[Chairman: Mr. Musgrove] [1:30 p.m.]

MR. CHAIRMAN: Could we call the meeting to order? It is now 1:30. I personally have a commitment; I have to leave at three, so I'll be calling on Mr. Topolnisky to take over as the chairman at that point. I guess first on the agenda is the discussion and subsequent decision on matrimonial support. Mr. Hurlburt has passed out some more information on matrimonial support. Do you have anything to add to that, Mr. Hurlburt?

MR. HURLBURT: Not really, Mr. Chairman. The chart is what I was talking about at the end of the last day. It appeared that it would be better if I had it in this form. I don't know whether or not you want me to go through it. I could run through it roughly just so people can read it, or not, as you wish.

MR. CHAIRMAN: You could just highlight it.

MR. HURLBURT: The bottom half of the first page is about finding somebody: the respondent, the person who is to pay maintenance or support. At present in the Queen's Bench the petitioner has to find the respondent. In the Family Division the court workers will do something along those lines but not a great deal.

We have suggested that it be possible to get the address of the respondent and the name of the employer by court order from Alberta health care. I think we suggested that the clerk of the court might be able to ask but not have any legal power to require, so it really is a court order. Then if the respondent appears to be absconding, we would go on to allow the court to get the social insurance number, again from health care. It would allow the court to order the employer to give the address of the employee who is responsible. It would be provided that the information thus obtained would be confidential except to serve the respondent.

Then we have suggested that there be an administrative arrangement with the police under which, if they had a record, they would provide it, as long as they didn't see any reason why they shouldn't — that is, there would be no police reason to keep it confidential — and, as a small point, that it be seen whether Motor Vehicles could keep a record of the provinces in which Alberta drivers' licences are surrendered by people who leave and go to the other provinces. As we understood it at the time, if I go to Saskatchewan with my Alberta driver's licence, when it expires, I will get a Saskatchewan driver's licence and give up my Alberta driver's licence. I think what happens is that the Saskatchewan government will send it back, or that seemed to be the case at that time. We have also suggested that the provincial government seek to have unemployment insurance and Canada pension records available for addresses only. That was our proposal.

One of the pieces that has just been handed out is a newspaper clipping quoting the Attorney General — I haven't verified it with the Attorney General — in January of this year. There has been quite a bit of pressure in the intervening times to do something to assist in collections of support payments. The Attorney General seemed to suggest going further than we would have gone. He even talked about income tax records, which I would have thought are about the last place you would go, the last place any information would come from. So he talked about that and police files — sort of federal data banks which will correspond with provincial data banks and so on. Then he talked about health care, drivers' licences, and motor vehicle registration. Again, that information would be confidential, except for this particular purpose. There's also a proposal that if the federal government owes money to some individual who is not paying his support payments, it should be possible to divert the federal government's payment so that it would go to the support. That isn't part of our proposal; it's just to indicate that maybe we are too conservative and too cautious. I don't know.

That's the information side. That kind of information would be used to serve somebody with a document to start a support proceeding. It would be used to find him in order to collect the money. It's all related to address, with the one exception that if he were absconding, the social insurance number could be found, and that would then tie into at least Canada pension. So that's that part of it.

With regard to actually carrying out the service of the initiating document, whatever it is, summonses for support are now served in the

Family Division by the police or are not served, as the case may be. When I say "now", I have this problem that we haven't gone back and investigated to see whether what was true when we wrote the report is still true. But I think it's something like this, that the police serve them. At the time we wrote the report, they were experimenting with the sheriff serving them, and I don't know what the result of that experiment was. But in any event, what we suggest is that the family court assist in serving documents through the court staff — that attempts be made to do it by mail, through the sheriff, or, if necessary, through private location services and, if those don't work, by Family Division workers themselves with occasional assistance by the police, usually when there's likely to be a breach of the peace if the document is served by other means. That is a second point.

Moving on from getting the thing started, we suggested that in the court proceedings each party be entitled to get financial information from the other. In Queen's Bench that situation does exist; you can have examinations for discovery and so on. Each party can examine the other under oath before trial. If support is involved, then the financial situation of both parties is relevant; similarly if property is involved.

Our suggestion is that that be made a little more efficient by requiring both sides to file financial information. If the court is not happy with the information it's got, rather than the judge getting down and rolling up his sleeves, taking out his pickaxe, and trying to find out from the respondent what the situation is -- which is pretty well what he has to do now -- the court would be able to refer them to a debt counselling service, which would receive information and verify it to some extent. The point of all this is that we found it extremely surprising how little information the courts very often have in making maintenance orders. The result of their lack of information is that they make orders that are simply not reasonable. That has a bad effect when you're trying to enforce them or collect the money, because if the person from whom it's being collected sees that it's patently unreasonable, his resistance to paying climbs very rapidly. So we would like to see something done to give the courts better information. We looked through a lot of court files, and in file after file there was very little: maybe the wife's statement about what she thought her husband made, that sort of thing, which is often very inaccurate. So we've made those suggestions.

Also, rather than calling an employer to give evidence, which can be done now, the court would be empowered to direct the employer to provide a statement saying what the respondent -- the employee, the one who is to pay the money -- is earning and what his deductions are. All this is really intended to give the court a reasonable, factual basis to make its orders, reduce the guesswork, and end up with orders that in fact bear some relation to what the actual circumstances are. It's tough enough when you've got all the facts to decide how much the responsible spouse or father should pay for the support of the wife and children, if it is a wife, as it usually is. It's difficult enough to try to make one income support two households, but if you have nothing but the vaguest idea of what the income is and the property that's behind it, it's difficult to be anywhere near target. That's information.

