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Legislative Assembly of Manitoba

STANDING COMMITTEE
on
STATUTORY REGULATIONS
and
ORDERS

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Chairman
Mr. Peter Fox
Constituency of Concordia

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MANITOBA LEGISLATIVE ASSEMBLY
Thirty-Second Legislature

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LEGISLATIVE ASSEMBLY OF MANITOBA

THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS

Tuesday, 19 July, 1983

TIME — 8:00 p.m.

LOCATION — Legislative Building, Winnipeg

CHAIRMAN — Mr. Peter Fox (Concordia)

ATTENDANCE — QUORUM - 6

Members of the committee present:

Hon. Messrs. Evans and Penner, Messrs. Ashton, Fox, Harper, Kovnats, McKenzie and Mercier, Mrs. Oleson, Ms. Phillips

WITNESSES:

Representations were made with respect to the following bills:

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

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

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

Bill No. 97 - An Act to amend The Queen's Bench Act; Loi modifiant la loi sur la Cour du banc de la Reine

Mr. Len Fishman, Family Law Subsection of the Manitoba Bar Association, spoke on Bills No. 64, 65, 66

Ms. Susan Devine, Manitoba Association of Women and the Law, spoke on Bills No. 64, 65, 66

Ms. Evelyn Wyzykowski and Shirley Scaletta, Catholic Women's League (Manitoba Council), spoke on Bill No. 97

Messrs. Isaac Beaulieu and Vic Savino, on behalf of First Nations Confederacy and the Dakota-Ojibway Child and Family Services, spoke on Bill Nos. 65, 66

Dr. Frank Hechter, private citizen, spoke on Bill No. 66

MATTERS UNDER DISCUSSION:

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

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

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

Bill No. 97 - An Act to amend The Queen's Bench Act; Loi modifiant la loi sur la Cour du banc de la Reine

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MADAM CLERK, Carmen DePape: The first order of business of the committee is to elect a Chairman. Do we have any nominations? Mr. Penner.

HON. R. PENNER: I would like to nominate the Member for Concordia, Peter Fox.

MADAM CLERK: Are there any further nominations? Seeing none, Mr. Fox, would you please take the Chair?

MR. CHAIRMAN, P. Fox: Committee will come to order. We have a quorum. The first business of the committee is to hear representations on Bills 64, 65 and 66.

The first presentation, Family Law Subsection of Manitoba Bar Association, Len Fishman.

MR. L. FISHMAN: Good evening, Mr. Chairman. I'm here on behalf of the Family Law Subsection of the Manitoba Bar Association and the views I'll be presenting are the views of that subsection of which I'm chairman. We've gone through the bills in relation to The Marital Property Act amendments, The Family Maintenance Act amendments, and The Child Welfare Act amendments, and I propose to make representations on those bills.

The first concern that we have with respect to the three bills, is why are they not in one omnibus bill, as opposed to the three separate bills that are being presented and the acts that are now the law of Manitoba, in our view, require consolidation and should be, in fact, in one bill.

I get the impression, or we get the impression that looking at the amendments in The Family Maintenance Act, in particular, that that's the road you're on and we're hoping that that's the road you're on, that you're moving towards one omnibus bill and the concern we have is that many of the amendments to The Family Maintenance Act appear to deal with matters that should be in a Child Welfare Act, or would appear to be, is merely something that is a preliminary step towards that consolidation process.

Our first concern is in Bill 64 with respect to The Marital Property Act amendments, Clause 2, affecting Section 4(1)(b) of the act. As far as we're concerned, we have some question as to why the test is the intention of benefiting. The test for the question of acquisition of assets prior to marriage, is whether or not the assets were acquired in specific contemplation of the marriage. We're wondering why there's a change in the wording here, that would seem to change the onus and would change the test that's required to be determined by the judge, determining whether or not the assets are, in fact, something to be considered.

Where you have a second marital situation where, say both parties have been married a second time, there is a situation that both will have premarital assets presumably if they've been living together prior to their second marriage. There becomes some question as to the change of the test in this particular case in specific contemplation of the marriage; the new test being the intention of benefiting as opposed to the old test of the assets being acquired in specific contemplation of the union, and that would seem to be the test that most befits the situation.

We note that Mr. Carr in his recommendations, No. 67, put the matter a little bit differently and much along the lines that we're now suggesting, and I believe that in our representations to the Attorney-General, we agreed with Mr. Carr's recommendation No. 67.

With respect to Clause 4, the section dealing with the subsection 10(1) of the act, we question why the word "debts" has been removed from the text of the section. It formerly read, I believe, "debts and liabilities." Now, the word "debts" is gone. Being lawyers, we're concerned that you've taken a word away and it must have meant something, and that there must have been a reason why you took it away. If it's only a question of editing for extra words, then we have no complaints.

Clause 5, which amends Section 12 of the act, is an amendment that we oppose. It appears to us that by removing the conditions under which parties will be able to apply to the courts for a declaration as to separation and that they should have the courts settle their marital property, that you're, in fact, going to be encouraging litigation. You have taken away a number of rules that gives the party the right to apply for separation, and as far as we can see, in Section 12, we have enough opportunities to get to court.

By rewording Section 12 in the way you have, you've simply said any spouse can apply at any time for a declaration as to the sharing of assets, and we don't see that this is particularly useful, particularly where parties perhaps have not separated, maybe using this as a means of getting at each other during the course of cohabitation and could very well lead to breakdown of marriage. It could also be used as a tactic by a partner or a business associate of one spouse to encourage the other spouse to assist in the disruption of the spouse's commercial life.

Our view is that we are satisfied with the conditions in Section 12 as they now stand.

Because of the position we've taken with respect to Section 12, we have no comment on Clauses 6 and 7, because if you follow our position for Section 12, then they become unnecessary.

We do have a question with respect to Sections 6 and 7, why we have the word "complete" modifying equalization. Equal is equal as far as we can understand, and it seems to be an extra word that doesn't help too much.

In Clause 9, you have used a new phrase, "division of assets" as opposed to "an accounting of assets," which is the way the phrase is used throughout the act previously. That's a distinction that we don't follow and we don't see as particularly necessary. Perhaps, if you could explain it to us, then we would have a better idea of what we're saying here.

With respect to Clause 8, you've added a section to the act, 13(3), which we view as not being acceptable. We take the position that Section 13 should be left the way it is. Section 13(3) would be acceptable if you leave out the words after "dissipation"; in other words, leaving out the words, "or has otherwise been substantially detrimental to the financial standing of one or both spouses."

We see that as a further invitation to prolong litigation, creating a test that will be difficult for people to plan on and for courts to decide. As a result, these trials that are intended to be short and sweet and easily understood will in fact become contests over conduct all over again if you leave in this phrase. Who is going to decide, or how is one going to decide in advance what is substantially detrimental to the financial standing of one or both spouses? It's a very broad wording that we see as being unnecessary in the circumstances and certainly not helpful or determinative of any rights that ought to be protective.

With respect to Section 15, which is with respect to the closing and valuation dates for an accounting, we're quite satisfied with Section 15 as it now stands. We see that Section 15(b), as you've now put it, leaves out the situations that would arise in Section 12 if it's left the way we had proposed.

Clause 11 is one that we view with some favour and that we would like to, in fact, see expanded. It's our view that the statement should contain more information than you've got set out in this particular section. For example, we would like to see that the statement stipulates that the assets sworn to are as of the date of separation.

