look at very closely here, particulary in view of the recommendations of the Manitoba Commission. I was just wondering, in order to initiate discussion, if you would like, Mr. Muldoon, to comment on the Ontario Bill that's presently before the Ontario Legislature.

MR. MULDOON: Yes, thank you, Mr. Chairman. I would that I had time to give you the kind of comment which I think is deserved, and that is a very careful and more expert comment than I'm able to give you this morning. I have had an opportunity to look at the Ontario Bill which I think arrived in our office last week so I haven't been able to study it fully. From what I can see of it it's a very pallid half measure. It's a very pale measure indeed. For example, if I could just make a couple of highlights, in terms of property disposition as between spouses whose marriage breaks down, the property to be shared, and the norm is much the same as the Manitoba Law Reform Commission has suggested, that is to say an equal sharing of the value of property acquired since the solemnization of the marriage or during the course of the marriage if you will, but the property defined to be shared is called matrimonial property; it's property which has to do with the running of the house, with the car or cars, perhaps the summer cottage, the boat, the power toboggan, the furniture, what's known as matrimonial property, well some spouses in Manitoba with the aid of a moving truck and having my colleague, Myrna Bowman, as their counsel can get away with most of that already if they're quick. That's one of those cases where possession is nine points of the law and if you're quick with the moving truck and have got possession you might get away with it. I'm not suggesting that that's a norm for the law, but I'm suggesting that the extent of the property to be shared under the Ontario proposal is much less extensive, much more limited, than that proposed by the Manitoba Law Reform Commission which is the entire shareable estate as we've defined, meaning all property, real and personal of whatever kind or nature acquired by a spouse after the solemnization of marriage, during the course of the marriage. So my remark about the Ontario legislation there is that it is a half measure.

The next matter you mentioned was the question of judicial discretion My colleagues and I, at least most of my colleagues and I, the overwhelming majority of the Commission in this case, have recommended against according of judicial discretion in terms at least of property disposition. We've looked at similar statutes in other countries and we mention in our report the experience in New Zealand where the statute provided that the court would have discretion to accord a share of property to the spouses according to their contribution to the marriage. That law went along well for a few years until in a case known cryptically as E versus E, the Supreme Court of New Zealand — if you think of New Zealand, although it's a state in the international field it's a unitary State like a province of Canada and is a small one — the Supreme Court, consisting of three judges, over the agonized dissent of the Chief Justice of New Zealand said that discretion is such that it has to do with what you contributed to the acquisition of that property specifically. Now that's one danger, that's one way in which the courts could go off the path, when you give the discretion.

The other problem with that is that in our experience wherever you have a discretion like that, wherever you have a sharing between someone who does a socially valuable thing, and I can think of all sorts of speeches and not just sermons I've heard in my day, some from politicians who have spoken of the value of marriage and the value of the family. We have one party who does a socially valuable thing like rear children, like make a nice home or some kind of a home anyway, against the other partner who actually earns the money, who makes the material contribution, the court's judicial discretion inevitably cause the one who doesn't earn the money to be the loser. Now sooner or later that's the way the court decisions tend.

Our other complaint about judicial discretion in these matters is that that almost ensures that every case goes to court because if there is a discretion, if the judge could vary the share by 25 percent each way, which is 50 percent in total, almost every case will see one spouse or other saying, "I'm sure I could persuade that judge that I'm the better person, that I'm the nicer spouse, that I deserve a bigger share" and everyone tries it out.

Our recommendation which excludes judicial discretion in effect diverts people, it becomes a matter of accounting because if you go to court you know what the result will be because there is no discretion. It's a matter of cold disposition of material acquisitions. Now I know we live in a materialistic age and I know that you gentlemen as politicians have to deal with an electorate which is somewhat materialistic, but the Commission's view was it's easier to make that kind of a decision. It's easier indeed to make a clinical 50 percent, 50-50 sharing of material things once and for all and avoid every case going to court. It's a kind of a diversion, the implication is diverting people from court in those matters.

The other thing which I noted, and I'm sorry I can't give you a full rundown of the Ontario Legislation because I simply haven't had time to examine it . . .

MR. PAWLEY: To you, Mr. Chairman and through to Mr. Muldoon. Before you leave judicial discretion, can you imagine areas that you would like to comment to the committee on where there might be good reason for us to consider judicial discretion, hardship situations that we could create by removing any judicial discretion. Do you feel that there are any danger signals here that we should be aware of?

MR. MULDOON: Well yes, let me put it this way. Two of my colleagues dissented on the matter of judicial discretion and their dissent is recorded in the report. What the Commission has recommended there is a law which would be clear and simple in its operation. Such laws, despite our best intentions and our best wishes, we always hope that that which is simple and clear will also be just. Now maybe simplicity and clarity are not consonant, not identical with justice because they say whatever the situation a 50-50 split. The Commission, the majority, recognized that that may not seem perfectly just but they rationalize it to this extent, that the acquisitions here which are to be divided are those garnered after the solemnization of the marriage. In other words it's almost a function of time and during the time that the marriage is tolerable and not breaking down, if acquisitions are being made by the parties, then I suppose they're gaining even though they may be unhappy because it's a function of time, these acquisitions. When one or other of them finds the marriage intolerable and it breaks down that's when one can invoke the sharing which we've recommended. So we say that the longer you find the marriage endurable the longer you'll have to acquire property if that's what's happening and in that sense it would be difficult to point the finger at some spouse and say aha this marriage broke down, and it does frequently because of your behaviour or your misbehaviour, and therefore you're not entitled to half, because we say so long as you're running parallel, , so long as your marriage hasn't broken down, should be entitled to a share of half the value of assets acquired during the marriage.

There will be cases, no doubt if this were enacted in which somebody would say — and this is going to raise another issue you gentlemen will hear much of in your travels — that is no-fault maintenance; but those who speak of no-fault maintenance are going to probably be the ones who raise this issue. So I suggest that they're speaking in two different directions too, because what they're going to say on this issue is that there are going to be occasions when a spouse's rotten behaviour disentitles that spouse to an equal share and the court should be able to take cognizance of that. The majority of the Commission simply say we think that this isn't the case for judicial discretion, that this is a case for a clinical division of the value of the material assets, the sooner the marriage breaks down because of that rotten behaviour8the sooner they will be divided, the less there will be to divide. I suppose if one of them is a real money-maker that person in a new life made after the breakdown of the marriage will continue to make money, the other one may not. But there'll be an equal division. I'm sorry, am I not getting through?

MR. CHERNIACK: I wanted permission , interrupt you to see if on this very point you are prepared to make some distinction with another recommendation of yours I believe, which deals with fault. Is that on support?

MR. MULDOON: Yes. Yes, the Commission with varying emphasis between its majority and its minority recommend the retention of faults in terms of the support obligation.

MR. CHERNIACK: And it's consistent in your mind?

MR. MULDOON: Yes!indeed it is.

MR. GRAHAM: Well, Mr. Chairman, first of all I was rather surprised that we were getting into the review of other legislation without looking at the proposals that are put forward here by the Law Reform Commission. But be that as it may I think that at some time we're going to have that type of discussion and it may be that it should be now.

But the point I wanted to ask Mr. Muldoon is something that I view as a very basic premise to start from in the review of any law on proposed changes, and it's a question that I like to ask anyway. Will the changes that you are proposing here, will they solve more problems than it creates?

MR. MULDOON: My answer is I believe so, yes.

MR. GRAHAM: Is that opinion shared by the other members of your Commission?

MR. MULDOON: Yes.

MR. GRAHAM: I believe you mentioned there were two members in your Commission that did not agree that legislation — and I refer to Page 5 of your Working Paper where it says, "Whether it is better to have the Legislature systemetize the law through the enactment of guiding principles, or better to have the law evolve through the perceptions of the judiciary is an important question in terms of family law." It says, *"It will be noticed in this report various members of the Commission adhere to the one proposition or the other depending on the circumstances."* / /was I suppose that the problem that has existed with various members of

the Commission and I'm sure that it is a problem that has existed in various jurisdictions in whether or not we should actually be enacting law or leaving the discretionary powers of the judiciary in there.

MR. MULDOON: Well I could respond to that, Mr. Chairman by saying that — at the time the Working Paper the Working Paper has now metaphysically gone to its reward and is superseded by our report. But Mr. Graham makes a good point. At the time of the Working Paper the Commission's views were more evenly divided on the matter of judicial discretion. I suppose the Commission is pretty representative of the public at large because we haven't been unanimous on every one of these recommendations.

By the time we had conducted our public hearings and by the time we had come to formulate these final recommendations opinion crystalized in the Commission more against judicial discretion in property disposition, property sharing, than for it. As a result two commissioners dissent on judicial discretion and five favour no judicial discretion. That's the final result. At the time the Working Paper was issued the opinion-split was more even among the commissioners, but that's just the internal workings. Every Law Commission, I suppose, doesn't start off unanimously and may be lucky if it ends up unanimously. But that's the progress of our thinking on that.

You asked me for one other matter, or I comment on one other matter of the Ontario legislation and that has to do with inflicting equality on people as I see it in the Ontario legislation, people who are not married, who decline to marry, who say I do not want a commitment. God knows when I was practising law people used to come into the office and they'd say: I've asked George or I've asked Harry to marry me a million times and he won't; or I've asked Susie or I've asked Mary to marry me a million times and she won't, and the answer is, well, I guess he or she doesn't want to marry you, declines to marry you, declines to make that commitment. The Ontario legislation says that after two years such a couple would be as if married.

I have an interesting column here by Scott Young where Mr. McMurtry got on an open line show and explained his position and was given some sort of hell by the callers-in who said: "For God's sake, the reason we are living in this way is that we do not want to be married; don't be so bloody moralistic as to inflict the . . ."

MR. PAWLEY: . . . his brother is debating him on that very issue, Roy McMurtry's brother who teaches at Guelph University.

MR. MULDOON: Is he?

MR. PAWLEY: Yes. Very interesting case.

MR. MULDOON: Well, in light of that and I don't know whether I have too many if I do, this article might be of interest to the members of the committee in that very context. Perhaps I could ask the members of the Committee when they have that before them just to make a little note on it as I see I have made that for myself on the original but I haven't on the photo-copy. The suggestion there is see Pages 34 and 35 of the volume, that part of it which is Report No. 23, Part I, 34 and 35, the Commission dealing with that very issue which Mr. McMurtry answered questions about.