As to how you collect, basically, at the present time in the Court of Queen's Bench you collect a support judgment like any other judgment. You either send the sheriff out under a writ of execution or issue a garnishee summons and try to catch his wages or his bank account or what have you. The Queen's Bench can also commit a willful nonpayer to jail for up to a year. Rarely, however, are these orders enforced in the Queen's Bench. Even if they're Queen's Bench orders, they usually go to the Family Division of the Provincial Court and the collection is done through that court.

In the Queen's Bench the creditor does everything. He prepares his writ of execution and takes it down. The clerk of the court puts his seal on it. The creditor carries it over to the sheriff and tells the sheriff to go out and seize, and that sort of thing. In family court it's usually done by order; that is, you have to go to the judge to get your remedy. We think that's probably a good idea. But since 1977 the family court can give a garnishee order. It can order the bank account to be garnisheed and the amount paid into court up to the claim. It can issue a continuing garnishee, if you like, of wages. In the absence of that provision you have to serve a garnishee every month; this is true for an ordinary debt today. You have to sort of guess when there's going to be some

money owing -- this is if it's wages -- and you trap a little bit of money, which is paid into court, and it's subject to exemptions and so on. It's very inefficient.

In 1977 -- and this was in part as a result of our activities, because we and a government committee were working together at the time -- the continuing attachment of wages was introduced. The Family Division judge can make an order directed to the employer saying, "Pay so much a month into court for this claim." We think that is a good thing. It hasn't been used as much as we would have hoped, but we thought at the time, and still do, that some changes should be made in it. These are listed in the bottom right-hand corner of page 3. Probably the main thing is not to issue one of those things for a year or two's arrears, because then the fellow would never get his salary, and he has to live. Put in some exemptions: the court can do that now inferentially, but it doesn't say so. Issue one of these things only if there's been a default: if the fellow is paying, there's no reason to run around garnisheeing his wages. Do it only on notice unless he's actually running away, and fairly minor things like that. We think the provision was put in quite quickly and should be looked at and made a little better. You'd call those details. Some of them are fairly important but still detail.

Also, that the province see whether some arrangement could be made to attach the wages of federal employees through the federal government: the province can't do it by itself. Since that time the federal government -- wait a minute; I guess this has really been done. I haven't checked the federal legislation. In 1981 they introduced legislation to allow garnishment, and I think maybe this can be done there too. So we may not have to worry about that one.

The family court can also issue a writ of execution and commit to jail where the respondent refuses or is willfully at fault. This isn't intended to get the person who can't pay; it's only to get the person who won't pay. We've actually suggested that the limit be raised to agree with the Queen's Bench limit. That doesn't matter very much. At the present time the family court can commit for six months, the Queen's Bench for a year.

With regard to registration against land there is presently a very rigid and unsatisfactory arrangement under which the person entitled to the money can take a maintenance order down to Land Titles and register it. If it's registered against somebody with a good deal of land, it will tie up a great deal of land and may even virtually put him out of business. This is true even if he's never defaulted, even if there's no reason to think he won't pay. We have suggested a more flexible arrangement under which the judge would have to be told why this is necessary, against how much land it is necessary, and also that it wouldn't happen unless the chap who is supposed to be paying had defaulted. In other words, we would leave the ability to tie up the land but make it a judicial tying-up and not at the whim of the other side. That is the sort of remedies side.

Then there is the collection service we talked about. It is our suggestion that the family court have people in it who will, number one, keep track of orders -- they do that now to a great extent -- secondly, make sure they know when a default occurs; and thirdly, start a regular collection procedure, letters and what have you, to the one who's supposed to be paying and isn't. Try to get him in, try to find out what the problem is, and try to get the thing restored. If necessary, tell him to go off and get it varied if he can't pay, if circumstances have changed. Then if he doesn't pay, start the proceedings to collect; that is, bring on an application in court. Our suggestion was that that be in the family court.

The long sheet that I think you have is a statement from the Manitoba people that was mentioned last day. The Manitoba government has established a separate collection agency. All support orders made in Manitoba courts go into that agency, and it operates much as I have said. It writes letters and does what it can and then eventually sees that the matter comes on into court. Unfortunately, I have a little trouble in reading that thing, but it seems to me that if you look at the right-hand column, what they're saying at the bottom in the last square is that they collected $8,347,000. I think the line above that means they paid the government $646,000. That would be because the government had paid support payments to women and children, mostly, and was entitled to get those payments back. This is what the agency collected for them.

When I say I don't understand this, it would seem to me that the second and third things should add up to the fourth. They've got

payments to the payee, which I would have thought meant the private payee, and then payments to the government. I would have thought that would add up to their total collections, but it doesn't. I don't quite know what that means. But I'm quite sure they are saying that the government got back $650,000 through them and that the total cost, which is right down at the bottom in a separate thing, shows about $300,000. So the Manitoba government itself is making money out of it, apart from the fact that a lot of money is also being collected for private people.

That really is one thing we think, if it were looked at properly administratively, would help a lot of private individuals, women and children, who should be getting their money. Secondly, it would help the government, which is paying out a good deal of money on social assistance, some of which could be got back for the government. So it would be expected or hoped, and I think would likely prove to be true, that the government would actually make a profit from this simply by getting the social assistance money back.