In addition, we think that there should be statements as of the date of filing, or application, as the case may be. In other words, we're asking that spouses file a double inventory; one inventory that they wish the court to look at for the purposes of valuation on evaluation day, and a second inventory as of the date of the application of separation.

Our experience is that the forms that are now being used are not being used in the way that they were presumably intended and that, in fact, you never can tell, from the statement of assets and liabilities that's now attached, what the person is deposing to. It's not a valuable instrument to use for cross-examinations or that sort of thing, and it's not the kind of thing that you can rely on in court as a proper pleading, which is something that we would like to see. We would like to see family law put on the same level as an ordinary civil proceeding so that you could rely on your court file pleadings and the documents that people swear to.

For guidance, we suggest that you take a look at the Ontario forms which has a breakdown of statements, assets and liabilities as of the date of separation as of the date of application.

With respect to The Marital Property Act, we would also like to see amendments that you have not included, such as penalty sections for failure to disclose adequately what the assets and liabilities are. We would like to see jointly-owned property as a shareable asset within the parameters of The Marital Property Act.

In addition, we have proposed a futher amendment that we would style as Section 19(3) - well, an amendment to Section 19(3), which would provide that the court would have the power to direct interest to be paid upon all or part of the amount shown by an accounting to be owing from one spouse to the other from the date of evaluation to the date of payment at such rate or rates of interest as the court deems reasonable, unless the court finds that such payment would be clearly inequitable, having regard to the circumstances of the case.

The present interest section that you now have is a very limited section in terms of its availability to the parties, and in terms of its usefulness in encouraging a party to settle or to make an offer of settlement in advance of going to trial, which, as you may or may

not know, often takes a couple of years. It creates a situation where a term deposit, for example, in the name of one of the spouses can earn interest for a couple of years, yet not be something that's taken into account on the accounting by the judge, because he's looking back at where that money stood as of the date of separation two years ago. So there can be a geniune inequity there.

In addition, we would like to see amendments that would allow for the filing of a lis pendens in the Land Titles Office once an application has been filed so that any interest in property, any property that would be transferred subsequent to that application would show that lis pendens as being registered, and it would prevent the difficulty of parties being able to dispose of assets for what may not amount to prices that are unconscionable or that would amount to dissipation of assets, but might nonetheless be transactions that the other spouse has a genuine interest in and would want to have a say in. We would like to have that, as well, something that would be able to go into the general register as well as being a lis pendens which could go against property.

That concludes what I have to say on The Marital Property Act. Would you like me to move on? I have never been in front of this committee; I don't know how you work.

MR. CHAIRMAN: Yes, unless there are questions on this particular aspect.

Mr. Penner.

HON. R. PENNER: Thank you very much, Mr. Fishman. It's been helpful and I won't attempt to, nor is it my function, or anyone else's, to respond in any sort of a debate fashion; nor would I want to do that, but just some questions for clarification.

With respect to your concerns about Section 12, there are, as you are probably more aware than I am, analogous sections in The Family Maintenance Act. Do you or does this subsection have some evidence of the abuse of those similar sections in The Family Maintenance Act? Have these led to trouble?

MR. L. FISHMAN: Are you speaking of the sections where a spouse can apply for a living allowance? Is that what you're talking about?

HON. R. PENNER: Yes.

MR. L. FISHMAN: It's a very rarely used section, very rarely used. I've never had the opportunity to use it; in fact, I know of no one else who has. There may have been one or two applications that have gone in. That in and of itself is not a reason why The Marital Property Act concerns aren't valid. There are problems with that section, the living allowance section, because I think that generally people are going to be afraid to use it. It's really a concept that most people aren't familiar with. The idea of going to court and not getting a separation, I think, is something that would be difficult for most people to process.

HON. R. PENNER: Thank you.

I think it would appear from 13(3) that conduct substantially detrimental, etc., is wider than dissipation. Is it your view that it is too wide and you want the only conduct which might be considered that of dissipation as defined? Is that your concern?

MR. L. FISHMAN: No. The concern is that you seem to be creating a clause that's going to invite litigation. It's going to be an excuse for people to bring conduct into the courtroom when they're talking about division of assets. That's the major concern. It's not so much that these words are wider or narrower than the other words that you've used, but that this is an additional statement that people are going to latch onto and every husband is going to say to his lawyer, go in and fight it, because she's ruining my financial situation even by bringing this very application. It's an invitation to fight about conduct. That's the way we see it. We don't see that it adds anything that will be creating a corresponding right that's that important to protect.

HON. R. PENNER: Of course, we expect with the unified family court that there will be less fighting and more conciliation in any event, but time will tell.

Finally, does the - I'm trying to recollect, Mr. Fishman, whether or not the Family Law Subsection has a position with respect to community of property. I asked that question because it relates to Section 12 which is critical. Section 12 is kind of a halfway house, or intended to be a halfway house, between the present state of affairs and community of property. Does the Family Law Subsection have a position with respect to community property?

MR. L. FISHMAN: We have a formulated one. I'm not sure I understand exactly what you mean by that in relation to Section 12. Section 12 is a section that gives someone the opportunity to go to court.

HON. R. PENNER: Yes.

MR. L. FISHMAN: We accept the position that marital property should be jointly owned and that marriage is a partnership, and we accept the basic philosophy of The Marital Property Act, if that's what you're asking me. We agree that marital property ought to be shared, but there is the difficulty of in whose name is the property . . .

HON. R. PENNER: Shared on separation?

MR. L. FISHMAN: Yes.

HON. R. PENNER: And community property is instant sharing, right?

MR. L. FISHMAN: Instant sharing at what point though? That's the question. Are you saying that all property will be instantly shared upon marriage as it is acquired, or is someone going to have to go to court to say, okay, now is when it happens?

HON. R. PENNER: Well, okay, we seem to have a different understanding of what community of property is, so I think I'll just leave it at that and we can discuss that at some future time.

Those are my questions.

MR. CHAIRMAN: Ms. Phillips.

MS. M. PHILLIPS: Yes, Mr. Fishman, I'd like to pick up on that particular point. It seems to me this section is saying that a person can apply for an accounting during marriage in a situation where one of the partners does not give those details to the other partner during the marriage; that it's not necessarily a division, or saying, well, this half belongs to you and this half belongs to the other one. That's the way I read the section. It's saying, while the two people are married and they are not sharing that information with each other, one can go and ask for an accounting during the marriage.

MR. L. FISHMAN: Without a division, the same with an accounting just to figure out what's on the balance sheet and who would owe who what if they did separate.

MS. M. PHILLIPS: Well, regardless of whether they're going to separate or not.

MR. L. FISHMAN: It seems to me that you have some assistance in Section 6 of The Family Maintenance Act that gives you the right to apply for that information. According to the wording of that act, it's rarely used in that way, but the provision is there in Section 6.

Our concern is that people will be using the legislation in a way that will disrupt marriages as opposed to using it as a way to settle their affairs upon dissolution of marriage. We don't want to see marriages broken up by the legislation or by people pursuing their rights or going after the information.

As far as we're concerned, Section 12, as it now reads, gives you enough opportunities to go to court. That's simply the position we've taken; that we don't want to see parties saying, well, okay, it's been a year since I had my last accounting, let's go have another one. There would be no limitation on it. How would you know how often someone would be engaging in warfare with their spouse? A lot of people, I suppose, live together in a state of warfare and in a state where they're not prepared to . . .