Now I have, and I suppose it would be available to others, I got this from the Policy Development Division of the Ministry of the Attorney-General of Ontario, one copy which I haven't completely studied myself yet, but I think that they can be obtained quickly. I could recommend to the Committee if it wants to have an overview of the Ontario legislation here it is in pamphlet form, a pamphlet with the Foreword written by the Honourable Roy McMurtry in which he describes the legislation. It makes a little easier reading and it seems to be a fairly accurate summary. I can't warrant that it is accurate because I haven't studied it that closely, but it seems to be a fairly accurate summary of the Ontario legislation. I have only the one copy and I'd like not to be relieved of it at this moment if I could avoid that.

Also they've published a pamphlet named *"Highlights of Ontario's Favorite Family Law"* , and in my opinion there's more ballyhoo than substance to the so-called reforms. Well now I've run out of that subject, I must confess to the committee, that is to say the Ontario legislation and I'm prepared to deal with anything else which the Manitoba Law Reform Commission has recommended.

MR. PAWLEY: I wonder if you would, Mr. Muldoon, deal with an area which I think will be the subject of quite a bit of controversy among those submitting briefs; this continuous debate as to whether or not we should be proceeding to full community property disposition rather than deferred property division upon termination of marriage. There seems to be so many women's groups that are expressing the belief that we should proceed to full community property disposition as in California, and because of the fact that this will be an issue I think the committee will be confronted with, I'd like to just hear you deal with that.

MR. MULDOON: Surely. You'll undoubtedly be hearing the same briefs from the same people who appeared before the Commission when we went on our circuit of public hearings a year ago. You may be hearing new ones from new groups. That was urged upon the Commission and they considered it. Since some American States have what I think would be a more felicitous term, instantaneous community property, that is to say the day one is married one's property is owned in community with one's spouse.

MR. CHERNIACK: . . . that was the day one earns a dollar, that dollar is split.

MR. MULDOON: Yes, from that day forward then, let me put it that way, it's instantaneous in terms of community upon marriage; and then the next question is, how is the community managed? The traditional community of property was managed by the husband, but that's not an acceptable norm, if it ever was, any more. In California, and there's a review of this in the report at the very beginning of Part 2, Property Disposition. In California as of July 1st, 1975, I believe , the regime of property enacted by the Legislature of

California in anticipation of the Equal Rights Amendment being enacted to the U.S. Constitution, which looks as if it will not be enacted now, marital property was held in instantaneous community with joint management. There have been other schemes referred to as dual management, common management, equal management, various refinements in various jurisdictions. The Commission looked at the best we could do without actually going to those places and interviewing the lawyers and legislators and the people emerging from the family courts; the best we could do was to read the commentaries in law journals as to how the systems were working; and they were in my opinion that which I have described initially when this committee opened its meeting this morning, they were in the Commission's opinion an infliction of equality and not necessarily a functional according of equality because they lay traps, they provide complications of manufacture and not of nature especially since one would not think of enacting community of property with a husband only management these days.

They require the spouse to act daily as a board of directors of a corporation with only two shareholders and two directors and no one to cast the deciding vote. They opened the possibility of spouses, especially toward the days when the marriage may be breaking down, going out and pledging the same property, purporting to dispose of the same property at the same time; or, neither spouse can dispose of property without the actual presence and assent of the other of having to take one spouse around to do much business, of making merchants so cautious that they won't deal with people. We looked at that and we said, does that give any more equality at the end of the day than what we have suggested which is deferring that community to the termination of the regime when there's equal sharing? And we could not honestly conclude that it does any better by anyone, that it would do any better for Manitobans than what we have suggested. Now, we've asked people how would that be an improvement and the answer usually is, well, it'll give me an opportunity to participate in the negotiations. Well, we've suggested that the law should declare that as a norm for whatever declaratory value the law has, but we haven't seen how that would, in terms of the question which the Honourable the Attorney-General asked me just a few minutes ago, bow that would make things any better for people. I'm sorry, perhaps it wasn't the Attorney-General's question, Mr. Graham's question. How would instantaneous full jointly managed community of property solve more problems than are created now in the course of events or than are natural? We could not conclude that instantaneous jointly managed community of property would do that. We rather think that it's a slogan, and I think slogans are the enemy in this case, it's a slogan, it's a wish, it's been achieved somewhere in some communities, but we can't on analysis see any benefit from it. We've recommended provisions for the wasting or squandering of assets, to stop that, that's under Property Disposition. That's one of the means of termination, that's on Page 75 under Dissipation of Property, the squandering option.

MR. CHERNIACK: Thank you.

MR. MULDOON: So that we say in effect, don't set up something which is a natural in a two-partner partnership with no deciding vote in anyone's hands, as a natural for causing dissention, which it could indeed in some sort of a competitive collision make good marriages sour — and people say that the majority of marriage breakdown is caused over money matters now. The law provides for an ultimate equality and a natural right to be consulted on the acquisition and disposition of assets, and don't lock people into a two-shareholder corporation which is the management of their assets. Let one or the other acquire assets. Each one has a future expectant interest in sharing the value of those assets, but don't make complications of manufacture. That's what I mean by inflicting equality. I suppose we spent as long in that consideration as any other in this report because those matters were urged upon us, urged upon us sometimes raucously, sometimes seductively, always passionately, instantaneous jointly-managed community of property. Nell, at the end of the day the Commission couldn't see any great benefit from that and therefore declined to recommend it.

MR. GRAHAM: Mr. Muldoon, in your deliberations did you have any representation!made to you by those that are in the financial community and in the granting of credit with respect to the availability of credit and the security of creditors when you come to the question of joint ownership or where that joint ownership appears to be breaking down?

MR. MULDOON: I cannot recall — I think the Appendix doesn't disclose any credit grantors appearing for us but the financial community I suppose was represented at least in part by the Manitoba Estate Planning Council — at least these are the people who plan the estates for those who are big in the financial community — they appeared before us with recommendations. The thrust of their recommendations really was leave in place!, as the Commission has recommended be left in place, some provisions such as we presently have in the Testators Family Maintenance Act, that seemed to be the big concern. There they did made some exclamations about our working paper, they thought it was very radical and one of them hazarded the guess that it would see a greater transfer of assets and property in the Province of Manitoba than the grants to the Hudson's Bay Company and the CPR rolled in one. But aside from that we thought that our tentative recommendations in our working paper were not done damage and I think that the Estate Planning Council didn't intend to do damage to them. They were a little startled by what they described as the radicalness of them, but they said that there may be some tax problems. I would think that if the provinces generally go to such systems as we have recommended and they seem to be, Ontario is coming halfway along the line but still in the same direction,

other provinces will probably do so, too, that's ample grist for a Federal-Provincial Conference on ironing out some of the tax absurdities between husband and wife. The Commission has recommended that the Provincial Legislature do its bit by simply abolishing interspousal taxation, not intergenerational, that is to say succession duties between spouses. We say, "why?" If we believe that in life they're equal partners, why should we prevent or throw an obstacle even for the very rich, and that's what succession duties do to the succession of the estate of the one or the other. When it comes to passing property between generations to the next generation, the Commission has no problem with the concept of succession duties at all.

The same with gift tax. Why should there be if you say these two are one, they're one partnership, they each have an expectant interest in the estate of the other, why should there be gift tax between spouses? In fact, though there is gift tax, it's probably not paid, it probably isn't enforced as we point out. There's a massive non-enforcement of the Gift Tax Act between spouses, I would hazard, in the acquisition of property, the paying of mortgages where one is working and the other isn't.

MR. CHERNIACK: There isn't any gift at all when you have community ownership. Why the concept of gift?

MR. MULDOON: Well the Commission thinks that the Gift Tax at least as between spouses where we've recommended a deferred community ought to be abolished.

MR. CHERNIACK: But if you recognize an equal ownership then surely it's no longer a gift. . .

MR. MULDOON: Quite so.

MR. CHERNIACK:. . . so why are you getting involved in gift tax or even gifts at all. Are you conceiving of gifts as between spouses as being a necessary thing in view of the fact that you are already determining an equal ownership?

MR. MULDOON: One of the means of termination of the standard marital regime which we mention here is by agreement of the spouses where one may simply say, I'm going to accord you this share of my property, we're going to terminate this regime. Or we say . . .

MR. CHERNIACK: Would you mind expanding on that. You have a regime where there is community ownership and you say when there is termination there's an equal split of the assets. Well there's no gift is there?

MR. MULDOON: No, there's no gift, Mr. Cherniack.

MR. CHERNIACK: Well there's no gift then why are we talking about gifts?

MR. MULDOON: Because the way to define that community ownership would be to abolish the operation of gift tax between spouses. What we've said here. . .

MR. CHERNIACK: I'm sorry. Mr. Chairman, I hope you can allow this kind of interchange.

MR. MULDOON: Perhaps I can address my remarks to the Chairman.

MR. CHERNIACK: Well he is allowing it so. . .

MR. CHAIRMAN: As long as the meeting continues orderly, I feel it's permissible.

MR. MULDOON: The abolition of gift tax between spouses would be the principal means of defining that concept of community of property, because what we're saying here is that people will have their own property because the community is deferred to the termination of the regime. Do you follow me? People acquire and manage their own property. So long as they're getting along well, so long as there's no need to terminate the standard marital regime which we have recommended, they will buy and sell, they will dispose of and acquire their own property.

MR. CHERNIACK: So you say that there will not be a succession on death?

MR. MULDOON: There should not be.

MR. CHERNIACK: There will not be according to your recommendation except for the half that is retained in the ownership of the deceased. The other half, by law passes therefore it's not a gift.

MR. MULDOON: No, you tax now, I believe, a succession where a widow for example or a widower elects to take under The Dower Act.

MR. CHERNIACK: As a succession, sure, but because it's a right but it's not an ownership.

MR. MULDOON: Well we're suggesting that you would have to amend the tax laws there because our view is that the standard marital regime should terminate in the manners I've mentioned in that letter to Ms. Anonymous. That is to say by agreement of the parties, by separation, divorce, nullity of marriage or an order of the court granted in light of the squandering or dissipation of assets, but not on death, that shouldn't see a formal termination of the standard marital regime.

MR. CHERNIACK: Could you spell that out. . . continue after death.