That's really all there is, Mr. Chairman. You'll see a long paragraph at the bottom of page 5 of this chart, but I think you can simply ignore it. It has to do with how the government collects things. It talks about an amendment that was put through in '77, under which the government was subrogated to the rights of a person who is supposed to be receiving support payments and is on social assistance. I don't think that amendment has worked very effectively. We had made some suggestions about it at the time, which are in our report. What I'm saying in that paragraph is basically that the whole thing, not just what we had to say about it, should probably be looked at again, because there has been a lot of water over the dam since that time. What I've said is that I doubt that the standing committee should do anything about that aspect of things.

We are concerned about, first, the information to locate people who should be paying; secondly, some way of helping and getting them served with process to start proceedings for collection; and thirdly, information which is needed in order to try to give the court a chance to make a fair award. That means one that isn't either too high, so the respondent can't pay it and will resent it even more bitterly than if it were reasonable, or too low, so the party receiving support will receive whatever should be paid. Finally, we have made some suggestions about the legal machinery and about a collection service.

MR. CHAIRMAN: Questions or comments?

MR. R. MOORE: Mr. Chairman, I fully recognize the horrendous proportion of payments that aren't actually paid, but I disagree with the thoughts put forward about locating these people who skip — disappear into the woodwork across Canada or within the province. I'm not saying that setting up an agency through the courts and allowing the courts to access all these various resources isn't an effective way of doing it; that part may be all right. It's the fact that you're giving that power to the courts.

With all due respect to the courts, the power given the Supreme Court of Canada under the new Constitution — the power it has to go outside the legislators of this country — alarms me very much. They have tremendous powers now. If we say, "We give you the power to set up an agency for the purpose of tracing these people who skip," that's just the start. I am opposed to giving the courts or any other jurisdiction within this country the right to know where I am at all times, where I'm going, and where I've been, and having it all in a computer. What we're doing is allowing the start of such a process, and that's a very, very dangerous trend in our society today. Mr. Chairman, I hesitate to give them the authority to access every type of record they have within the system now and put it in one place. I respect the court; I know they'd use it just for this process. But it's the precedent we're setting that's dangerous. I think methods other than giving the courts that power have to be found.

MR. HURLBURT: Mr. Chairman, might I just say something? The information-getting power is one thing; the agency is another. The point you raise is a profound philosophical question, one that you have to have regard to. But the agency really isn't a device to invade privacy and that sort of thing. It's just a device to do what a collection agency would do, and a little more, in bringing it back to the court. With regard to getting the information, it's a question of balancing the importance of the

privacy interest, if you like, against the interest in getting the money in. This doesn't answer your question, but I would say that opinion is moving in that direction. That won't persuade you that that's the way it should be moving.

MR. CLARK: Mr. Chairman, the way our present law reads, I am wondering if you can enforce a court order from Alberta in all the other provinces across Canada. In other words, if a husband — and I'm not saying just a husband — skips out here, doesn't make his payments, and goes to Ontario, Quebec, or anywhere else in Canada, is the court order issued here good all across Canada?

MR. HURLBURT: I'll give you the lawyer's answer: yes and no. There is a procedure under which an order here — and I think this is true in any province — can be taken to the province as a provisional order, registered there before a court, and then enforced in the province in which you find the husband. It's not very efficient, because (a) you have to find him first and the local government won't do that, and (b) you have to send the papers to the local government and they have to appoint somebody who goes into court and does these things. There is a mechanism for enforcing an Alberta order elsewhere or another province's order in Alberta, but it doesn't work too well.

MR. CLARK: I understand that that was one of the big problems enforcement of this Act had. I wonder if there has been any move to change that portion of it.

MR. HURLBURT: Something has been done. Again, the provinces are rather jealous of their own authority, and the court order that was made in Alberta while the husband, if you like, was here would be based on the information that was true at that time. By the time he has gone to another province, he may be making twice as much or half as much, so the circumstances should probably be looked at again anyway. I don't know of any movement to make it so that I could simply take my piece of paper from Alberta, hand it in to Saskatchewan, and immediately enforce it.

MR. CAMPBELL: Mr. Chairman, one question on item 5, Registration of Support Orders against Land. I guess it really doesn't matter how much land. This order goes against the total property?

MR. HURLBURT: Under the present law it can be registered against all the real property that's in the husband's name.

MR. CAMPBELL: So if he wished to sell, he'd have to discharge that claim. Thank you very much.

MR. HURLBURT: The present Act with regard to the Queen's Bench doesn't even talk about taking it off. I don't really know what would happen. You'd have to persuade a judge that he has authority to do it. A Queen's Bench judge can discharge a family court land registration, but it doesn't say anything about the Queen's Bench. Without knowing, I suspect a judge would take a fairly robust view and say, "It's coming off if you want to sell the land." But the mere fact that it's there, that you would have to go to the court every time you wanted to do something — and you haven't even missed a payment — seems to us to be too rigid and unworkable.

MR. CHAIRMAN: Any other questions?

MR. MUSGREAVE: Mr. Chairman, when the institute was working through these recommendations, I assume you had some input by lawyers who were familiar with the problems involved.

MR. HURLBURT: I have trouble giving you chapter and verse after all these years, Mr. Musgreave. The answer is yes; we would have been out talking to people and talking to the government. As far as workability, the continuing attachment of wages was in force in Manitoba from maybe 1974 on; I don't remember. We certainly looked at the experience there. The family law Bar there found it useful and workable. Ours hasn't been used too much; I'm not really quite sure why. It has developed one or two problems — one or two that we forecast. Everything here has been looked at by lawyers. I'm not prepared to say that they all agreed to everything.