MS. M. PHILLIPS: Maybe it would be better to be going for a separation.

MR. L. FISHMAN: . . . They're not prepared to take the step of going to court or going to lawyers or actually having a separation, and might be tempted to use this kind of legislation in that way.

MS. M. PHILLIPS: I guess I just want to clarify. You said that you were opposed to this particular section, and I want to be clear that you're opposed to it because you fear it will cause more litigation; not that you're opposed to the principle of either party being able to get an accounting during marriage, and perhaps the situation might be once they got the accounting, they'd live happily ever after.

MR. L. FISHMAN: We're in favour of information. We're in favour of one spouse knowing what's going on in the marital establishment and being able to find that out. Section 6 of The Family Maintenance Act should give that power, but, as I've indicated, it's not used often.

MR. CHAIRMAN: Mr. Mercier.

MR. G. MERCIER: Mr. Fishman, I take it from your presentation that you and the members of the Family Law Subsection are generally happy with the way in which the present act is working, with some minor exceptions that you mentioned at the end that you feel should be given consideration and added to with respect to penalty sections?

MR. L. FISHMAN: Generally speaking, it seems to be working well. There isn't much litigation over conduct, and we wouldn't be unhappy to see the bit of respite that you have there for people-who-want-to-fight conduct taken away. I don't think we would cry too many tears over that.

Generally speaking, I think the act works well because it has created a situation where people have an expectation of what's going to happen in court. Unfortunately, most of the people that require a court to help them out in the kinds of the things that this act will do for them can't afford it. Often the $10,000 or $20,000 of marital property that most people have, or $20,000 to $30,000 of marital property, just isn't worth the litigation and the cost of the lawyers and the courts, which is one of the difficulties we have with the act.

One of the big difficulties that we have had in the past is with respect to pensions. Now, your recent amendments appear to be working, but we don't have a Court of Appeal decision yet, so we don't really know. There's been a couple of Queen's Bench decisions that have more or less overturned what Isbister did to the pensions provision, as it formally read, but we don't really know. Insofar as that goes, our experience is that we need amendments to The Pensions Act in order to solve that problem. At least that's what it appears to be, the kinds of provisions that they have in British Columbia, for example, where I believe it's their Pension Benefits Act allows for the division of credits and their Marital Property Act - I don't believe it's called that - creates spouses as joint tenants in the pension upon the separation, which is not the situation that we have here.

So we're still stuck with the situation where in a pension case, firstly, we have to fight with the other lawyer to get the information because they don't believe the law really says that it's divisible. Then when you get the information you've got to spend over $1,000 to get an actuary to tell you what it means; then you've got to try to convince a judge that what the actuary is saying is real. So you end up with a situation where an actuary says a pension is worth between $50,000 and $75,000 and the judge says, well, okay, I'll say it's worth $30,000, you don't really know why the judge is saying that and no one really understands the actuary except perhaps another actuary. It does seem to create a hardship on the payor spouse, the spouse who has the pension, who is being asked today to come up with that money, but then on the other hand is the spouse who's being left behind going to wait for 20 more years until he retires? There are all kinds of competing considerations on that particular question.

MR. CHAIRMAN: Ms. Phillips.

MS. M. PHILLIPS: Yes, Mr. Chairperson. Just for Mr. Fishman's information, I don't know whether he realizes, but yesterday amendments were tabled to The Pension Benefits Act that I think should clear up some of the concerns you have about that.

MR. L. FISHMAN: Those haven't been brought to our attention. Could you tell me what bill that is? I'll find it. The bill number, it's got a big number.

MS. M. PHILLIPS: 95? It will be introduced by the Minister tomorrow, so you can get a copy at the Clerk's Office.

MR. L. FISHMAN: Thank you.

BILL NO. 65 - THE FAMILY MAINTENANCE ACT

MR. CHAIRMAN: Would you proceed with Bill 65, Mr. Fishman?

MR. L. FISHMAN: Yes, I will, Mr. Chairman. With respect to Clause 1, our first concern is why you've botered to define the word "custody." It's a word that's a term of art that's been used in the legislation for years and years, and if we hadn't known what it meant up until now I don't think we're going to know by giving it this particular definition.

The difficulty we have with custody is that it's often confused with other terms, such as guardianship and wardship, and if you're going to define custody, it's our view that you ought to define all of those terms. It's not enough to simply say that custody means a particular thing, because it's a word that's used often in many statutes, in particular this statute, and The Child Welfare Act. We don't particularly see that defining it in this particular way really separates it from the other terms of guardianship and wardship, which are often used interchangeably and which are often misunderstood.

The definition that you've given to custody doesn't appear to be more than a dictionary-style definition of the word "care and control," doesn't seem to cover the whole ground that you would want to cover with the word "custody." Other things that the definition might include might be some of the rights, privileges, duties, obligations, exclusions and the like that you would want to be incidental to a parent's custody of a child.

With respect to Clause 2, the definition of parents, it's our view that you ought to include in that definition the concept of in loco parentis. These are people who, by their conduct and association, have come to stand in the place of a parent and have certain obligations in law, and it's our position that if they have these obligations they ought to be able to have the correlelative rights that would go along with them. So it's our position that parent ought to include that particular kind of parent. In relation to that, the amendments to Part 2 should also in fact in our view contain parent as including a parent who is standing in loco parentis.

With respect to Clause 3, sections which would be numbered 1.1 and following, we have a question why you're adding the phrase, "regardless of the wishes or interests of any party to the proceedings." Why is that used to modify what is in the best interests of the child? It doesn't seem to do anything except be a bit of a reference to the concept of parents' rights, that a parent should have the absolute right to their children unless they do something terrible. It's a position that we don't see as being useful in this particular section. We would like to see a clear statement that the best interests of the child is the paramount and only consideration; that everything else is a subordinate consideration, unless of course it bears upon that major test. So we don't see the purpose of adding this particular clause, regardless of the wishes or interests of any other party to the proceedings.

If the intention is to, in fact, make a legislative statement with respect to the question of parents' rights, we would prefer to see that in an omnibus act, incorporating the best interests definition in The Child Welfare Act in Section 1(a.2) of The Child Welfare Act, as it now reads, we would add in a section or we would amend Subsection 2 which reads, "The child's opportunity to have a parent-child relationship as a wanted and needed member within a natural family structure," we would add in the word "natural" there. We think that would cover the situation, because you would have a statutory definition of what best interests of the child means. We're hoping of course that when you're referring to it in The Family Maintenance Act that you're in fact intending to bring that definition forward from The Child Welfare Act, so that it in fact is the test; so that you won't find a judge saying, well, that's The Child Welfare Act, we're here under The Family Maintenance Act, and although these acts are somehow interrelated it's not in this piece of legislation and therefore I don't have to pay attention to it. That's one of the reasons why we'd like to see these things in one statute, so you don't have that kind of statement coming down from the bench.

I have to say though that although the subsection's position is that the best interests test is and should be the only test that there is a considerable ground swell of opinion that says that the parents' rights ought to be considered as some sort of equivalent or superior test. People seem to have the notion that parents own their children as property, subject to them doing something so terrible that would cause the state to interfere. Generally, it's thought to be the test that in a contest between parents and strangers that the law is, as stated by the Supreme Court of Canada, in cases such as Hepton and Maat, and re Baby Duffill (phonetic), and those kinds of cases, which seems to create a situation where the judge faced with the test which is articulated as generally that a parent shall not lose custody of their child unless there is serious and important reasons that militate against that parent's continuing custody.