MR. MULDOON: Well we've recommended that there still be a liberty of making a will, freedom to make a will, and we've recommended that two presently implaced statutes remain in place with modifications. One is The Devolution of Estates Act. That's the will which the Legislature has already made for every one who does not have a will. It's not entirely satisfactory to people but at least it disposes of the property of a person who dies without leaving a will, and under that statute there is provision for how the property goes in the event that the deceased leaves a widow or widower and one child, or a widow or widower and two children, and we've simply suggested that whether the deceased leaves one child or two children, by The Devolution of Estates Act one-half of the deceased's estate should go to the widow or widower. We've suggested that under The Dower Act that's a statute which can override a will, if the deceased spouse doesn't leave sufficient in his or her will for the surviving

spouse, the will can be overridden by The Dower Act. As it presently stands it's one-third of the deceased's estate. We've suggested that the Legislature should amend that to be one-half of the deceased's estate because it would seem invidious that a spouse who got out because the marriage broke down would get out with half, but a spouse who stuck it out till death did them part would get out with only a third. That did not seem just to the Commission.

MR. CHERNIACK: Mr. Muldoon has not answered my question as to why the S.M.R. should not cease on death. You're saying that it doesn't have to because you'll do it through the existing law after amendment, but why is the principle not exactly the same and therefore why don't you carry the principle into after death regardless of what the law is or should be, why shouldn't it be a consistent approach that on a separation by death or any other reason there is a split and then there is no gift.

MR. MULDOON: Well our view of that was the existing law provides well for the disposition of property. It may be that in this era in which we live when with the ease, legally speaking, of getting divorces one sees more people in multiple serial marriages that we should leave a freedom of testation, a freedom of making a willto people because they may have families, n not just a previous family but previous families; We say leave the freedom of testation with the safeguards which The Dower Act provides and if people don't want to accept that freedom of testation by making a will then The Devolution of Estates Act is still there.

MR. CHERNIACK: But how would you take away the freedom of testation for that portion of the estate which remains under the ownership of the deceased, that is half, the same half as on separation; wouldn't he or she still have that need to have a will or rely on The Devolution of Estates Act? **MR. MULDOON:** Well one could then dispose by will or by devolution of estates or The Dower Act, yes.

MR. CHERNIACK: And it would be the law later even if you had a split in the S.M.R. on death?

MR. MULDOON: Yes.

MR. CHERNIACK: So it seems to me that if you have a principle in mind, and you do, then that principle should carry into a recognition of termination on death as well as on other forms of separation and you would still need your law relating to The Devolution of Estates Act to take care of the lack of a will; but if there is a will you wouldn't even need The Dower Act, I believe, insofar as death rights are concerned because it would be built in, if the S.M.R. ceases on death then you wouldn't even need that protection, it would be there automatically, it would not be an estate that passes, it will not be subject to succession duties, it would be an automatic recognition of an acquired right and therefore all you would need is The Devolution of Estates Act to take care of the half which remains with the deceased.

MR. MULDOON: With utmost respect, not quite so. Just as I mentioned earlier that the Ontario legislation comprehends less extensive property of spouses than our recommendations, so the S.M.R. potentially, maybe not in every case, but potentially comprehends less extensive property than that considered by The Dower Act because The Dower Act deals with the estate, the entire estate of the deceased spouse. The community, deferred as it is, which we have recommended, deals with that part of the estate acquired since the solemnization of marriage.

MR. CHERNIACK: And after the separation as well.

MR. MULDOON: Yes.

MR. CHERNIACK: I mean it doesn't include after separation.

MR. MULDOON: It doesn't include after the separation, no. So that people may go along for a while perhaps not thinking much about materialistic things, get married and then decide that - perhaps they are both practising a profession, she as a dentist and he as a nurse — they say we want to get out of this S.M.R., we want to contract out of it, so it seems to me that whether people have it or don't have it, and we've recommended that it be not compulsory but be there for those who don't contract out of it, that's one concept, that is to say the marital regime, but what comes upon having lived a lifetime with someone else and the marriage is dissolved by the death of one of them is another concept. We think that the law really ought to provide a more generous share for those who stay together until death parts them than necessarily those whose marriages terminated later. Now why do we consider that? Well we were amazed to find that most other civilized countries which have some sort of community of property regime, and they go from countries on the right in Latin America to countries on the left, the Soviet Union, all make that kind of distinction insofar as community of property is concerned, it's to discourage, I suppose, and these are not popular words, they sound almost Victorian these days, it's to discourage the adventurer, the gold digger, the person who says I am going to marry this rich person and then divorce him or her and I'll get half, or Mary or John is going to come into a big inheritance when rich uncle or auntie dies and then I'll have half.

So all of the countries we have noted where there is a community concept exclude property owned prior to the solemnization of the marriage and inheritances and gifts of various kinds!and there is a mix there, different arrangements, but that's the basic arrangement. So the distinction is to be made between what you would inherit when your beloved goes to his or her reward or what you would divide when the regime is terminated and we have the two concepts running parallel but one ends before the other, and that's why it seemed to me that the need isn't the same, the extent of property one considering isn't the same. And another thing, under succession you get the property in specie but upon the termination of the regime we've suggested a division of the value of the property, thus when people's marriage breaks down we hope that they will not saw the dining

room table in half but one of them will take the dining room table and account for one-half of its value to the other, because what comes out of a dissolution, the termination of a standard marital regime is a money award, not the property. Those concepts differ all along the line, not greatly, but enough that we couldn't accept the idea that the standard marital regime should be terminable upon death. We think that marriage already provides its own termination there with death but the regime is terminable on some event other than death.

MR. CHERNIACK: Mr. Chairman, I wonder if I may ask Mr. Muldoon whether he had considered this gold digger problem as being one that could apply on death as well, that is a person who is wealthy at age 74 ½ marries a young gold digger gentleman and on death suddenly that gentleman who has contrib,,ted nothing to the marital regime would inherit under our existing law one-third of the estate of that wealthy person.

MR. MULDOON: Yes, we considered that and there was some element of whimsy there, I must admit. I don't know that the law can protect people who are invincibly stupid or perhaps who die happy having made that kind of marriage. There's a limit to what the law can do, I think, in ordering people's affairs and how they dispose ... it may have been worth it to the person who went perhaps to his reward prematurely even.

MR. CHERNIACK: So what you're saying is that the right should be to share after the end of the S.M.R. or after death in one-half of the moneys earned during the period of the marriage relationship, not earned prior to the marriage, not earned after the separation. That's what you're recognizing?

MR. MULDOON: Yes, upon the termination of the standard marital regime: breakdown of the marriage, divorce, separation if you will, nullity or a court order saying, ah, there s been squandering here, let's terminate it.

MR. CHERNIACK: But that would affect only what has been acquired through earnings. . .

MR. MULDOON: Yes.

MR. CHERNIACK: . . .during the period of that regime?

MR. MULDOON: Yes.

MR. CHERNIACK: Nothing prior, nothing inherited, nothing gifted during and nothing after?

MR. MULDOON: That's correct.

MR. CHERNIACK: But on death you say, you continue to accept the principle that there should be a sharing of half of the total estate?

MR. MULDOON: Yes, we wouldn't want to recede from the progressive principle which we think is already implaced in the law of Manitoba are differences only with the fraction, the percentage.

MR. CHERNIACK: So you recognize the opting out during the S.M.R.?

MR. MULDOON: S.M.R. is what we've been calling it.

MR. CHERNIACK: All right. You recognize the option during, you would of course recognize a premarital agreement on release of The Dower Act or whatever?

MR. MULDOON: That's the best time to do it because that's when the bargaining power is best.

MR. CHERNIACK: That's right' and do you recognize it after the marriage?

MR.MULDOON: Yes. We've said that . . .

MR. CHERNIACK: For the Dower Act?

MR. MULDOON: Yes.

MR. CHERNIACK: And the Devolution of Estates Act.

MR. MULDOON: Yes. Our suggestion there, I think you'll find that suggestion clearly stated in the letter of which you have a copy, is that if people are contracting out they ought to be careful to contract out of the standard marital regime and out of the Dower Act because if they contract only out of the standard marital regime they'll be into — they would be under our recommendations — into the Dower situation which people now are in. So they must be sure to contract out of both.

MR. CHERNIACK: What's your reason for contracting out of the Dower Act?

MR. MULDOON: Well, one can do it now. A matter of freedom between informed persons0 we've suggested that every contract to be upheld in these circumstances would have to be made with independent advice so the people would know what they were contracting into and out of. We would hope, you know, that . . . in the last portion of the report we suggest that if the Legislature sees fit to adopt these recommendations, some day they'll become part of the normal, social and legal landscape of Manitoba, but until that time we are hoping that whatever reforms are effected will be widely publicized, pamphlets maybe like Mr. McMurtry's to be handed out when you get a marriage licence to be given to clergy when they're going to publish bans, to be given to high school students.

But once these things become part of the culture, if you will, of Manitoba then people will have an understanding of them. People have an amazing understanding of the law today although if you ask them under what statute it is, of course, if you give them a lawyer's examination they'll fail, but they have an understanding.

MR. CHERNIACK: Mr. Chairman, there are more things I want to ask but I have been monopolizing so I'll stop for awhile.

MR. SHERMAN: Could I ask Mr. Muldoon, through you Mr. Chairman, how does what you have just been saying, Mr. Muldoon, with respect to the S.M.R. and the time period during which this community property agreement exists, how does that square with your earlier response to Mr. Cherniack that the

Commission is in favour of abolition of the gift tax legislation?

MR. MULDOON: Because we're suggesting that that would be the main way of defining the expectant community interest because the kind of community of property which the Commission is recommending, and it is recommending a kind of community of property, is deferred. We're saying that people would continue to own their own property, they would still be separate as to their property until either the standard marital regime they have is terminated or until one of them dies. If it's death then the Dower Act would come into play. If it's one of the means of terminating this standard regime then that would come into play, and in neither case do we say that the according of half the value of the one spouse's estate or of their combined estate8sharing of half the value, should be accounted or considered as a gift under any taxation statute of Manitoba. That's just not a concept which should apply there because there is a notional ultimate sharing and so it's foreign to that, but that property passing between them at any time should be accounted a gift by the law. They should be one in effect, one corporate, not one in flesh necessarily, but one corporate entity so the property moving between them doesn't attract gift tax. That's the Commission's view and I answer Mr. Cherniack by saying there are different concepts of property and sharing here as between the regime while it endures until it's terminated, and the marriage until it's terminated by death.

MR. SHERMAN: Yes, but . . in other words you are saying that your view, or the Commission's view, of this oneness extends to property that was brought into the marriage by the two parties to the marriage, are you not?