MR. MUSGREAVE: Mr. Chairman, my concern is that they were looked at by lawyers. If they were my age, they would have a view far

different from a young woman lawyer who has been working with these kinds of cases. Some of the remarks some judges have been making lately don't make me feel too comfortable; I'm not saying in Alberta but in other jurisdictions.

The other question I have is on (2) on page 3. With the kind of mixed economy we have these days, with some people making money wherever they can and not reporting it all, I'm a little concerned that you're suggesting we restrict this just to earnings from an employer. Somebody could be working part-time and making three-quarters of his income elsewhere. Does this not provide a loophole for him, in effect?

MR. HURLBURT: I think a part-time employee is an employee and has an employer. What we were concerned about was the breadth of this. For example, I'm an unincorporated small tradesman; I do some work for you; I'm going to do this on a continuing basis; I have an employee or two; you owe me money, and that money can be trapped. We thought we saw dangers that kinds of relationships that shouldn't really be subjected to this particular kind of thing might be brought into it. Again, this is not a major point. It did look to us as though it were too broad and might cause trouble; that's the only reason.

MR. CHAIRMAN: Any other questions or comments?

MR. CLEGG: Mr. Chairman, on the same point Mr. Musgreave just raised. Did the institute look at the possibility of providing for a declaration of means in affidavit form, prescribed in legislation, to be available in advance of family court hearings -- this would cover employment income, assets, and nonemployment income — to avoid the need for a further court order? The recommendation says that "either court may order parties to see debt counselling service." That would mean that first of all there would have to be a hearing, then there would be an order, and then there would be another hearing. It would seem that in almost every case where maintenance is going to be ordered, it's going to be necessary to know what both sides have so a fair award can be given. I think some administrative steps can be taken in advance.

MR. HURLBURT: Our recommendations cover that. The first note in this column under heading 3 on page 2 is, "In either court, either party to be able to demand financial information from the other." That's right away; that is, at the beginning of the proceedings either party would be able to set in motion an exchange of information.

MR. CLEGG: Mr. Chairman, does that imply that it would be prior to the court proceedings?

MR. HURLBURT: Yes.

MR. CLEGG: I see. Thank you.

MR. HURLBURT: This being a very abbreviated statement, it doesn't set that out at great length, but we have prepared forms and every other thing you can imagine to bring about that result.

MR. CLARK: I guess I have to get back to my first question. If you set up a committee or some type of organization that looks into the addresses of all these people -- I feel that the majority who are skipping out on their payments are people who move out of the province. If you set up a committee and go through what Ron described as going to the data bank and getting this information, where do you go from there? If you found out he's living in B.C., does this committee then go to work and help the people to try to get the court order changed?

Another question I'd like to ask in conjunction with that is: it is my understanding that if a court order for maintenance for children was set 10 years ago and is inadequate at the present time, it can be taken to court in Alberta right now. Am I right in that?

MR. HURLBURT: If you're talking about an Alberta order, there's no question about that at all. A maintenance order can be brought to court to be changed anytime there's been a change of circumstances.

On your first point, about moving out, we've focussed inside Alberta. We didn't really look at the Reciprocal Enforcement of Maintenance Orders Act, which is the interprovincial mechanism.

MR. CLARK: Isn't that the majority of cases?

MR. HURLBURT: I don't think it's the majority; it's certainly important. We just didn't go that far.

MR. CHAIRMAN: Any other comments or questions? Maybe we should go through this a step at a time — there are actually four, I believe — and agree to them. Number 1, Objectives.

MR. HURLBURT: There's nothing there; that's just a statement, Mr. Chairman.

MR. CHAIRMAN: Number 2, Finding Respondent. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Serving Respondent. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Legal Machinery for Collecting Support Awards.

MR. HURLBURT: I beg your pardon, Mr. Chairman. I guess I put two number 3s. That may be confusing you. There's Information Needed for Fair Award.

MR. CHAIRMAN: Yes, 3A. That's on page 2. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Number 4, Legal Machinery for Collecting Support Awards. Agreed?

HON. MEMBERS: Agreed.

MR. CLARK: Is this where we're only going to charge on the earnings? I believe I agree with Mr. Musgreave on that. I'm not too sure we couldn't modify that. We could put it down as all taxable income or something like that. That bothers me a little bit too — leaving out what might be a majority of your income. A lot of people have part-time jobs just doing commission work. I think a real estate agent is a good example; he might sell quite a bit of real estate on the side. I'm just not sure I'm in agreement with that either. I wonder if there's some way it could be changed.

MR. HURLBURT: There certainly is; you could certainly change it. Our test is: is there an employer? If the answer is yes, this kind of thing would work; if the answer is no, it wouldn't attach. You may not think that test is adequate, and that's your affair.

MR. CLEGG: Mr. Chairman, does the institute think it would be feasible to add to this a method of attaching any income of any source coming to the respondent? Obviously, if the source isn't known, it wouldn't work. If, for example, the respondent is a lawyer, he will have income coming in from various directions, but it may be known that he bills a lot of fees to one particular client. Say I was a lawyer working for Imperial Oil and I was billing them a couple of thousand dollars a month. I wouldn't have any earnings from any employer, and nothing could be attached in that direction. If the petitioner knew that money was coming to me regularly from Imperial Oil, that could perhaps be attached.

MR. HURLBURT: Personally, I would have great reservations about that. It's one thing for an employer — we're talking now about a continuing attachment. Number one, it should be periodic things in order to be useful. Certainly, you might find that the client does pay periodically; there would be no problem with that.