The judges tend to treat that as a primary test. In other words, has the parent abandoned the child, has the parent done something that is neglectful of the child, or something that comes under the heading of serious and important reasons before the judge will embark upon the examination of the question of what is in the best interests of the child. So you may find

a situation where a judge would be saying this child would be better off in a different environment, would be better off with its grandparents, or an uncle or an aunt, or the state, but we can't show that these pasrents have done something intentionally that means that their rights ought to be abrogated and cut off.

Our answer to that, of course, is the amendment to the best-interest tests in The Child Welfare Act, and if you're looking for cases that refer to that kind of thing, I'd refer you to the Ontario case of Moors and Feldstein (phonetic) that talks about the question of parents' rights in relation to the question of the best interests of the child and, in balancing those considerations, comes to the conclusion that the parent's natural right or preeminent right is still a question of fact. It's certainly something that would be considered in every case by every judge and, certainly, if it's something that's codified under the best interest test, would be something that the court would be responsible to take into account.

With respect to the 1.2, speaking of the child's views being considered by the judge, we have a number of questions with respect to that. The first question comes in the first clause where you say "whenever the child is able to understand the nature of the proceedings," the obvious question becomes: How do we know what the child understands and doesn't understand, and how do we go about finding that out? To envision something along the lines of a voir dire such as in a criminal proceeding where the judge would have a separate hearing as to whether or not the child understood the nature of the proceedings; or are we thinking of something along the lines of the kinds of tests that are used in the criminal cases: Is the child able to understand the nature of the oath?

The second point we question is who is to decide or who is to give the list of alternatives that are available to the judge. Is that something that the judge would be creating a list of his own? Is this something that counsel would be making representations on? Is this something that perhaps should be codified?

We question the use of the word "shall" in that subsection. Why are you making this a mandatory test? Why not a discretionary test? Make it a test the judge may administer or may have resort to if he chooses.

The last question of course is, in our mind, the most important question, which is: How will these views of the child be ascertained? Are we suggesting that this be an open court? Are we suggesting that it be in the judge's chambers? If it's in the judge's chambers, will there be a transcript; will there be a court reporter; will counsel be present; will counsel be able to ask the child questions? Or are we simply looking at a situation that we say if the child's able to understand the nature of the proceedings and the judge considers that it won't be harmful to him, that we treat that child as an ordinary witness and examine him and cross-examine him or her, and foilow the usual process. So we have a lot of concerns about that.

The last concern with respect to that, of course, is: Will the parties be present if the child is to be interviewed in the judge's chambers? If the parties aren't going to be present, then why should their lawyers be; and if the lawyers should be present, why shouldn't the parties be?

With respect to examinations of the parties, 1.3(1), our concern is that there should be some guidelines as to how these particular examinations will take place, when they would be ordered, and under what circumstances.

The next question becomes: What will be done with these reports; who will have the opportunity to use them? Will they automatically be evidence? Will they be tendered in evidence by either party? Whose witness will the maker of the report be? Will it go in and be seen by the judge only; will it be seen by the parties?

I think you should know that at this particular time, we have home study reports that are prepared by the Family Court. They're handled in a number of strange ways, as well as the ways that we would all think that they would be used. Some judges, for example, will take those reports and refuse to release them to counsel; will keep them in their own private file; will read the report, using it as a means of testing the credibility of the parties, to be opened in the middle of the trial or towards the end of the trial as some sort of surprise package to be waved around and shown to one lawyer or the other, or brought into the record.

There aren't guidelines at the present time and, as a result of that, we think that there should be guidelines. The question becomes: If the report is ordered by one judge, does that judge retain jurisdiction over that report to allow it to be released to the parties? Can either party make such use of the report as they wish? Who will be the one to subpoena the report if they cannot consent upon it going in? What will be the consequences of failing to accept the whole process?

We note that in Section 1.3(3), there is a section that allows the judge to draw any inference. The question becomes in that case: Is that going to be the only consequence, will that be the only sanction, or will that party be liable to contempt? Will that party be liable to the kind of charge that could be brought under Section 116 of the Criminal Code? If not, if that's not what you want to happen, then it may be that you have to say it.

Going back to Section 1.3(1), we have a question as to what the effect of the word "social" . . . "or other examination of the child or a party." That could lead to very wide examinations that are of really no real relevance to the proceeding at hand and may, in fact, infringe upon various parties' rights. We're unhappy with the word "other" in there, and we're not too sure what you mean by "social," and think that it may create some difficulty.

With respect to 1.3(2), we don't see that this subsection is in fact a necessary subsection, but if you're going to keep it, that there should be something in there to the effect that it should only be ordered if it will not be a cause for further or undue delay. We don't want to see the situation where in the middle of a trial, one party says, well, I'd like to have this kind of report or that kind of report, when really what that party's looking for is a three, four month, or six month delay. So we would like to see that as a part of the test that the judge takes into account when deciding whether or not to order that report.

MR. CHAIRMAN: Mr. Fishman, we have some 25 other presentations. I wonder if you could help this committee by condensing your remarks so we could get on with it.

MR. L. FISHMAN: I'll do my best, Mr. Chairman.

MR. CHAIRMAN: Thank you.

MR. L. FISHMAN: With respect to Clause 4 deleting all the words after "relationship". We have no objection to that. We see that as a positive move. Deleting conduct is one of the considerations.

Clause 5 is a section which creates a new bundle of rights that we are not in favour of. You've created a situation where five years of cohabitation will create a situation that the parties can use the act as if they were married. We still believe that there should be a distinction between marriage and non-marriage, and that the parties can have remedies such as they now exist in the act, or as they may find in private contract. We have a question as to what the phrase "substantially dependent" will mean and how it would be interpreted.

With respect to Clause 6, we're happy that you've created a substantial fine for non-disclosure. As I indicated previously we'd like to see something similar in The Marital Property Act. In addition we would like to see a phrase in there "without reasonable excuse", which will give a party an out if, in fact, circumstances are beyond their control and they cannot make the proper financial disclosure. We'd also like to see a minimum penalty to encourage judges to, in fact, give a penalty of some kind. It doesn't have to be a large penalty but certainly a minimum penalty is something that will give a judge the idea that the Legislature wants him to take this particular provision seriously. We would like also to see provision that would create a continuing offence for a continuing failure to provide the information once there has been a finding that the information has not been provided as required.

We'd like to see also added to Section 6 of the act, in Section 6(c) where it calls for itemized statements of each other's debts and liabilities, if any, we would like to see words that would include assets, and marital debts in that disclosure.

We're in agreement with Clause 7. We feel that is a useful clause to the payor spouse, who is paying on a voluntary basis, and will want the right to get the benefits of income tax deduction.

With respect to Clause 12, dealing with the settlement provisions, the offer of settlement provisions we would like to see the words added in Subsection 5, "and the completeness of the financial disclosure, at the time the offer was made," so that a judge in deciding that there was an appropriate offer can also decide that the party was in the position to appreciate that offer for what it was worth.