MR. MULDOON: Yes Yes, we're saying that marriage should be regarded as a partnership. Now here's one aspect of it, a standard marital regime which is the bracket, if you will. In terms of property it's a bracket in the middle because it doesn't comprehend property owned by either spouse before they got married and it doesn't comprehend property owned by either spouse after that regime is terminated. So that's the bracket.

MR. CHERNIACK: Or gifts during.

MR. MULDOON: During, yes. Now the other concept is whatever either of them owns at any time and dies possessed of is another concept. But our view is that in either case the state ought not to tax property passing between one spouse and another whether by operation of law or by voluntary gift. It should not consider that a gift is the Commission's view. There's a dissent there. One of the commissioners dissented . . .

MR. SHERMAN: Well, through you, Mr. Chairman, I'm not implying that I similarly dissent, I just wanted to get this straight in my own thinking. In other words, you're really looking at two different subjects of legal examination here. You are going beyond your recommendations and you're not beyond your terms of reference, I don't suggest, but beyond your recommendations having to do with family law and family property to include, at least by implication a view, a professional and Commission view with respect to gift tax legislation, because the recommendations that you are making with regard to S.M.R. and community properties seems to me to be acceptable, all things being equal, without getting into the gift tax aspect at all, and it's interesting that you would go on at least by implication to cover the area of gift tax.

MR. MULDOON: We couldn't see that we could rationally distinguish the one from the other. Now in terms of succession duties we realize that the problem is for the few people who have estates which attract succession duties. You won't find mobs swirling around the Legislature Building in that area because there are that few people, I think. But with gift tax, we see that it's possible that almost every married couple where their house is owned jointly and he is paying the mortgage could notionally be in violation every year of the Gift Tax Act. And, of course, you wouldn't prosecute them but why should they be in violation of the stupid Act, of that stupid aspect, and we consider that stupid. If you have a concept that these two are partners and that what she does to raise children and make a home is as valuable as what he does when he goes to the office or the factory then . . . perhaps I should apologize for my language but the Commission concluded that it is stupid to tax them or to say that they are liable to file returns and gift tax returns because he paid the mortgage on the house. That just seems not rational to us. And then we thought, if we're dealing with property we have to deal with how people will dispose of their property. And you see the sophisticated people who don't want even to risk being prosecuted these days doing crazy things, employing people whose ' talents could be better used by society to draw promissory notes and make tracks on paperto make contorted arrangements to avoid a tax which shouldn't be falling there in our opinion.

I don't mean to get into any partisan differences of opinion which you gentlemen have but that's the opinion of the Commission that the kind of contortions people make to avoid taxes which shouldn't be there in the first place are a waste of talent and a waste of time, and are stupid. They shouldn't be doing that. Husbands and wives shouldn't be having that kind of complication if they think of it! ; if they have a smart lawyer or accountant who gives them estate advice and says, look we're going to make twelve promissory notes and you're going to retire them, take this promissory note rip it up at the end of the month. Why must people play games like that? The Commission couldn't see that.

MR. SHERMAN: Well I think those views are very valuable they are something of a bonus over and above the assessment of the family law situation and family law legislation that Manitobans may have been seeking through the work of the Law Reform Commission. I appreciate those comments and I thank Mr. Cherniack for yielding the floor temporarily. Thank you.

MR. MULDOON: May I say too that in the working paper published by the Law Reform Commission of Canada there was some support for that and you'll see a quotation from the Law Reform Commission of Canada dealing with property disposition on divorce. The Commission, I should make clear too, isn't

recommending any abolition of gift taxes, succession duty between generations, just between spouses.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, having partially digested the Canadian Law Reform Commission Report and having gone through the report here I have to say that I have some concern about the family aspect of the report here. And I was just wondering how much time the Commission had actually spent on the problems of the maintenance of the family when marriage breakdown does occur. I know when you!to family courts, I think that that is probably the major problem when you come to the disposition of assets and the responsibilities which are inherent in any standard marital regime.

MR. MULDOON: If it be a function of time, Mr. Chairman in answer to that question, I think that the taxpayers of Manitoba really got their money's worth out of my colleagues and my time in the preparation of this report. As you know, the Commission is composed of only one full-time commissioner, myself and six part-time commissioners. As you may know!the Commission is obliged by Statute to meet only four times a year. Well we were meeting weekly, sometimes twice weekly, weekendsin session for over eight hours at a time assimilating the research which our research staff had developed and debating the matters which are finally formulated into reports. It indicates that. It indicates that just because there are enough dissents in there to show that there's been careful consideration!as careful as my colleagues and I could make of the matter. We spent a good deal of time on that.

And you may know the Commission some years ago recommended a reform in terms of family courts. I think I understood that to be part of the question, which was accepted in principle by both the Government of Manitoba and the Government of Canada which offered some financial assistance to establishing a pilot project family court. That's where the action is in I suppose every aspect of law8 , you look at law as to how would it come out if it were applied by a court.

Our hope is that that pilot project which we have recommended for Manitoba, is unique in all Canada and has attracted the favourable interest of the Government of Canada as well as the Government of Manitoba, will after this period of financialrestraints be put in operation. Because that's a one-stop shop. The Commission has seen that family law takes place in various tribunals now, some of them adept and some of them less adept in the job and people sometimes have to go to two or three tribunals in order to resolve the problems of one man and one wife, one husband and one wife, one couple, and the Commission's view was there should be a one-stop shop. We hope that when the financialrestraints program is lifted, the Province which has the right to establish and maintain and operate the courts under the BNA Act will do that and will take advantage of the Federal offer of money to support part of that experience. That hopefully will be coming next year but I have to rely on what I read in the reports. The Attorney-General may be able to tell us more about that. I don't know.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, as Mr. Muldoon has indicated, the unified family court project was approved in principle and details were sorted out as to cost-sharing Ottawa and Manitoba, and we pretty well reached the point where we were ready to go. But as Mr. Muldoon has implied, we had to defer the commencement of that project for a period of time because of the restraint situation we found ourselves so that it's a matter that we will have to continue to review insofar as the approaching fiscal year as to whether the program can be reinitiated or not. But certainly at the present timeisone of those discretionary programs that did involve some significant sums of money that we were able to eliminate over this particular period of time until such time as it could be re-examined, and I would hope, with Mr. Muldoon, that we will be able to remove it from the shelves and to initiate it because I'm just as anxious as he is that we get on with it, but it's a question of money and attempts that this government has used to try to reduce expenditures in every way possible.

MR. CHERNIACK: Well if no one else, Mr. Chairman, I do have some more questions — I wasn't quite through with the concept of the gifting and the taxation, and I want to again try to get the principle clear in my mind as to what the Commission thinks.

The Commission recommends an exemption of an inter-spousal gift or a succession on the principle that the spouse being in a community of marriage is entitled to half of the assets. What about the other half?

MR. MULDOON: Well the Commission recommends that if the other half go by succession or gift to that other spouse that that should be considered part of the partnership.

MR. CHERNIACK: What is the rationale to that?

MR. MULDOON: The rationale is that you share half of the value of the assets acquired during the marriage as a crisis measure upon termination of the regime but that the spouses work together. The Commission's view is that spouses form families which are the units of society and that so long as their marriage isn't breaking down they should be presumed to be working together and sharing together and sharing ...

MR. CHERNIACK: But your law does not say so. Your law says, only to the extent of half.

MR. MULDOON: That's the equality when the marriage breaks down, yes.

MR. CHERNIACK: Well, no it's also when the marriage is terminated by death, you're still saying half.

MR. MULDOON: Half of the entire estate there —(Interjection)— at least half, yes. But our view was, and again that's one of the implications which perhaps would have been morefelicitouslyspelled out in the spilling of more ink and paper in the report— our view was that that's the minimum requirement, that's a Dower Act type of requirement. Our view was that there still should be no tax between them even if the one spouse inherits everything from the other spouse.

MR. CHERNIACK: Now you're into taxation policy not really principle are you? When you say the spouse is entitled to half you're not saying the spouse is entitled to 60 percent but then your saying well however if they get 60 percent then that should be tax . . . So that's tax policy you're discussing8 not the principle of what is the right acquired by a person in
the marital tradition.

MR. MULDOON: If the Commission stumbled that far into tax policy then it did, I think I must say, Mr. Chairman, with respect, that it did so with its eyes open, it intended what it said. The Commission isn't a surrogate legislature, it just makes recommendations.

MR. CHERNIACK: I just wanted to know the extent to which you had thought it through.

MR. MULDOON: Yes, we had thought that spouses should be together in a mutual tax haven8if that's a good expression — , isn't the expression used in the report — but there ought to be no taxation between spouses. If at the end of a long or short life there is a rollover then some States levying succession duties gets it when the second spouse dies because then you have a generational succession likely or some succession outside of the marital bond. But we emphasize the marital bond, we emphasize the notion of partnership, of people working together, of forming a basic — and we've heard it, everybody has heard it, nobody says it isn't a most important basic unit, the basic unit of society.

MR. CHERNIACK: Except that many spouses that you talk about never did think that in their lifetime and don't today and that's why you provide for opting out agreements and that's why you now say8well if certain things happen almost by accident like paying a mortgage then there's a stupid tax involved. But really doesn't it mean that8as you say in your own recommendations or lack of them, that you do conceive that during the standard marital regime there should not be a community ownership of property.

MR. MULDOON: There should be an expectant or deferred community.

MR. CHERNIACK: A deferred, which means that the spouse has no right except the right to try to terminate it.

MR. MULDOON: To terminate it, yes.

MR. CHERNIACK: Otherwise the spouse has no right in the ownership. .

MR. MULDOON: No proprietary right, that's correct.

MR. CHERNIACK: So there is no restraint other than the squandering aspect on let's say the husband, the earner, the earning husband giving his all to his mistress, there is no restraint on that because that may not be considered squandering or whatever word you use in there.

MR. MULDOON: I'll bet you it would and quickly.

MR. CHERNIACK: I'll bet you it may not. There are circumstances under which it could be considered that the wife deserves what she gets . But you know I said mistress, I could have said son, daughter, I could have said all kinds of things other than wife. I am saying that in your recommendation you do not deny the spouse in whose name the property stands to dispose of it during the standard marital regime in any way other than liquor, gambling — I mean these are the things you refer to. But suppose he wants to give it all to charity. Are you saying that that would be called squandering? I don't mean all of it but a substantial part of it.