I am inclined to think that in starting to get into different relationships where people aren't used to paying regular money — where they aren't used to administering, if you like, garnishees — you would get into a situation where the harassment to the innocent party, who has nothing to do with all this, would get to be a little great. Even employers find it irksome and bothersome to have to comply with garnishees and periodic garnishees.

I would certainly have no problems about trying to get in wagelike or salarylike things that may not be caught by those words; that is, I suppose, your regular commissions from your real estate company. That I could see. I think the danger of finding people who really shouldn't be asked to support this kind of thing gets greater the farther you get away from a true employee/employer relationship.

MR. CHAIRMAN: Some simple amendment that we could put in here that would . . .

MR. CLEGG: Mr. Chairman, I think we're dealing with the question of a periodic and continuing attachment. Of course, when the petitioner knows that a single sum of money is owed to the respondent, that can be attached anyway. Maybe this limits Mr. Clark's concern. The only area we're dealing with here is where there is a regular series of payments we know is coming. To follow Mr. Clark's example, if a wife knew that her husband, who was a real estate agent, had sold a house, under the single attachment process she could attach that commission on a one-shot deal. As Mr. Hurlburt has pointed out, it's difficult to attach on a continuing basis sums which are coming from a source which only pays occasionally and in varying amounts, and maybe doesn't have a current relationship with the husband. But we mustn't forget that the single attachment approach is still there in all circumstances now, and the institute's recommendation would leave it there. It could always be attached for a one-shot deal. I think what we're talking about now is the extension of the periodic and continuing attachment, and that really is only appropriate and useful and workable where there is a continuing and regular flow of money, as in wages.

MR. COOK: Just following up on the same line of argument as Mr. Clark, what would happen in the case of a self-employed individual or person who had investment income and was not employed by anyone, a person who had substantial real estate holdings and received an income from them? Technically he's not the employee of anyone.

MR. HURLBURT: The essence of a garnishee or what have you is that somebody owes your debtor money; that is, somebody owes the husband who is supposed to pay the wife money. In order to recover, you want to get it from that third party. If he's self-employed, there is no specific third party who is his paymaster regularly. But anytime you can find money in that third party's hands, you can garnishee it; that's open. It's not as efficient as a continuing garnishee, but it's open there. With regard to income from real estate, we have suggested that the court have power to appoint a receiver; that is, an official whose business it is to get all that money in and who can do so armed with a court order. So there is something there for that. Have I answered your questions?

MR. COOK: My inquiry would be in the case of someone who has income from stocks or bonds.

MR. HURLBURT: Seize the stocks or bonds, or garnishee the company that was paying them, I guess. I think the administrative problems for your average transfer agent would be a little high if he's going to divert dividends that come out every three months and remember to do it, and that sort of thing. We hadn't really thought along those lines. I think what you'd do is seize the stock if there were default under writ of execution.

MR. CHAIRMAN: Okay. Is there any amendment that we can put into this to satisfy the concerns? Has anyone got any suggestions?

MR. HURLBURT: I'd certainly be prepared to try to do something, Mr. Chairman. In order to do it right, I'd want to be sure I really grasped to what extent you want to go.

MR. CHAIRMAN: Would the committee like to see an amendment?

MR. CLARK: At the present time, Mr. Chairman, there are limitations on the garnishee, are there? There are quite a few limitations on what you can . . .

MR. HURLBURT: Yes, on wages. It's a very unsatisfactory way of doing it, but we've covered that — at least we hope we have — by this continuing attachment. In order to attach anything on wages, you've got to serve them as close as possible to the pay date, and if you miss and the money is paid out, then your garnishee doesn't get anything. If he's paid every two weeks, you have to garnishee every two weeks. It's not a good thing. If you can find a bank account, on the other hand, you can run your garnishee into the banker and trap the whole thing, if your claim is equal to the whole thing, and have it paid into court. It's useful if you can find a substantial amount of money that is owing to your debtor, but it's not very useful for small amounts.

MR. CLEGG: Mr. Chairman, would it be feasible to consider an amendment to expand

this continuing garnishee to earnings from an employer or any other form of remuneration which comes on a continuing basis? That would cover a real estate commission from a real estate company that regularly retained this person as an independent contractor, a salesman.

MR. CHAIRMAN: Would that satisfy the committee?

MR. CLEGG: I think it would only work on a regular relationship, as Mr. Hurlburt pointed out.

MR. CHAIRMAN: We should probably have a motion to include this amendment in it. Would anyone like to move that?

MR. CLARK: I'll move it.

MR. CHAIRMAN: Okay. This is on the amendment. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Now we vote on number 4 as amended. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Registration of Support Orders Against Land. Are we agreed with the institute's proposal here?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Number 5 is Collection Service. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Could we now have someone as a mover of the total of these five different motions with the one amendment involved? Eric Musgreave moves it. Agreed.

Discussion of Family Relief Act.

MR. HURLBURT: Mr. Chairman, again I have a little chart. I also have copies of the white and green sheets if anybody wants those. I won't pass them out unless people want them. I'll give some to Mr. Clegg, and he can see if anybody wants them. They're more than welcome to them.

MR. CHAIRMAN: Mr. Hurlburt, would you like to brief us on this?

MR. HURLBURT: Right, Mr. Chairman. We're now talking about the Family Relief Act, which is really a continued story from the matrimonial support we've been talking about. The Family Relief Act operates on death, but it's basically to provide support for dependants. It actually started in New Zealand at about the turn of the century and has evolved to where it is now. Basically, we think it's a sound piece of legislation. We have made some suggestions which we think will improve it and make it more up to date.