We think that there should also be provision that the sealed offer would not form part of a transcript, for appeal purposes, unless costs were appealed, and in that case we would like to see the offer of settlement resealed so that the Court of Appeal will be in the same position as the Queen's Bench with respect to assessing costs on the basis of an offer which has been made. In addition we would like to see a situation clarified so that the parties, not only the lawyers, will sign the offer so that you will not run into the situation where a client will say - my lawyer bound me and he wasn't really following my instructions. I know that we all expect lawyers to act on instructions but not all clients, when the case is over, feel that their lawyers have, in fact, acted upon their instructions. Enough of us know that we run into those clients who come to us after the case is over and said - well, my lawyer didn't do what he was supposed to, or he said this, or he said that. So we'd like to see that possibility removed.

With respect to Section 8(6) of the act, we think that this is a rather arbitrary provision, and we think that there are numerous circumstances in which maintenance ought to continue after a remarriage. Not every marriage, or every second marriage, will be a reason why maintenance should be curtailed. For example the parties may have made an agreement that will call for periodic payments to extend for a certain number of years, and that perhaps is being done either as a way of saving money on income tax, or as a way of paying out a lump sum where the lump sum is not available maybe to have an asset form the capital basis of paying out that periodic sum, or whatever.

As a result of this provision, you will be creating a disincentive to marriage, and encouraging people to continue living common law, because they will continue to be receiving maintenance by virtue, say of a decree nisi that they would automatically forfeit upon marriage a second time. Perhaps the situation ought to be that the law would create an opportunity for a show cause hearing upon a second marriage, or even upon the resumption of cohabitation.

The present Section 21, I believe, allows for an application to vary a discharge to the order if the court thinks it fit and just to do so. If you don't think that's broad enough then perhaps you would add a section that would say that in and of itself would be a circumstance entitling the party to come back to court for review.

With respect to Part II, the Child Status Provisions. As I indicated previously we believe that this is material that belongs in a Child Welfare Act.

Section 11.2 calling a child - a person is a child of its natural parents, we question whether or not this relates to 11.9 which is your paternity section and will those two sections relate?

We question in Section 11.3, well it's our suggestion, that this should include parents who stand in loco parentis as I indicated previously.

Section 11.4, in our view, should be of retroactive application. It seems primarily to deal with the situation where a party might have made a will and have neglected to change it when their circumstances change. It's our view that if people want to change their wills let them do it, that the legislation shouldn't be doing it for them. A will does speak from death, and it's presumed to state the intention of the maker as of the time that they've died. The Testators Family Maintenance Act doesn't cover all of the circumstances in which a dependant might want relief and by making these amendments retroactive we think that you'll be covering some of that ground.

In Sections 11.5, and 11.6 we question why you have "any person having an interest" as being the applicant, it seems to us that it ought to be a narrower group of people, or a smaller class.

With respect to 11.6(5), it's our position that if the presumptions, in fact, do conflict then there should be no presumptions at all.

In 11.6(6), we don't know what you're referring to when you say the subsection (6) and (7). We can't find the Subsection (6) that you're referring to.

With respect to Sections 11.6(8), we're unsure, or we disagree, with the position that you've taken than an adoption application should be held up if anybody's making an application for a declaration of paternity. It would seem to us that the hearing could continue, and if that's a necessary application to be heard, that it would be better heard at the same time, rather than delaying the adoption process indefinitely to have this declaration hearing take place.

In our view the policy considerations in favour of quicker adoptions are of greater importance than the policy considerations in relation to a declaration of paternity by someone who would not normally be involved in the adoption process.

With respect to blood testing in 11.7(1), we think that the act should, in fact, include testing of the child. It's not particularly clear that the child will be one of the people tested by the wording of this particular section. We don't understand why you want to do it by giving leave to the party to obtain the test, why not simply direct the parties to submit to testing, and in that regard Mr. Carr's recommendation No. 5, in his report, was a recommendation that we supported and the wording that he had in his recommendation was acceptable to us.

We presume that Section 11.8(1), will have the words, or is intended to have the words "of the law of Manitoba" as part of it. We presume that you're not intending to enact for the rest of the provinces when you say that it should be recognized for all purposes.

With respect to 11.8(2), we are of the opinion that you've got the order mixed up here. It should be that the order should not be discharged until you've had the hearing. Well, you've got it - on application the judge will discharge the previous order and hold a new hearing. It seems to us that the hearing ought to be held before any orders are discharged effecting the status of the parties.

We see no reason why this particular situation should be a situation different than any other application where new evidence comes to light, and it's our opinion that the common-law tests as to new evidence coming to light ought to be the tests that are used in these particular situations; namely that the evidence could not have been obtained at the time of the hearing and secondly, that it's practically determinative of the issue before the court.

With respect to Section 11.9, our major concern is in subsection (e) where you use the phrase "relationship of some permanence." That's a phrase that to us is rather meaningless and potentially very dangerous, and we would like to see something more definitive in that subsection.

With respect to 11.14, we think that there should be an additional subsection (c) to the effect that where the respondent has not attorned to the jurisdiction, the order should be provisional only subject to confirmation. And a subsection (d) that would go with that order saying whether or not the respondent had, in fact, attorned to the jurisdiction.

Section 11.15(2), we consider to be very difficult to understand and probably doesn't say clearly what you want it to say. We're not exactly sure what you want it to say in fact.

Section 11.16, in our view belongs in The Evidence Act and doesn't need to form part of this act and would be better in The Evidence Act.

The next sections that we deal with are the ones dealing with the extra-provincial findings of paternity. We would like to see those completely taken out. That's the business is to find in 11.11(b) where finding a paternity is made incidentally in an extra-provincial proceeding. That's something that concerns us, that the courts of Manitoba would be dealing with and would be bound by an incidental decision made by a court in another province where the issue was not squarely before that court and where the Manitoba court would not be in a position to determine the validity of that finding. That sort of reasoning applies to Sections 11.17, 11.18, 11.19, 11.20; and in 11.21, we would simply delete the reference to extra-provincial findings of paternity.

Clause 16, which affects Section 12 (4) and (5) of the act, we think ought to have the words after "a person who stands" add the phrase "or has stood" in loco parentis to a child. You have the situation where upon separation of a person who has, in fact, been standing in loco parentis to the child would then be found as no longer standing in loco parentis to the child because he's no longer providing the support and living with the mother, for example.

With respect to the amendments to Section 12(5), we have a number of difficulties. You've created a test that is very much subjective and the factors that would go to create a situation where a child would, in fact, be entitled to continuing support which may, during cohabitation, be factors which are reasonable to consider after cohabitation are perhaps no longer reasonable to consider. People change in time and they certainly change after such things as separations and divorce.

It's our view that the child should, in fact, be continuing to live with one of the spouses. In terms of the support test, we would prefer to see the test articulated in The Divorce Act adding perhaps the situation of a child's education as being something entitling that child to continuing maintenance after the age of 18. That's more or less the way that The Divorce Act test is now interpreted in any event.

With respect to Clause 17, we have the question of when. The question is where the parents have never cohabited after the birth of the child, the parent with whom the child resides has sole custody and control of the child. Our question is when is the child's residence with the parent operative? For example, you have the situation of a child apprehended at birth, who at the end of the order - or maybe there is no order - will be coming out of the agency's care; the question is, which parent will he go to then? You've left a gap there. We would prefer to see a situation using the phrase "has habitually resided."

We would like to see in Section 14.1(2) after the phrase "the court may order that," the words, "subject to such terms and conditions as the court deems convenient and just," and that subsection (d) would read, "that the party who is not given custody of the child may have access." It shouldn't be a situation that the non-custodial parent automatically has access.