MR. MULDOON: Yes, I rather think that that would be, vis-a-vis the spouse.

MR. CHERNIACK: So you are saying that the judges will decide, the courts will have discretion to decide?

MR. MULDOON: To decide what squandering amounts8although I think the guidelines are pretty — that's why I said, not entirely whimsically, I'll bet you that would be. We intend that the kind of situations you've mentioned would be considered a dissipation of property not building up of this estate in which the other spouse has an expectancy, yes. I'm not suggesting that a normal gift of one hundred or two hundred dollars to a charity would come into that but there's a point beyond which you can't make the law like an automatic vending machine, that somebody has to exercise judgment. We have said insofar as the division, the equal sharing, there should be no exercise of judgment, it should be automatic and clinical there but there are many other issues in which judgment has to be exercised by somebody and the institution most civilized countries have is a court, a judge, to exercise judgment to resolve disputes.

For example, if a parent who is earning a substantial income wants to give it all to the children and avoid the wife I think he's in touch with the law on two counts. One, he would be in touch with the law in regard to the spouse who would say that's a dissipation of the estate in which I expect some interest. I suppose if it's being all given to a spouse the Gift Tax Act would say that's not a gift-free transfer, depending on the amount and the circumstances.

MR. CHERNIACK: He may be quite prepared to pay the tax.

MR. MULDOON: But the wife, we have suggested, should have the right to stop that dissipation of the property in which she or the husband, depending which is the earner, has an expectancy, an expectancy of sharing. Stop it. Terminate the regime and invoke the sharing at that point. Or some other order, a receivership order.

MR. CHERNIACK: That's all contemplated here?

MR. MULDOON: That's all contemplated there. We do have receivership now under the Wives' and Children's Maintenance Act. Few lawyers know about it but it works just dandy, if I may say so.

MR. CHERNIACK: I wanted to move to something else, Mr. Chairman. I understand that in the recommendations there is a provision for retroactivity. That is that the SMR will be considered to have started

at date of marriage not the passing of the law. Then is there some right for unilateral opting out which I haven't seen yet8 I don't know just where it is, I don't recall?

MR. MULDOON: First let me direct you, if I can, to the page and then I'll try to give a discourse for the benefit of the transcript. Page 86: Applicability of S.M.R. to Existing Marriages is one possibility of retroactivity and Settling in Manitoba and the applicability of the standard marital regime on Page 92. If these reforms or something like them be enacted, which I hope they will, obviously there will be a day on which they come into force and obviously on that day some Manitobans will be already married whereas some won't be. The question then is: how would the reforms affect existing marriages?

We've considered, and from what we've heard at our public hearings, it may have been one-sided because they had a great deal of favourable response in terms of the property disposition part here at the public hearings, we've assumed that most Manitobans would be quite content to share equally because whether they do or don't some day, if they make a will or don't, either the Dower Act or the Devolution of Estates Act will take care of it in any event unless they're sooner divorced.

So we've recommended that unless one of them within a certain time after the proclamation of the reforms gives notice, some objectively proveable notice, not something which is imagined and may not be proveable later, but something which you can prove later, unless that notice is given then the regime would be retroactive, it would commence on the date they were married, just as it would commence on the date anyone else was married after the law came into effect. But the party said, no I'm not willing, this law is foisted on me, I'm going to be stuck, our standard marital regime, we not having agreed to avoid it, is going to begin today, the day the law comes into effect and I can't get out of that but I don't want it to apply to such estate as I had before the law came into effect, then we say okay, you should have the right to give notice to your spouse and you'll prove it somehow. You'll get a notary public or someone to date it or the spouse will acknowledge it or some way prove that you did give that notice; then in the case of that already existing marriage, upon such notice8the standard marital regime would commence on the day the law comes into force. In the absence of that notice it would commence back when the people got married.

There would be some problems of accounting. I don't think they would be general, I don't think that that many people have such complicated estates but there would be some problems because people might not remember what they owned if the law wasn't in effect when they did get married. Basically the Commission was of the view that if the standard marital regime provides a norm of justice which the law does not now provide then that's no reason to deprive people who are already married of that norm of justice when it comes into effect. By the same token it could inflict a norm which people didn't contemplate when they got married so we've provided the opting out, unilateral opting out, to avoid bringing into that regime any property acquired up to the date the new law would come into force. It will either apply to existing marriages from the date they were solemnized or it will apply, if people choose that option, to existing marriages from the date the law comes into force. That's the simplest way of explaining it in our recommendation. I hope you will not consider me presumptuous, Mr. Chairman, when I forget and say it will and I mean it would. It depends on what the Legislative Assembly enacts.

MR. SHERMAN: A supplementary, Mr. Chairman, to that. I would expect the Commission encountered some strong views on both sides of that question8 I'm wondering how the Commission's adoption, acceptance of the unilateral concept jibes with what kind of information Mr. Muldoon has given us this morning about the overview that the Commission takes to the oneness of marriage and the common bond and the necessity of preserving that common bond. It seems to me to be a little inconsistent particularly in light of the Commission's approach to the question of instantaneous jointly managed community of property. There Mr. Muldoon told us that the Commission feared an infliction of an artificial constraint that would put a strain on a marriage. I wonder how the Commission justifies the adoption of this unilateral concept. Would it not similarly put that kind of an artificial restraint, not a restraint but an artificial difficulty on a marriage?

MR. MULDOON: A new constraint. Yes. We did discuss that at some length. What you have is the Commission's final recommendation of course. The other alternative was of course to say that those who are already married will be exempt when the law comes into force. We canvassed ourselves and the practising lawyers among us, especially those who have some experience in family law, thought that that isn't fair either. If we do, as we do, regard this as a means of achieving more equality and justice between married people then we thought that those who are already married shouldn't be deprived of that. You may say that's officious but having gone that far, to say it should apply to existing marriages, we then said but now is there some unfairness in that? That's why we suggested that the one who has a pre-existing estate to protect in his or her mind, finding himself in Manitoba already married when reforms of the norms of marriage come into effect should have that partial way out but not from that day forward, only from that day backward. Now that's a compromise.

Undoubtedly if reforms of this kind are introduced they will cause dislocation. Any major legislation of this kind causes dislocations in some people's lives. You may remember when the Liquor 8ct was reformed some years ago people said there would be great waves of drunkenness. Well I think there was a slight upsurge. That was to be expected, but it levels out. These things always cause dislocation in the lives of many people who are living at the time they come in. So I acknowledge to you the Commission could have said, it will not apply to existing marriages or it could have said on the other hand, these are the possibilitiesand I think they're the

whole possibilities: it won't apply to existing marriages; it will apply full force to existing marriages or !about where we were8and say it will apply to existing marriages but you can exclude from it property acquired until the law comes into force if you take some particular action.

MR. SHERMAN: But is there not a fourth approach, Mr. Chairman? I'm just asking for clarification. Is there not the approach of a bilateral decision. Why would the Commission consider that it would have to be a unilateral decision?

MR. CHERNIACK: That is here already.

MR. MULDOON: Mr. Chairman, anything which the Commission recommends the law should do about marriages and marital property, anything which the Commission says one spouse may do should be read as being always available to both upon agreement, both upon consent.

MR. SHERMAN: Perhaps I misphrased my question. By implication the bilateral option is there.

MR. MULDOON: Oh yes.

MR. SHERMAN: I've misput my question. What I'm suggesting is did the Commission consider that there should only be the bilateral option and not the unilateral?

MR. MULDOON: Yes, we considered that and we thought that that would work the kind of notional injustice upon the one spouse who says, oh hell — or with whatever expletive he may say it — I didn't expect this to happen! I don't want my assets to date exposed to this ruddy standard marital regime and remember there is no bargaining power now because we're already married, not an agreement to marry. We considered if that required the agreement of the other spouse it might not be done. It might work that injustice.

So the one case in which the Commission recommended that a spouse could do something about that property absolutely to deprive the other of an interest in it is in this one case of those who are already married when the new law would come into force and one of them might even consider himself stuck from that day forward but at least he could clear himself from that day backward. That's a compromise. I acknowledge that. Even if I didn't you could see it.

MR. SHERMAN: Well it may be a good compromise but it seems to me that the day that the law comes into effect, if it comes into effect worded as recommended by the Commission, that there would be an immediate explosion of domestic fights throughout the Province of Manitoba which is something which in your opening remarks to us, by implication you suggested the Commission was studiously attempting to avoid, that you didn't want to get into the area of imposed or inflicted equality or inflicted regulation or into the area of defining a good marriage or tampering with good marriages. What if you've got a perfectly good marriage and when the law comes into effect as proposed by the Law Reform Commission, you suddenly wind up with spouses fighting over this particular option and one being able to do it and act on it unilaterally. Can you not see that that would put a strain on a household or don't you think that would happen?

MR. MULDOON: In some cases it will, in other cases I think the time we have prescribed will go by and no one will do anything and they'll be into it The alert will do something. Presumably there will be a great deal of publicity. Yes, I can see that that's a possibility but I can't see though, and the Commission couldn't see, simply saying all those who are married whenever such a regime would come into law would be exempt because we think that that would simply crystallize some injustices which are in the making right now and need curing. To say that . . .

MR. SHERMAN: But you wouldn't go so far as to say for one partner to opt out there has to be an agreement between the two partners.

MR. MULDOON: Well then there's nothing one partner can do, it depends on agreement. Everything which can be done, the Commission's view is that spouses so long as they are in agreement should be able to do anything with their property they like, make any arrangements they want. That's with agreement. And we say that there's a limited area in which anyone can do something not by agreement, or let me put it this way. There's a limited area in which spouses can do anything contrary to the will of the other spouse.

MR. SHERMAN: What if one spouse doesn't read the newspapers, and I presume lots of people don't?

MR. MULDOON: The Estate Planning Council told us that they would be alert to tell their clients, the stockbrokers would be alert, the whole business community, the tom-toms will be beating.

If I could just add to that, I don't mean to end my answer on what may seem to be a light note, I don't think there's a way to avoid what you're suggesting. Any fundamental change in the law is going to make some people unhappy and those some people might be married to each other —(Interjection)— No, we compromise, it's the best we can do. One may see some humorous aspects to it but not that many and I don't want to give that impression.

MR. GRAHAM: Mr. Chairman, I'm sure the Law Reform Commission did a lot of work on this and has done a lot of conjecture8 and supposition in the various ways of accomplishing what they set out to do. In the question of whether one person should be able to unilaterally opt out if this comes into effect, has the Commission considered the various methods, whether mutual consent will opt them in? What percentage of the action would you get if that were the case? I am wondering if they have considered the various ways of doing this and what would be the public reaction to it.