The basic rule is that you can leave property by will if you want to. Unfortunately the Legislature can't let us take it with us, but it can and does let us say what's to happen to it. That, of course, is a very important thing: that we can dispose of our property as we like during lifetime, subject to taxes and all sorts of other things, and that on death we can dispose of it as we want. But the Family Relief Act cuts back on that a bit. The little summary, the first little paragraph in the left-hand column of the chart, says:

> If deceased did not make "adequate provision for the proper maintenance and support" of [certain people], the court can order provision to be made from estate.

You'll see that the Family Relief Act doesn't purport to stop you from doing something by will, but it can cause, and sometimes does cause, part of the estate to be snaked out from under the operation of the will. So you can say either that it's changing the will or that it's taking some property out from under it, whichever way you want to look at it. But this is done, and the way it is done is that the person who is called the dependant makes an application to a judge, who looks to see, first, whether the person claiming is one of the protected classes and, secondly, whether either the will or the intestacy makes adequate provision for proper maintenance.

At the present time the dependants -- that is, the people who can claim -- are those listed in the left-hand column starting at the bottom of page 1 and going over to about the middle or less of page 2. The surviving spouse is entitled to claim under the Family Relief Act if proper

maintenance or adequate provision hasn't been made. A legitimate child is entitled to claim. An illegitimate child is entitled to claim from his mother as if he were legitimate. An illegitimate child is entitled to claim from the father if the child was acknowledged by the father during his lifetime or is found to be a child in affiliation proceedings. We've already looked at that under the status of children Act.

In order to claim in Alberta, the child must be a minor or alternatively an adult who is unable to earn a living because he is physically or mentally handicapped. So you can say that in a sense this Act imposes a duty upon me to look after my minor children and a mentally incompetent or physically handicapped child who is an adult. In some places any child, however ancient, can apply. But that isn't true in Alberta, and I don't think it should be true. A child who is born after death is a child for this purpose; that is, if the father dies before the child is born, the child is considered his child for this purpose, as is fit and proper. Basically, that's the list.

We suggest certain additions to that list, which are in the right-hand column. First, the present Act applies only to the person who is legally married to the deceased person at the time the person dies. We suggest that a divorced spouse should also be able to apply if that divorced spouse has a maintenance order or an agreement for support at the time of the death of the deceased. There is doubt as to whether support orders carry on past the death of the one who is to pay and whether they can attach the estate. What we are saying is that the divorced spouse who has a support order has a claim for support and that the place to deal with that claim is under the Family Relief Act.

When the paying person dies, the whole situation is changed. The existing order really won't be appropriate, because on the one hand the source of the money will not accumulate any more money; on the other hand, the source of the money no longer needs money to live on. So the situation is quite different after the death of the person who's doing the paying. And we say: all right, sit down and include that claim for support with the other claims, and let the judge look at the whole thing and see whether or not everybody's properly looked after.

Mr. Chairman, I think there's a question.

MR. LYSONS: If I might, Mr. Chairman. I would have to do some serious thinking before I could ever agree to this "divorced spouse with support order or support agreement." It sounds like a pretty tough order, especially if the deceased has remarried, perhaps with more family and so on. I say that in relation to the other things that are coming up. There's nothing for the common-law spouse. I think there would be a spot in there for a common-law spouse as well. Really, you're dredging up history to allow a divorced spouse that has had a legal claim at one time to go back and dig into the estate. [Inaudible] reasons for doing it.

MR. HURLBURT: Mr. Chairman, we're not going back to dig up an old claim; we're only talking about a current claim, one that still exists. We're talking about a divorced spouse who, at the date of death, was entitled to be supported by the deceased person. If that situation did not exist, there would be no claim. The court could now make an order that said the divorced spouse's order under the Divorce Act or whatever will continue after death. As much as anything, we're really saying: let's clear up a messy situation; don't leave that other order going on and on — the estate would have to be prepared to meet it if it continues — and deal with it now all at once. That's basically it.

As far as the second marriage or second relationship goes, that is a dreadful problem during life. It's one of the least soluble problems there is: the correct financial relationship between an individual's responsibility to family 1 and his responsibility to family 2. That's one of the great, difficult, unresolved questions of today. But what we're really saying is: if there is a subsisting order or a subsisting right to support, deal with it in the family relief context; don't let it go marching on all by itself, because it's got to be wrong at that stage. That's that one.

As to the common law, we have not set our faces against it. In these family law reports we've been dealing with, we've only dealt with the married relationship. We have another project going on in which we are going to look at the unmarrieds. I don't know what we will say when we look, but we will be doing that within the next year or so. All I can say is that we haven't yet looked at the common-law side, but we will.

MR. LYSONS: I'm still not convinced, because there's just so much at stake here. I can't put my memory to work closely enough to actually describe an example, but surely there would be a preferential order built in here somewhere. You have that right at the top.

MR. HURLBURT: Nothing in the arrangement suggests priority. That just happens to be the first topic we get to. The present scheme of the Family Relief Act doesn't say anything about priorities at all; nor would our scheme say anything about priorities. Basically, it would leave those to be dealt with by the judge who hears the case. The way he would deal with it is under the words "adequate provision for the proper maintenance." What's proper is in relation to the pot and all the people who are involved with the pot; that is, the estate and the beneficiaries too. The court has no business making away with the estate money unless it's justified by the desirability -- and it has to be a public-policy desirability based on protecting dependants, people who legitimately should be called dependants. It's not an invitation to the world to come in and share, but it's the court to work out a scheme, if there isn't enough money, under which the people who should be protected will be protected.