With respect to 14.1(3), we would prefer to see this completely taken away and go back to the situation of where you're considering the best interests of the child as the only test. In this particular situation, you're asking for more evidence that may not necessarily be

related to the best interest test and if there is evidence of the parents' ability or inability, then that is something that would bear upon it. We see this as being something additional and only adding confusion.

Section 14.1(4), we quarrel with the words "same right as the parent granted custody." We would like to see the non-custodial parent have rights, have the right to apply for these things, and to have the judge order these kinds of things; but we don't believe that the non-custodial parent should be in the situation where they have the same rights. Having those rights carries with it the right to generate those reports, so the non-custodial parent would be able to say, well, I want my child to be tested by this person or that person and in many cases the testing in and of itself, is not something that is going to be in the child's best interests.

It's further our view that these reports should not be available to the non-custodial spouse, unless, in fact, they are available to the custodial spouse and should only be dealing with reports that are in fact in existence.

That concludes my remarks on The Family Maintenance Act.

MR. CHAIRMAN: Mr. Mercier.

MR. G. MERCIER: Mr. Fishman, thank you for your remarks. I have one question on Page 2, Section 1.3(1) and you referred to it in part, whereby a judge . . .

MR. L. FISHMAN: I'm sorry, I've lost which one you're talking about.

MR. G. MERCIER: Page 2, Section 1.3(1) . . .

MR. L. FISHMAN: Right, okay, "Examinations of party." Yes.

MR. G. MERCIER: You referred to it in part, but the fact that "a judge may order a psychological, psychiatric, social, medical or other examination of the child or a party." It seems to be very, very broad and almost a frightening kind of power, in the sense that this kind of order could be made that certainly may, in part, be very unrelated to the issue. Do you have serious concerns about that section?

MR. L. FISHMAN: Well, we're concerned about "social" and "other." Those are words that don't lend themselves to ready definition, as far as we can see, and creates a situation that could result in abuse. But we do realize and recognize that these reports are often useful and necessary and if you cannot get a court to order them, you often cannot obtain them.

HON. R. PENNER: A couple of questions. You raised a question originally about the definition of custody and I thought you said something about differentiating custody from guardianship. Are you not familiar with the use of the term in a parallel way in Bill 66 where, in fact, that's exactly what we do. We differentiate custody from guardianship by referring specifically to custody, with respect to a parent of the child; and guardianship means a person other than a parent of a child. This is exactly what we've done and that's why those words appear.

MR. L. FISHMAN: I am familiar with that. The difficulty is that The Child Welfare Act in section - I've forgotten the number, it's in the hundreds - defines some of the rights and duties of a guardian. You don't have any of that for custody and, in fact, in The Child Welfare Act as it now reads, the definition of guardian includes custody. Now, if I recall, one of the amendments takes out some of those words but doesn't do the whole job, if I recall correctly. I'm referring to Section 114 which speaks of the authority of the guardian.

HON. R. PENNER: But you would agree, would you not, that it is not usual; in fact it would be exceptionally unusual, to have definitions include declarations of substantive rights. You would define in a particular way and then substantive rights flows later in the legislation from the definition.

MR. L. FISHMAN: Sure, I have no objection to the process. What we're talking about is making sure that all the information, all the rights and obligations are there and we don't particularly see that in these particular definitions.

HON. R PENNER: Now I want to make sure that I understand what you're telling us, with respect to 1.2 about the child's views. Since this already in The Child Welfare Act and is brought into this act for reasons of consistency, is it the position of the subsection that the question of the child's views should be removed, from both The Child Welfare Act and this act, or that it should remain in The Child Welfare Act and not in this act?

MR. L. FISHMAN: Firstly, it's in The Child Welfare Act only in the child protection sections - isn't that correct?

HON. R. PENNER: No, also in the custody sections of The Child Welfare Act.

MR. L. FISHMAN: I'm not sure where.

HON. R. PENNER: 107(3), Mr. Fishman.

MR. L. FISHMAN: Not the way it reads now.

HON. R. PENNER: What I'm pointing out is that the best interest test is in The Child Welfare Act in a couple of places but it is particularly for purposes of our discussion in 107(3) and we have, in a sense, a parallel provision here and I want to make sure I understand your point when you, in a sense, were critical of 1.2.

MR. L. FISHMAN: Are we talking about two different things? Are we talking about the best interest tests or the child's views?

HON. R. PENNER: No, I'm sorry, we're talking about the best interests test in 1.1.

MR. L. FISHMAN: Okay, I'm sorry.

HON. R. PENNER: I may have misled you, I may have said 1.2, I meant 1.1.

MR. L. FISHMAN: We're strictly in favour of the best interest tests. We would like to see all other considerations fall by the wayside or certainly be subsidiary tests.

HON. R. PENNER: Now to clarify the second question, child's views to be considered, which are in 1.2, I'm drawing your attention to the definition section of The Child Welfare Act, 1(a.2)(6): "The views and preferences of the child where such views of preferences are appropriate and can reasonably be ascertained, as used in conjunction with the best interests of the child."

MR. L. FISHMAN: Yes.

HON. R. PENNER: In The Child Welfare Act.

MR. L. FISHMAN: We're not objecting to the question of obtaining the child's views. The question becomes, how it's to be done. That's our concern. Children's views should be considered but, not determinative of the issues certainly, but the real concern that we have is how it will be done so there's a balance between the fairness to the litigants and the emotional welfare of the child.

HON. R. PENNER: I think I have one final question, Mr. Fishman, because again I want to make sure that I have your views clearly. You did talk about some problems you have with 8(6) of the bill, Maintenance Ceasing Upon Marriage. Is it not the case that simply declares the law as it presently is and, if I'm right in that statement, are you opposing the law as it presently is and have some other position that you would advocate in its place?

MR. L. FISHMAN: I'm not sure that's the law as it's presently applied. It may be that remarriage is a consideration, particularly in divorce situations, that would lead a court to say there's been a change of circumstances and that makes it a fit and proper case to change that order, but it's not an automatic situation. It is often the situation.

HON. R. PENNER: Finally, what is the situation under The Family Maintenance Act?

MR. L. FISHMAN: The Family Maintenance Act, of course, doesn't apply to divorced people.

HON. R. PENNER: No, but isn't the statement with respect to maintenance ceasing upon marriage, as it is in 8(6) here, isn't that declaratory of the law as is?

MR. L. FISHMAN: Sorry, what section of The Family Maintenance Act are you referring to?

HON. R. PENNER: This section deals with questions arising under The Family Maintenance Act and obviously we can't alter the divorce law, and try and deal with the divorce law. You'd agree with that?

MR. L. FISHMAN: Right.

HON. R. PENNER: Okay.

MR. L. FISHMAN: But parties are still entering into contracts, based on this law, that are subsequently being adopted or endorsed by a Queen's Bench judge on a divorce. We wouldn't want the law to say that, if there is a second marriage, that you're automatically effecting that Queen's Bench Order which may or may not directly incorporate a separation agreement entered into by the parties. Parties may have entered into an agreement that the court may say, well that's fine, let this agreement go and the agreement will be operative, without necessarily incorporating those provisions into its order; and the parties would then be able to use this act as a way of nullifying their agreements.

MR. CHAIRMAN: Ms. Phillips.

MS. M. PHILLIPS: Thank you, Mr. Chairperson. In Section 2(3), Mr. Fishman, you said that your association was not in favour of this section at all?

MR. L. FISHMAN: You're speaking of the . . .