MR. MULDOON: The Commission, and we've dealt almost exclusively so far only with property disposition, in this aspect the Commission's view was that the present law is awfully unjust in most

circumstances and has the potentiality to be awfully unjust in most circumstances. I mention to you that which is almost a cliche these days "The Murdoch Case" "The Rathwell Case" cases where one spouse wasn't smart enough or wasn't assertive enough to say our property gets into our joint names and we operate this as a business partnership or whatever, in effect by operation of law was denied a share and so we said what would justice require? What's your view of marriage? We have a view of marriage which is the same as much of the justifiable rhetoric we've all heard all through our lifetime and we say well if people say this so often why doesn't the Legislature enact laws which really give some meaning to the value of marriage and the value of the family in the community and we came up with a standard marital regime. Mr. Chairman, it's not by accident that we have called it a standard marital regime because we suggest that it should be there for people who are going to get married but who aren't concerned about contracting out or making their deals or adjusting their estates or even getting their estates planned. And we say well now is that so foreign to the law of Manitoba? Is that a concept that we're introducing, recommending the introduction of a concept which is utterly foreign to the lives of Manitobans? And it's not, because just as we have recommended a standard marital regime as I mentioned earlier, the Legislature already has a standard Will called The Devolution of Estates Act. Can you contract out of it? Well you don't need to contract, you can avoid The Devolution of Estates Act by making a Will but if you don't have a Will you get The Devolution of Estates Act. So we're suggesting here if married couples don't have some agreement which they foresee is in their best interest, and we suggest that they should have every freedom to make whatever agreement they want, if they don't have that then they should get the standard marital regime because a 50-50 split is a definition of equality, is a definition of equalness.

I suppose that a lot of people get married pretty thoughtlessly just as a lot of people live their lives pretty thoughtlessly. For those the Legislature has thought it good to have a Devolution of Estates Act so that there will be some justice, the Legislature's concept of justice for the survivors, for the dependents. We're suggesting a concept of justice which we think should be enacted for those who get married thoughtlessly, whose expectations are betrayed later on, get married with high hopes and sometimes end up with betrayed expectations and nothing, nothing to show perhaps for a faithful lifetime of work, of building up a marriage and a home. And that may sound as if I'm playing a gypsy violin to you, Mr. Chairman, but that's the kind of injustice which the present law permits to happen, the betrayed expectations, and our view was here's a definition of equality, 50-50. If people get married without thinking that they need some special arrangement which we say they're free to make then that, we suggest, is what they should get in the same way that they already get if they don't make a Will, the operation of The Devolution of Estates Act. That's the best way I think I can answer Mr. Graham's question. I think if you said this were optional: "Excuse me there, young bridegroom, we'd like you to join up with the plan here which may deprive you of half your estate if you and your wife separate or divorce and it's all your option." But that way, and why not, maybe some people would say, "I'm not signing up anything." But that's the attitude some people take now to making Wills when they leave their widowed spouse, their dependents without provision and the Legislature has thought it good to make a standard Will.

MR. GRAHAM: Mr. Muldoon, just for clarification, I was referring to the retroactivity of marriages that are already well down the road.

MR. MULDOON: Well the Commission considers that its recommended standard marital regime is a good thing, clearly, it couldn't, with rectitude, have recommended that if it didn't. It considered that the standard marital regime unless spouses want out of it and do so by mutual agreement, should apply to existing marriages, marriages existing at the time it would be enacted. We suggest that if nobody does anything about that then it should apply retroactively. In other words after the law would be enacted, every standard marital regime would come into force on the date of the solemnization of a wedding, at the marriage, unless the parties contract out of it. We say, okay for those already married, every standard marital regime for those already married will come into force on the date they were married retroactively unless one of them squawks, says, "Oh, no, you've caught me, the regime applies from this day forward but not from this day backward." I take it that's much the same question as Mr. Sherman asked and that's our compromise. Whether to have it apply to all or apply to none, we tried to compromise as best we could. We're not philosophically compromisers but we think we boxed ourselves in to the necessity for a compromise in that particular aspect.

MR. CHAIRMAN: Mr. Cherniack, you had other questions?

MR. CHERNIACK: Yes, Mr. Chairman, I do have. On this point, however, do you see the consequences of your recommendations being accepted as sort of an exodus or a claimed exodus for Manitoba to get out of that law?

MR. MULDOON: No, because I thin'k that what we have recommended is the coming thing. I think that there will be fewer and fewer places to go. If Mr. McMurtry is serious in Ontario, from what I hear in Saskatchewan it is coming there, I think it's stalled a bit in Alberta but they're always a little aberrant because they're so rich and are probably trying to get people to come in there, I don't know, in B.C. there is a similar provision. This seems to be in the works throughout Canada. Quebec, of course, has had some form of this called the sociacquests, ete d'acquets, the partnership of since 1970. And The Maritime Provinces, as I see from my readings in there and in Newfoundland, are all thinking of the same sort of thing. I think it's the coming thing. There are several states in the United States where one wouldn't advise an absconding Manitoban to go

to because they have instantaneous, immediate, joint managed community property, so there are fewer and fewer places.

MR. CHERNIACK: I wonder, Mr. Chairman, if Mr. Muldoon could clarify the kind of bookkeeping that will have to take place. You have a formula which I haven't studied to any extent but are there going to have to be books kept as of date of commencement of S.M.R. and throughout the S.M.R. period to separate the previously acquired or by gift acquired goods. How do you envision that?

MR. MULDOON: I don't think that it will be a problem to most people, and I don't think that most people are going to employ accountants. I think that those who have complex or extensive estates may be well advised to employ accountants. If one has an extensive estate when one gets married, that's something I've heard about but I have never experienced, I suppose that you could say that your wedding day is kind of like valuation day under the Federal Government's capital gains tax provision. You should have a good idea and the more precise the better of what you own at that time, what your assets are, and what your debts are, maybe that they'll cancel out. I don't see that as being a great problem with most people, I think that if the reform were enacted once it became part of the social and legal landscape more people might be more cognizant, it might make materialists of more people, they might be more cognizant of what they own and what they owe at the time they get married if they are going into the S.M.R. but the Commission didn't foresee it as a great problem and the accounting is pretty simple. The concepts are pretty simple, they're not entirely simply, but we've worked out one typical family as how they might terminate their regime there in the Report and let me put it this way, none of my colleagues nor I had any great difficulty with that nor could any of the members of the Commission, and they are not all lawyers, they co
dn't see that people would have any great difficulty.

MR. CHERNIACK: You are recommending that the income from independently-owned or privately-owned (I don't know just what term you would give) but clearly non-shareable assets, the income during the standard marital regime would still be part of what is jointly owned.

MR. MULDOON: Yes, but of course it may be consumed as it's earned, too, so there would be nothing there.

MR. CHERNIACK: Naturally. All moneys consumed other than what - gambled away?

MR. MULDOON: Yes, are gone, they're invisible.

MR. CHERNIACK: You see it seems to me I see a problem. If somebody is on the stock market, is he gambling his inheritance or his earnings? You say your lawyers didn't see a problem but I'm just wondering, here you have a person who earns $50,000 a year, has acquired an inheritance of $100,000, is gambling on the stock market and loses. Well does that come out of his income and is chargeable to the jointlyowned property or is that part of what he inherited from somebody else which was not part of what's jointly owned.

MR. MULDOON: Well it either is or it isn't.

MR. CHERNIACK: You say that?

MR. MULDOON: Yes.

MR. CHERNIACK: How do you recognize it? I agree with you, it either is or it isn't, but how will you recognize it without a set of books?

MR. MULDOON: Well you'd recognize it by normal accounting procedures. You would recognize it, I suppose, too, I think you shouldn't take that - it's a good example, let's take it as an example but let's not put it in isolation. That conduct will either be tolerable to his or her spouse or it won't be, and when it starts not getting tolerable, I think we'll get more information together and there will be an application.

MR. CHERNIACK: Are you providing for full knowledge?

MR. MULDOON: Yes.

MR. CHERNIACK: I think you are.

MR. MULDOON: Yes.

MR. CHERNIACK: Which means that after he's done something bad, the spouse can say, "What's going on here?" You're not saying the spouse has the right before the act.

MR. MULDOON: Who knows what evil lurks in the heart of a spouse. No, how could you foresee that. Most of these things. . .

MR. CHERNIACK: Come on, come on, that's not what I mean. I mean that that spouse was not entitled to know what acts the deciding spouse is going to do and will then gamble that sum of money.

MR. MULDOON: Sorry. Our suggestion, and that's found in Part I of the paper is that spouses are entitled to complete disclosure as between themselves of their assets. They're entitled to be consulted about the disposition of assets so that if the spouse you mentioned who is going to make a big losing on the stock market is going to do it, if he's observing first of all, I suppose, an ordinary, decent standard of conduct, with or without law towards his spouse, he will tell that spouse. If he's going to observe the law which we recommend, he's obliged to tell that spouse!, "I am going down to my stockbroker's today and I am going to buy a million shares of Red River Mud." That's what we consider merely the declaratory value of the law. There's no way of enforcing that. That is to say we can't provide every couple with a policeman to make sure that they live up to the Family Law Statute of Manitoba. But if that person is going to do it surreptitiously then the best thing the law can do is say here is an instrument on which you can take swift action as soon as you discover it.

MR. CHERNIACK: Try to terminate the S.M.R8

MR. MULDOON: Yes. So that will be either tolerable or it won't be tolerable. It may be that he will come back and say, or she, darling I have just lost 50 grand and they may have a great mutual forgiveness and reconciliation, which is their business of course. If that's not tolerable, if that snaps something, if the red curtain descends then there is an instrument which we recommend the law should give for quick, immediate action.

MR. CHERNIACK: And that is?

MR. MULDOON: That is to terminate, to get receivership, to take into account when dividing the shares equally what you squandered and credit that back so that . . .

MR. CHERNIACK: What about the fault aspect on support which comes in right at that stage? There is a fault. One person, presumably the husband, has not advised the wife of what he's going to do; he does it; it's a bad act. Do you have some feature in the separation and support . . .

MR. MULDOON: It doesn't. Our recommendations are more subtle than that. Separation is one of the means of terminating an S.M. R. but the termination of an S.M.R. wouldn't necessarily mean a marital separation. You could terminate the regime and not be separate as spouses.