MR. LYSONS: That makes me feel a little better, but it still leaves a lot of . . . I'm not suggesting that what you're doing is wrong at all -- by no means. Someone's divorced; we'll say that they remarried and they have other children. A divorcee comes along, as she is probably legitimately entitled to, and says, "I've got support payments coming from this estate of $600 a month" or whatever. If that were ever to have precedence in law over the fact that there is another spouse or even other children involved here, then the present spouse could be left virtually without anything from the estate. A good deal of that estate may have been built up with the second marriage. I find it almost too much to comprehend.

MR. HURLBURT: All I can say is that if the order is properly prepared, the divorced spouse is entitled to come in with it anyway and just say, "keep paying." It is possible to make an order that way. The first spouse, if she is in fact dependent -- if you chopped her off with nothing, that's just as bad as chopping her off with too much, if you like. All we can say is that the court is the one place that sees the particular case. The Legislature can only see a great tendency out there; it can't deal with specifics. The way this Act deals with specifics is to leave it to a judge to decide what's proper and adequate. That's the best I can do.

MR. CLEGG: Mr. Chairman, I was only going to add to what Mr. Hurlburt said. The report does not and could not, and the present Act does not and could not, indicate priority between the parties; it just lists the people who may apply to the court. The circumstances of each person -- their level of need, their level of being deserving of a share of the estate -- can be determined only by the judge in this case. As Mr. Hurlburt pointed out, an ex-wife may well have a continuing right to payments from the estate -- maybe for another five years. This merely gives the court an opportunity to say, "Rather than leave the estate tied up for five years so that these payments can be made, let us make a lump-sum payment now and extinguish that, so the rest can go to the other beneficiaries under the estate," who are probably the new family. This is really just making a new means whereby the estate can be settled more quickly in many circumstances.

As far as common-law spouses are concerned, I quite appreciate Mr. Hurlburt's quandary in trying to keep one issue tied up in one report. On the other hand, when legislation to implement something that has been recommended by the institute comes forward, it has to balanced in justice and social fairness at the time it comes through. There may be members of this committee who feel that the question of the common-law spouse should be mentioned at this point because otherwise its absence will appear to be discriminatory against common-law relationships, even though you would be dealing with them under a different project.

MR. CLARK: Just for clarification. I don't know whether or not I understand it. To use an example, a divorced couple divides their assets and makes a settlement in court. The fellow then dies and has a will that leaves his remaining money where he would like to see it go. Would this part of the Act allow her to open up that estate again for a bigger share of it?

MR. HURLBURT: Not the estate as an estate. The only time she could come in would be if the settlement you mentioned included a monthly or periodic payment for support. It's really only that that we're talking about.

MR. CLARK: What about yearly payments from property?

MR. HURLBURT: Yearly or periodic — payments to be made in the future, which would normally be periodic. It would mean that in order to qualify, she would have to have in her hands something from that court settlement that said she was entitled not merely to whatever property distribution there was but also to support. If she had that, it would let her come in and say, "Make proper provision for my maintenance, and here is the support order for my maintenance."

MR. LYSONS: I'm a little confused on this. If someone were divorced and had an agreement from the other person in the divorce, a valid claim for so much a month, that's one thing; that's a legal contract that's been drawn up and agreed to. But to allow a divorced spouse to sort of re-enter the family is quite another. Once the divorce is through, they cease to be members of the same family. The more I think of it, the more I question whether or not that should be brought back into the Family Relief Act. That almost outsider now, through the legal agreement they have, a legal contract that may be exercised in court — somehow or other it doesn't make common sense to me to have the surviving spouse come back into the picture.

MR. CLEGG: Mr. Chairman, I have a suggestion that might help to win Mr. Lysons' support. He might like to suggest an amendment that the divorced spouse who has an existing support order could claim only for the purpose of either securing or capitalizing that support. I understand from the committee a sense of concern that a divorced spouse with an existing support order could come back and say: "I didn't get a good deal. I want another quarter of a million dollars from this estate." They want to review the whole situation. I believe the institute's intention was that they would have standing to come in to get their support sustained, solidified, or capitalized. If we were to write that in as an amendment, I think everybody might be on board.

MR. HURLBURT: I have this difficulty with it. It may be that the amount in that order was splendid while the fellow was alive and earning a great large income. But he's now dead and the source of the income has stopped. If his estate is fairly modest and his other dependants are there, it may not be right to give the divorced wife the capitalized value or whatever it is. That may be too great, just as much as it may be too little, depending on the circumstances.

MR. CLEGG: If the amendment were drafted carefully, it would only show that she could claim for that, and the court would decide how much of a capitalization she would be entitled to in the circumstances. It might be none.

MR. HURLBURT: A bed but not a floor? Well, it is an approach. I imagine it could be done that way.

MR. CHAIRMAN: Would that satisfy your concerns, Tom?

MR. CLARK: Mr. Chairman, the thing I'm worried about — I'm going to use a farm example. A man has a farm estate, and they have had a divorce in the family. The farm income is split equally between the husband and the wife, and each is in agreement with that. The way I understand it is that when he dies, she can open up the divorce settlement regardless of his will and say: "Now I want all of that. I don't want half the farm income until I die anymore." She can come back and say, "I want it all," regardless of the fact that he might want to will it to somebody else. That's my concern, and I don't know whether or not it's a legitimate concern. It seems to me that she can come back and open that up again and say, "Now that he's gone, I'm entitled to the other half," regardless of the fact that she was happy with the half she was getting before and was willing to settle for it. It bothers me a little in that sense.