MS. M. PHILLIPS: The cohabitation section.

MR. L. FISHMAN: No, we're not.

MS. M. PHILLIPS: It seems to me this section has several different - I'm not quite sure what you call it - caveats on whether support is paid, such as where the one person is substantially dependent and also with the time frames. Even in those situations your association is not in favour of support or maintenance being paid to that individual? I'm talking about time frames of when they apply, etc.

MR. L. FISHMAN: The one year to apply; that's the way the act now reads in relation to the non-married couples that it does apply to, they have to apply within one year. The five years certainly is a lengthy period of time, but what we see happening here is that you are creating a marriage where there is no marriage and that we are taking the position that marriage does mean something after all, or should mean something after all, and that parties who choose not to marry should choose to set up their arrangements in some other way. They have the law of contract available to them; they have some remedies in the law as it now stands. If there are children involved, they have the right to seek relief under The Family Maintenance Act. We simply see that this is a situation that erodes the concept of marriage.

MS. M. PHILLIPS: Mr. Chairperson, in 8(6), you said that this section, in terms of maintenance ceasing upon remarriage, was arbitrary and that there were some circumstances such as where property settlements were made over a period of time or whatever. Are you confusing those kinds of situations with support and maintenance? We're saying just the support and maintenance. In those circumstances, would not those property payments continue? All that would end would be the support and maintenance.

MR. L. FISHMAN: I understand what you're saying. I'm confusing them in the sense that they are confused

all the time, that people don't always divide their settlements into, this is the property settlement; this is the maintenance settlement; this is the children's settlement and this is the pension settlement. They often take a global view of things and say, well let's do it this way; you'll pay X number of dollars maintenance for so long. As a result, styling it as maintenance may put it into the parameters of this act and may, in fact, work out to be something that the parties had not, in fact, contracted for.

MS. M. PHILLIPS: I have a question on one more section, Mr. Chairperson. Mr. Fishman, in Section 14.1(2)(d) and 14.1(4), you're objecting to rights that we're suggesting the non-custodial parent should have in terms of knowledge about what his or her child is doing.

MR. L. FISHMAN: No, we're not objecting to the question of that spouse having the knowledge. We are objecting to that spouse having the right to generate the reports. By saying that party has the same right as the custodial parent means that party has the same right to have that child examined by whomever they want, subjected to whatever kind of testing they, as a good parent, would want their child to be subjected to. We see this as an opportunity for the non-custodial parent to interfere with the rights of the custodial parent. We have no objection to these reports being made available if they are already in existence, and to some extent, we don't object to a non-custodial parent having the right to apply to the court to have these sorts of things done; but we don't want to see a situation where the non-custodial parent can interfere in the custodial parent's day-to-day life by interfering with the child's schooling and medical and other kinds of situations.

MS. M. PHILLIPS: Through you, Mr. Chairperson, in the word that's used here in 14.1(4) where it says, "to receive," you're the lawyer, Sir, I'm not a lawyer, but to me to receive a report is different than ordering a report.

MR. L. FISHMAN: Well, it talks about retaining the same right, retain means to keep what you already had or what you have. If I have the right to receive something, then I have the right to ask for it.

MR. CHAIRMAN: Thank you. Proceed with 66, please.

BILL NO. 66 - THE CHILD WELFARE ACT

MR. L. FISHMAN: With respect to Clause 1, we, in fact, don't have any comment on the definition of guardian. Our concern is, of course, that as stated previously we would like to see in loco parentis parents be included in a definition of custody, and, of course, we'd like to see the same definitions in both acts or having simply one act.

In addition to the other amendments to the best interest section that I mentioned previously, we would like to see an additional section being that one of the considerations of best interests would be the right of the child to grow up with his/her siblings.

With respect to Section 1.4(1), the section opening the proceedings to the media who would like to see a clause empowering the judge to make an order of non-publication in the same kind of way that he can in a criminal trial. If there is to be publicity, we would like to see a situation where a judge can make an order of non-publication.

Section 1.5(1), application for access by anybody appears to us to be a section that's again an invitation to litigation, something that will not be in the best interests of the child. The way this section is now worded, it could be a teacher, a neighbour, a friend, an uncle, a cousin, an aunt, a grandmother. It could be anybody who has never had a relationship with that child. It does say a person who has had - well, it's disjunctive - or ought to have the opportunity, gives too many people the opportunity to interfere in the lives of a child and his parents. Once access would be obtained by the neighbour, the teacher, the doctor, the friend, that could then be used as a way to interfere with the parent's mobility, the one that has custody of the child.

We would like to see the word "or" changed to "and." We would think that it ought to be a test that the person has had the access in the past, and ought to continue to have it in the future. There shouldn't be that disjunctive word. There should be the conjunctive word "and."

Why are you using the phrase "opportunity to visit?" We had, in fact, preferred Mr. Carr's recommendation No. 28 where he used that phrase that we didn't like previously, "the relationship of permanence." We'd prefer that to the "opportunity to visit."

In any event, we think that this section ought to be created in such a way that it's clearly an exceptional situation. It's not the sort of situation that should be on the same level as a parent applying for access to his child. It ought to be something that is discouraged generally. Certainly, there are exceptional cases where a grandparent has been cut off from seeing a child that he/she has seen over the years, but other situations that this section provides for would be not nearly so important, and might serve as an opportunity to disrupt the custodial parent's ability to look after the child. We see this as an opportunity for the non-custodial parent to harass the custodial parent through the use of his surrogates whoever they may be.

With respect to Section 1.5(2), our question is, does this apply to an adopted child whose parent has no visiting rights. — (Interjection) — 1.5(2), you're saying "no ordered granted under Subsection 1 shall be effective while the child is residing with both his parents." Now that could be his adoptive parents and it may create a situation where the non-custodial parent, either through himself or through his/her agents or surrogates, obtain access, and does it create a situation where the non-custodial parents, namely the paternal or maternal grandparents, can they apply for access if the child has now been adopted into a new family. It would seem that's a situation that you don't want to create, particularly where you have in The Child Welfare Act, a situation where you've got access for a non-custodial parent only after an adoption. That's the only situation where access is statutorily provided for. In this situation you would create a situation where a non-custodial parent could use either this section or have his surrogates, namely grandparents or friends or whatever, applying for access to the child.

With respect to Section 15(2) of the act, a minor point, we think that the word "clear" should be defined in this act. We shouldn't be having to go to The Interpretation Act or some other place to determine what five clear days means. It's certainly something that should be very clear and something that we want to have no mistake about.

We question the time period. Where is the magic in the five days for the surrender in two days for the placement? Why not 14, why not 21? We note that other provinces such as Ontario, for example, make the time period 21 days, Manitoba appears to have one of the shortest waiting periods, if not the shortest.

It's our opinion that an appropriate form should be generated with respect to voluntary surrenders, a form that would set forth the surrendering parent's rights, and it would also have a clause or a waiver that would show that the person has obtained independent legal advice. The Child Welfare Act, as it now reads, calls for a putative father, before signing an agreement that he's a father of a child and has an obligation to support that child, to get independent legal advice. We think that this is a more important situation for a person to have independent legal advice, and it shouldn't be too difficult to generate that sort of form.

With respect to Section 15(3), again our question is why two days? It appears to be a short period of time that doesn't give a party enough time to make up their mind to get proper legal advice, or if they have in the first instance obtained the independent legal advice that we have asked be provided, two days isn't enough time for them to decide that the lawyer that advised them the first time around didn't know what he was doing, and that someone else did and they wanted some other advice.