MR. CHERNIACK: I'm going into my next subject. Maybe I should have declared myself, Mr. Chairman. I'm interested in the fault aspect on support on separation. Where is fault a proper feature in that?

MR. MULDOON: All of the Commission, with a difference of emphasis, is unanimous that fault is a proper feature and you'll hear many ardent briefs to the contrary, and we heard them too, that fault is an aspect to be taken into consideration in awarding support or maintenance.

MR. CHERNIACK: Well "fault" means the general English usage of the word "fault" I assume.

MR. MULDOON: No, the Commission uses the expression "responsibility for the breakdown." The minority says8 "the paramount responsibility," tossing away the fine scales and saying it's either gross or it isn't and if it is it's taken into account and if it isn't, it isn't.

MR. CHERNIACK: But would you clarify for me; either spouse is constantly beating the other, or either spouse is drinking too much. How is that a factor in deciding support?

MR. MULDOON: Without becoming a psychiatrist beating is a pretty willful activity, it may be that somebody is driven to it by some psychiatric factor, but the law requires people to control those impulses because their criminal law provides sanctions against assault. Our suggestion is that if that be the husband, that be the income earner in that family, that the wife should be able to look forward to a longer range of maintenance if the paramount responsibility resides in the conduct of the husband there, he beats her.

MR. CHERNIACK: Why is that? An extra punishment, he goes to jail or the court does whatever it should do to punish him for beating and in addition there's a money penalty.

MR. MULDOON: There may be an extension. You see what the reform is here is not that "in addition" because that's what we have now, it's in receding from that somewhat that maintenance shouldn't necessarily be a life sentence. Spouses should be encouraged in terms of maintenance, most of the commissioners believe, to bec become self-sufficient as soon as possible.

MR. CHERNIACK: So what's that got to do with whether the husband hit the wife or didn't hit the wife?

MR. MULDOON: Let me describe the flaws of the present system and then set that off against our recommendations. Under the present system, and here's a not uncommon situation, I suppose people who practice law have seen this one. Here's a lady who marries a guy and they have some children and he's not going anywhere, he's not very socially gracious, he hasn't got that machismo and fire that other people have and he's going to be Joe Blogs all his life, a good citizen and probably a nice father. But one day she meets that guy who's all fire. . . I don't know she decides to leave Blogs and maybe expel him from their house and maybe get custody of their children under the present law!. Poor old Blogs may have to pay her maintenance for the rest of his life and what's he done? Well he's done nothing except be a kind of an ineffectual nice guy and we say that the responsibility for the marital breakdown there not being Blogs because he never was a silk purse, always was a sow's ear, and she couldn't make one out of him and it's not his fault, that Blogs then shouldn't be condemned to pay maintenance, be a meal ticket for her for the rest of her life. On the other hand, if he drives her out, if he's responsible for the breakdown, maybe she has some right to get extended maintenance.

MR. CHERNIACK: I understand the first part but I don't understand the next one' they're still separated.

MR. MULDOON: As a matter of justice, one of the perhaps best ways to explain it is to look at the. . . the minority I must say to you went into the matter of fault more fully than the majority. The majority of the commissioners maintain fault as an element in recommending maintenance8 the minority and stronger so that the strongest, perhaps the highest expression of the fault principle can be found in the minority's recommendations, and I'll bring that to your attention right now.

We say why retain the fault notion at all. We think it would be a positively — and this is the minority I acknowledge to you, but this is an exposition I suppose of the concept of retaining fault at all8 I think that it would be a positively anti-social law as well as being a foul example to the children of a marriage for the law to say in effect to all spouses, "You don't have to make any effort to live up to the commitment of loving, honouring, cherishing or being conjugally faithful to your spouse which you solemnly made upon marriage! ; you may positively harass, belittle, deride, assault and make life a hell for your spouse! ; you may irresponsibly

squander and plunge the family into debt, and don't worry for unto you maintenance shall be paid or forgiven, notwithstanding your rotten behaviour." We say that there is some element of justice and while you'll hear, as we heard, many people coming before you at your public hearings, Mr. Chairman, urging that fault be eradicated, we've also heard people whose view of marriage and married life is that as a matter of justice it shouldn't be eradicated entirely from those considerations.

MR. CHERNIACK: Where is the majority statement on that88 emotional harangue by the minority?

MR. MULDOON: Thank you, that may well be an apt description.

MR. CHERNIACK: Well you're one of them.

MR. MULDOON: Yes, I'm one of them.

MR. CHERNIACK: If the shoe fits.

MR. MULDOON: Well it was an emotional one as well as a cerebral, I think, if I may say so Mr. Cherniack.

MR. CHERNIACK: . . . defensive already.

MR. MULDOON: The majority's view is to be found on pages 20 and 21, and that can be. . .

Now there's one matter, Mr. Chairman, and it won't be heard probably by your committee in terms of fault or not fault, but which directly relates to that concept, and that is the duration of maintenance. How long will maintenance be for? In its recommendations for the reform of the divorce law, over which the Manitoba Legislature has no jurisdiction, the Law Reform Commission of Canada recommended that divorce be temporary and rehabilitational and most of my colleagues agree with that.

MR. CHERNIACK: Maintenance?

MR. MULDOON: Maintenance, yes, that it never become a life sentence for one or a lifelong meal ticket for the other, but that people should be encouraged by law; the law should build in an encouragement to become self-sufficient.

Now the next question isn't one of family law, we think, at least we thought, although in light of our discussion on tax, maybe it was.

The next question is, those who cannot become self-sufficient, who looks after them, whose responsibility are they? Are they the responsibility of the former spouse, the separated spouse? We're talking now in terms only of separation because, with great respect, Mr. Chairman, your colleagues in the Legislature have nothing to say in law on divorce, it's only in separation. But that, if I may use some shorthand to get around a long expression, may I refer to that as a former spouse understanding that the relationship still endures in law. How long will that person be obliged and who will look after the one who can't become self-sufficient after the maintenance terminates? Some groups came to us and said, "You should make recommendations for that too." Most of those groups when we explained to them that we were dealing with Family Law and not Welfare Law accepted that explanation because I think that the first job, the first priority in this regard is to define the maintenance profile in terms of Family Law. How long is Jones responsible to maintain his or her spouse? And of course our suggestion is that Mrs. Jones may be responsible to pay maintenance for Mr. Jones too. How long will that obligation endure? When it ceases who's responsible? Does Jones have to shift for him or herself? Will the state take care of him or her? But our view was that in terms of sequence and priority the first obligation would be to define the profile of maintenance in terms of Family Law and then decide whether Welfare Law will come up contiguous with that profile or whether there'll be gaps and who will be responsible.

Sometimes maintenance which is awarded on separation is adopted by a court on divorce and endures even passed the dissolution of the marriage. One of the things we looked at of course was the increasing number of people who were engaging in multiple serial marriage. When parliament undertook that job in 1968 it must be noted it passed a Divorce Act and not a Judicial Separation Act' and it says in the Divorce Act that any marriage undertaken after divorce is just as valid as if there had been no marriage in the first place, it's as valid as if there had been no previous marriage in the first place. So that in exercising their rights under the law some people are getting a first marriage dissolved and undertaking the responsibilities of a second marriage; and while the Legislative Assembly has nothing to do with divorce because some separation maintenance arrangements endure or are crystallized by courts when divorce comes along, one should look at that. There may be one or two multiple serial marriages but there's usually the same old income from which to pay maintenance.

I understand that some case recently, and it's not a reported case so I'm referring to it by heresay if you'll allow me to, Mr. Chairman, I can't give you a citation for this one — came before the Court of Queen's Bench not too long ago — many lawyers have told me about it and I don't even know the name — where a lady came to court to enforce her order, and this is in a divorce case, which was in default, for the maintenance of herself and some children and after hearing her side of the story the judge appeared to be very irked with the defaulting husband, ex-husband, and it looked as if he was going to make some pretty severe order against him, but he invited him to say why — apparently these people weren't represented by counsel — and the husband said, "I got a divorce in this court and that was my right under the laws of Canada." The judge agreed yes. "Now I've remarried and that was my right under the law of Canada." Yes. "Well meet my wife and children and I've still got the same income." Which family gets it? And that's why I think there's some concern with the question of how long maintenance endures, when do people become responsible to be self-sufficient and when ultimately will the state pick up that responsibility? But I think that the first obligation is to define the obligation in terms

of Family Law and then decide how near, how far, how identical the profile of Welfare Law will be and that's what we addressed ourselves to. So while invited by many groups to go forward and say Welfare Law takes up where Family Law ends, we said, "No, we end where Family Law ends." That's a far more political and a far more partisan matter, Welfare Law, we leave that to the Legislature, but we'll make our recommendations with regard to the profile of maintenance for Family Law. That's what we've done there.

MR. SHERMAN: Mr. Chairman, through you to Mr. Muldoon. Mr. Muldoon if we could go back to the hypothetical Blogs case that you gave us a few moments ago, you cited a family in which you suggested the fault for the breakdown of the marriage was on the woman's side or on forces over which she had no control and certainly her husband had no control, but you also gave us an example of a family which contained several children. My question is, to what degree does the original husband, the repudiated husband's responsibility for maintenance of those children extend, and I don't mean up to what age, I know what age we're talking about. Let us consider small children and a situation like you've painted for us in which a fault is recognized and that fault is attributable to the wife and the man, the new partner she takes up with becomes simply a common-law husband at best, perhaps even not that.

MR. MULDOON: Well when we speak, and you'll hear much about fault or no fault maintenance, it's always relative to interspousal maintenance, the fault of one spouse, the misbehaviour of one spouse toward the other. The Commission has recommended that the law declare, and here we've recommended something which sounds very much like the drafting of a civil law statute and not a common-law statute at all, a principle. The principle is that parents are responsible for the extent of their ability for the maintenance of their children and clearly there's no fault principle there. Both parents are responsible to maintain their children until the children attain the age of majority. Where the fault principle comes in is in spousal maintenance, so that, picture this possibility8 Here is one spouse, I don't mean to be sexist but we have to make a concretize example, let us say the wife who has the custody of the children, separated from the husband, the possibility exists that the husband will be responsible to pay maintenance, and we mean realistic maintenance not the kind of fictional phoney assessments of maintenance which are habitually made by our courts, Family Courts, for children. Picture the possibility of the husband paying maintenance, maintaining the children until the last of them attains the age of 18, one by one, but that the wife receiving maintenance which she knows will not endure until the youngest of them gets into grade two, and then he doesn't have to pay for her anymore. She has to become self-sufficient and that raises other problems. That raises the problem as to how can she care for the children and still be self-sufficient and it raises wider social problems.