MR. HURLBURT: For one thing, when you say she's entitled to the income, we look at property and support differently. I really don't know whether you're talking about half the

property or some form of actual support. I personally don't think that what you're worried about would happen, but I suppose Mr. Clegg's suggestion would cover it. He said to limit the recovery to what's justified by the order, if you like. Whether you capitalize it or what have you, you say that that establishes the top of the entitlement, and the judge can look at it from that point of view — possibly scale it down if the estate is modest and possibly allow it if the estate is substantial. I'm not advocating that, but it might meet your point; I don't know.

MR. CLARK: What I'm saying — I forgot to add a little bit — is that in a lot of farm families the farmer will will his farm to his son and daughters with a maintenance to his wife of the income of the farm until she dies. Then it's sold. Many estates are run that way. For instance, if it were a divorced couple and he had the same arrangement, she could open that up. She could actually force the sale of the land against his will.

MR. HURLBURT: If in the divorce it was agreed that she would have all the income or something like that?

MR. CLARK: Half the income. For instance, in a normal case if you weren't divorced, you would say to your son, who inherited your land through your will — you'd have written in your will that your wife would receive the income from the farm for her lifetime and at such time the estate would be sold and settled up. Many of the farms in our country are run that way. If you were a divorced couple, and she had made a divorce settlement for half the income from the farm and you were getting the other half to run the rest of your life on, then in my estimation when you died, it would be possible for her to open up the estate again for a cash settlement of the rest of it or take a cash settlement and force the sale of the land. I'm not sure you could do it.

[Mr. Topolnisky in the Chair]

MR. HURLBURT: I wouldn't expect, under the circumstances you're talking about, that the court is going to do anything that would generally interfere with the arrangements. If the half income that the divorced wife is getting is adequate, no problem. There's no reason to provide any more. If it isn't, there's a question as to who the competing interests are, if there are any. But the mere fact that she had agreed to accept X, if it's half the money or something else, as support would certainly suggest that that was at least adequate when it was proposed and that if she hadn't moved to vary it by the time of death, it was probably still adequate. So I doubt that it's a serious practical problem, but I certainly cannot say to you that no judge ever goes off the rails. I'm not about to make that statement. I think that this would not be misused, but I'm not going to be the judge.

MR. LYSONS: Mr. Chairman, I brought up my concern mainly because of farm estates. When a farmer or businessman or businesswoman dies, that's when income tax and capital gains and all these sorts of things have to be paid. That's got to come from somewhere. Using Mr. Clark's description of a divorce and a settlement and so on, the only source of money to pay off the income tax and capital gains is the estate and the deceased's portion of the estate. If we allowed the divorced spouse to come into this situation, there might not be anything left but to sell the farm. It's probably a little more unique with a farm than anything else because there are so many variables. A farm isn't a business that runs on a reasonably steady income. It's up and down and so on. Land values vary considerably. It makes it very, very difficult when you bring this into it. If there were some way to bring this in other than through the Family Relief Act, then perhaps I would see it a little clearer. But to bring it in under the Family Relief Act, where we're really looking at the children, the legitimate child, the illegitimate child — what is a posthumous child?

MR. HURLBURT: Born after the father's death.

MR. LYSONS: I see.

MR. HURLBURT: When that happens, that one has got to be all right.

MR. LYSONS: But to bring the divorced spouse in — without an amendment on that I would be sunk.

MR. HURLBURT: Mr. Chairman, the divorced

wife under these circumstances would have standing of some kind. If the estate were small and unable to support the payments that were to be made, and some sort of variation application were brought, the judge would have to decide, really without having the whole estate picture in front of him, what to do about it and so on. It seems to us more orderly to bring everything in and think about it all at once. I think that what Mr. Clegg has suggested would at least keep it so that the damage wouldn't be greater than it could be from the outstanding support order. I think I've said everything I can, Mr. Chairman.

MR. CAMPBELL: Mr. Chairman, one question. What takes precedence? Say that there's a divorce agreement or support order. The husband bequeaths or wills his land to his children — one or two or whatever. Following his death, what's the precedent? Who has the right in this particular case? If I understand it correctly, the divorced wife continues on with the maintenance following that?

MR. HURLBURT: If the order's properly drafted, I think that is correct. It comes out first, I suppose.

MR. CAMPBELL: In that case, in order for, say, the children to receive this, there would have to be a sale and a settlement in a lump sum?

MR. HURLBURT: No. By this time the order normally wouldn't be on a lump-sum basis; that is, lump sums are usually dealt with at the time or not too long afterwards. So you're probably talking about periodic payments of some kind, customarily anyway.

MR. CAMPBELL: In this case, the children would be responsible for this?

MR. HURLBURT: The estate, not the children. It may be the same thing, but not legally.

MR. CAMPBELL: So actually this is the estate. This whole support agreement has been transferred over or is still just within the estate, and that cannot be settled until the death of the divorced wife?

MR. HURLBURT: Or the expiry of the order or the discharge of the order or something — if the order's properly drafted. It's a rather murky area.

MR. CAMPBELL: Thank you.

MR. MUSGREAVE: Mr. Chairman, I hate to break in like this, but about five or six of us are supposed to be somewhere else at 3 o'clock. I wonder if we could adjourn now and continue this tomorrow morning.

MR. DEPUTY CHAIRMAN: In that case we'd lack a quorum. Do we have a motion to adjourn at this time?

MR. COOK: It's moved, and I'll second it.

MR. DEPUTY CHAIRMAN: It's been moved and seconded. All agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Adjourned until tomorrow morning at 10 o'clock.

[The committee adjourned at 3:09 p.m.]