The Commission wasn't in a position again since it wasn't going into welfare provisions but if you ask the Commission's opinion and you'll find it certainly implicit, obviously the need for lunch and after school programs, obviously the need for day care, especially lunch and after school programs for the working mother whose children are in school, the Commission recommends that even if at fault, a spouse who has custody of children, the full time custody of children, should be in receipt of an allowance from the other spouse at least until the youngest of the children are safely in school, at least then. But then if that spouse has to become self-sufficient, how? Well, one thing at least urban centres need — I don't know about rural centres, I think they're better off, I think they can make better arrangements with the neighbours there — urban centres certainly need lunch and after school programs so that the kids have somewhere to go to get a hot lunch and they've got somewhere to be. I'm not just referring to the plain storage of children as if you put them on a shelf until mommy comes but I'm thinking of the best kind of program wbere there is something educational or developmental for them to do. If the children get out of school at 3:30 or four the parent may not be available to take them home until 5:30 or six, that's the kind of program. That's beyond in some ways the scope of the Commission's self-imposed recommendations but very material. But that will depend too, the availability, whether that's the coming thing or not and we think it must be because of the incidence of marriage breakdown, because of the incidence of sole support parents. Some arrangement like that has to come. That will depend again on the maintenance profile. So the first thing to do, in our view, the first priority in sequence is to determine the profile of maintenance in terms of Family Law, inter-spousal maintenance, and then see where you go, how much. Our view of course is that no spouse should be imposed a life-long sentence of maintenance of another spouse, that the law should encourage self-sufficiency.

Now those aren't problems that I think you can answer in one day. I think you first have to — that's why I call it a sequence — determine the first and then see how far you go.

MR. SHERMAN: But if you accept the concept of fault, do you go so far as to say that fault and degrees of fault will affect the degrees of maintenance?

MR. MULDOON: Yes, our view is that some spouses should not either go scot-free, having created the situation — you may say that's vengeance, you may say that's justice, you may say what you like and you'll hear even more pejorative words about it from the people who will appear before you I'm certain, Mr. Chairman — that a person who causes a marriage breakdown in terms of elemental justice — and we think we're in tune with the people on this — shouldn't go scot-free in effect and the person upon whom a marriage breakdown is inflicted shouldn't be cast out without some enduring maintenance. Now however you rationalize that I know that most of the articulate people who appear before you will have a slogan which you will hear reverberating in your crania, no fault maintenance. The Commission, after hearing that too, came to the conclusion that fault

isn't something which should be entirely eradicated from these considerations. Reasonable people undoubtedly can differ on it but that's our recommendation.

MR. SHERMAN: But would you go so far as to propose measurable fault and a related measurable maintenance? In other words if you took two family situations in the same socio-economic circumstances and in one case the woman was at fault for the breakdown of the marriage and there were three small children in the household; in the other case the woman was not at fault, the man was at fault for the breakdown of the marriage and there were three small children in the house, do you conceive of varying degrees of support? That is to say in the case of the marriage where the man was responsible he would be responsible for paying a higher degree of support than in the other case.

MR. MULDOON: I don't think that the Commission's view is that the amount per period, per month or per fortnight, should be an index inversely proportional to fault, but rather how long it endures. Will it endure one year, seven years, how long does it go? Again while you'll hear the opposite view, you consider the plight. Here's the guy in the one case, the responsibilities of being a husband and daddy have sat ill with him. He's not been interested in his family, he has not been home much and he's out probably where he yearns to be, out of that. And the mother is left in a husbandless fatherless home to look after the children. Well that again may sound like strains from a gypsy violin to you but in the Commission's peregrinations, both as a Commission and as individuals, most of the people we spoke to — not necessarily most of the people who presented briefs to us but most of the people we spoke to said that she's entitled in that case, because it's not her fault that she is in this position insofar as it can be seen, she's entitled to be home with those children and to be a homemaker and to be secure in that for longer if she wants to be. Now she may be ill-advised, maybe she should get out and get self-sufficient right a way, polish up her job skills right a way. That is certainly the thrust of the minority report' but the majority say no, she is entitled to be home longer, she's entitled to be a homemaker for her children longer if she's not at fault. And then you simply look at the guy who is suddenly out of his house, who has lost his wife, he's lost his children and he has to pay and he's not at fault and the majority of the Commission say well he's entitled to get out from under the obligation to her, not the children, to her sooner because this happened not through his fault.

Now that seems to strike a chord. Maybe most of the people you'll meet and sometimes you'llmeet them in pubs and sometimes you'll meet them in neighbourhood gatherings or in grocery stores and maybe they're unregenerate, but they say that's an element of justice which people understand. I think you won't hear too much of that from the people who will present briefs to the committee, Mr. Chairman. It's a matter of judgment.

MR. FRANK JOHNSTON: Thank you, Mr. Chairman. My question was partially answered. I'm going back to where you suggested that the man who was divorced, which was his right under Canadian law and he remarried under his right in Canadian law, but you know when he remarries he's going to marry a girl, that he should say, "Now my income is such and I am responsible for taking care of another family which is mine. I was probably responsible' or the person said responsible for the divorce, now I have to pay that much money." And certainly you'd think that any reasonable person would discuss this. In fact the girl should say, "Hell, you can't support me if you've got that obligation." But why, if he moves into another marriage and has another family, the responsiblity to the other family, he sort of believes it's gone, I can't really accept that. Now you mentioned a Brandon case where the second wife is working, the man is working, they have another child and she's working to help support the other family. I think you refer to that case in Brandon as a woman who could have been rehabilitated in fact and won't.

MR. MULDOON: To job skills, yes, so we were told. Because under the present law the court says you are more valuable at home making cookies or you'll be paid to do that. He'll pay you. We say the present law is a little wrong there because it should encourage people to become self-sufficient as soon as possible, to be rehabilitated.

MR. FRANK JOHNSTON: Why do you take the figure, the grade two? Just from the point of view!the children are in school and the wife is at home doing nothing all day making cookies? What hit that particular age of seven? You know from being a family man I can say children at an age of seven could possibly, or in many cases need a parent at home. I guess that would have to be looked into or decided upon.

MR. MULDOON: Well I think so. That looks pretty close to being arbitrary and it almost is but there is some rationale there and that is that most children are securely in school. They know what school is about, they are there and in most schools where there isn't going to be a parent at home because one is out working, the children can stay for lunch. There's a problem as to what happens to the children after four or after 3:30 when the parent isn't away from work. But there had to be some cutoff. Some people suggested to us that until the child attains the age of majority, 18, the spouse with custody should be entitled to maintenance for himself or herself to stay home. That's the ultimate absurdity we thought. Again it's one of those things where you say, what's reasonable? Is the child in school, or most children? Obviously there will be exceptions and we mentioned the case where tbe child needs special care. But for most kids who are in scbool, they are in grade two by this time, they know what it's about, they're fairly secure in that environment and can stay for lunch. We think that's the time that the spouse who has the custody of those children should be thinking about becoming self-supporting. Not that the other spouse is going to stop supporting those children when they're seven, that

should endure to the age of majority. But the spouse who has custody should be phasing out at that point in our view. And then we suggested that even at that point, where that spouse who is phasing out of staying at home says I need a couple of years of an upgrading, we make the suggestion there that that spouse should have extra maintenance for that time, to get upgraded, to get back into the job market if it be possible.

There is one thing that struck me and I don't mean to create a diversion from what we're saying. You spoke of reasonable people and we were wondering about reasonable people and it occurs to us of course that if all people were all reasonable that wouldn't mean that they wouldn't have marital problems but it would mean that they would resolve them reasonably and there wouldn't be any need for the law and that's why one has to look at a law which will apply in most cases and therefore not create itself social problems of any magnitude. I don't think there is perfect justice in any enactment that you'd make.

MR. FRANK JOHNSTON: Well when I used the word reasonable — I think you referred to how far can the law go in taking care of things that people should be taking care of themselves. Thank you, Mr. Chairman.

MR. CHAIRMAN: I wonder if this would be a suitable time for the committee to break for lunch. Is there an indication that members would have further questions for this afternoon? Mr. Sherman.

MR. SHERMAN: I think there are a number of other interesting areas that we'd welcome Mr. Muldoon's leadership on but I understand the Attorney-General has an appointment this afternoon that he should be at and I just wonder what the disposition of the committee is in those circumstances.

MR. CHERNIACK: I've been sitting here thinking about the fact that I feel I've taken up quite a bit of time of the committee and I'm a little embarrassed about it. I think Mr. Muldoon bas shown to be an extremely great resource for us this morning. I found it. most helpful and you know I would do this on my own if other committee members don't share my interest. I would just love to sit this afternoon and go over the recommendations in Mr. Muldoon's presence or with him alone and I don't know that it has to be a formal committee meeting or quorums or anything like that, but I for one would like an opportunity to sit with or without Mr. Pawley, but with Mr. Muldoon and just go over the recommendations and see what else comes up. I found it very important this morning and I think it would be worthwhile this afternoon too' if it's not a hardship on anyone.

MR. PAWLEY: I agree witb Mr. Cherniack. You know, unfortunately I do have a commitment which I'm going to see if I can make alternative arrangements if possible. But that should not interfere with the committee meeting this afternoon and especially for those who wish to pursue these questions further.

MR. MULDOON: Mr. Chairman, my colleagues and I have gone willingly to talk with service clubs and other groups who wanted to hear us explain our recommendations and I think that certainly I'm willing to make that time available to this November 16th 1976 SB Tape 14 - 8 committee and I say this with every bit of respect, Mr. Chairman. I think you're going to need all the help I or anyone else can give you before you go and hear the briefs at public hearings and formulate your own views as to what the law should be and I'm quite willing to sit here with you and discuss formally or informally, as we've been doing or in some other way. I think it's helpful just to familiarize oneself with these concepts because they do interact and there are implications from the recommendations which don't appear in print because the thing would have become an encyclopedia. So I'm willing if you're willing.

MR. CHAIRMAN: I assume that you will be available for the committee this afternoon, Mr. Muldoon.

MR. MULDOON: Oh yes indeed.

MR. CHAIRMAN: That being the case the committee will recess until two o'clock.