With respect to surrenders, it's our view that the natural father ought to be served with notice of the surrender if he is known and if he can be found.

With respect to Clause 6, amending the provisions, providing if one child will be found in need of protection, we don't understand the rationale or the phrase giving the age of two years in Subsection 16(f). We think that the reference to age should be deleted as it serves no practical purpose.

With respect to Clause 10, the amendments to Section 24, we were very gratified to see these amendments. However, we do have some problems with them. Taking the agency's position for a moment, we would think that given the four juridical days to provide their access plan will put them in a situation of not having enough time to ascertain the facts or to determine what, in fact, would be the best access for the child.

What we would like to see is a situation where on the first returnable date which, as the act now reads, is 30 days after the apprehension, that the agency would then present its plan or, in the alternative, that the parent would have the opportunity upon application to force the agency to give forth its plan within four days of the application for access.

However, we are very much in favour of provision for access by parents of children who've been apprehended. At the present time, as you know, there is no provision for that, and the parents and the children are at the whim and at the resources or whatever of the agency.

If the agency and the parents cannot come to an agreement on the question of access, we then have the problem of how will access be determined. It seems to me that the agency is going to generally take the position that they're going to want to put all the facts before the court if they've taken the position that they don't want the parents to have access because of the nature of the abuse or whatever, or that the parents are going to use that access as an opportunity to undermine the agency's case by forcing, say, a child to retract allegations or do something of that kind. You're going to have a situation then where the process which is already very lengthy is going to be lengthened because there's now going to be preliminary skirmishes over access.

When the section refers to the agency having to bear the burden of proof that any limitation of access is reasonable, the question becomes: What are the limitations that the agency can plead? Can they plead that they don't have enough social workers to accompany the children on these visits? Are you, in fact, setting up a situation where one of the limitations would not be that the access be off the premises?

At the present time, most access that the agency grants to parents of children under apprehension appears to be access on the premises of the Children's Aid Society between the hours of nine and five, or whatever the hours of the agency are, and between Monday and Friday. It's important that parents have access to their children, but it's also important that the resources be available in order for that access to take place.

We would like it to be that if, in fact, one of the limitations you're envisioning is that the access will be on Children's Aid's premises, that, in fact, you give Children's Aid the facilities and the money so that they can do it. Right now the situation is they've got people who work from Monday to Friday and then they have standby workers on the weekends and in the evenings, and people who work are working during those times and simply can't make themselves available to see their children when the agency has the ability to provide them.

Generally speaking, they have to send someone out to pick up the child from the place where the child is living, whether it's a temporary home or a group home or a receiving home, bring them to the agency and then have someone sitting there monitoring the visit. This is something that we don't particularly see as being advantageous to the parties of the children, but that's a situation that now exists. If you're proposing by this legislation to have that continue or not continue, then it seems to us that the legislation is going to have to be a little bit more clear as to what you mean by the limitations of access and how those disputes are going to be settled.

Then, of course, the ancillary question is the question of resources being available to make this a real possibility. Not only is this a problem with parents who wish to have access to their children under apprehension; it's also a problem for parents who are having difficulty with each other, where one parent is claiming that the other parent is abusing the child, that the access should be supervised, and perhaps the judge may agree but there's nothing he can do. He either has the choice of saying no access or access will be supervised at the home of the custodial parent.

There are no facilities in the city or in the province for parents who are separating or having custody

disputes to have access to their children under supervised conditions, perhaps in the company of a social worker or simply in a facility that's amenable to a parent visiting his or her child.

With respect to the amendments in Clause 13, Subsection 25(9), we would like to see the Examination for Discovery kept. In Children's Aid cases, the real problem that we have here is again a resource problem; namely, that there aren't enough court reporters. If you want to get an Examination for Discovery and you're not prepared to do it on an evening or a Saturday, you're looking at at least a two-month wait with the government reporters and most of the private reporters. So that at the present time is a cause of severe delay, and I think if this committee has any power over it, you would be doing the profession and the public a good service if you could provide them with more court reporters and a situation where they could set their examinations something less than two months away.

We would like to see not only the Examination for Discovery, but we would like to see the pre-trial procedures that are now contained in the Queen's Bench Rules available in child welfare proceedings. We see no reason why the usual tools of litigation are not available.

With respect to the question of particulars, you've set up the sections so that the particulars will necessarily be filed. This is something that we think should be in the discretion of the recipient of the particulars, as the agency can very well put together as particulars in such a way that may be accurate, but may also very well kill the case for the parent. If the judge has got the particulars, he's read the particulars, and although we know that judges are able to put things out of their minds because that's what they're supposed to do if they're not in evidence, we also know the vagaries of human nature and the damage that that kind of thing will do if it's there.

The last point becomes with respect to that: What will be the penalty for the failure to provide adequate particulars? The way things now go, it looks to us that we will apply to the agency for better particulars; they will give us what they consider to be better particulars; we will then have our trial and perhaps the particulars will be shown to have been inadequate and the judge will say, well, so what! They almost never award costs in child wardship proceedings, so that is no real deterrent.

With respect to 25(11), cross-examination of the parents, as far as we're concerned, the Queen's Bench Rules are adequate at the present time, allowing either side to force the other side to testify and to be cross-examined on the 14 days notice.

With respect to section 32(2), we would like to see a provision allowing the Court of Appeal to extend the time to appeal if it's an appropriate case. As we understand it, the Court of Appeal is now saying that their particular rules bind them to the time limit set forth in The Child Welfare Act and, as a result, they are powerless to extend time where the application for appeal has not been brought within the time set forth in The Child Welfare Act, and that's an anomaly that we feel is detrimental.

That concludes my remarks on these bills.

MR. CHAIRMAN: Thank you, Mr. Fishman. Any questions?

Mr. Penner.

HON. R. PENNER: I have no questions, but I'm wondering, Mr. Fishman, I may have missed it; but did you submit a written brief?

MR. L. FISHMAN: No, we haven't. We haven't had the opportunity.

HON. R. PENNER: I guess time is running out on things. If there is any opportunity for you to present your points, even in point form, it might be helpful, if I might make that suggestion.

MR. L. FISHMAN: I can do that if you can give me an idea of when your deadline will be.

MR. CHAIRMAN: Deadline.

MR. L. FISHMAN: "When are you going to need it?" is my question.

HON. R. PENNER: Yesterday.

MR. L. FISHMAN: Well, is this going to be going into the House?

HON. R. PENNER: I guess it would be better at this stage - just looking at the time - pick it up from the transcription. I hope that it has its usual clarity.

MR. CHAIRMAN: Ms. Phillips.

MS. M. PHILLIPS: Thank you, Mr. Chairperson.

Mr. Fishman, I only have one question. Section 15(2), did I hear you right? You're suggesting that the five days is too little, that we should be raising that where someone is obliged to care for that child for a longer period before they can give them up for adoption?

MR. L. FISHMAN: It's not so much that they have to care for the child, but generally in this kind of situation what happens is the Children's Aid takes the child at birth. They wait the five days and then come to the mother and say sign the agreement.

The resources are available if someone doesn't want to care for the child, but what we do want to see is that people are not making decisions too quickly ill-advisedly. Five days appears to us to be an unseemly short time.

MS. M. PHILLIPS: You're suggesting the nine months prior is not enough . . .

MR. L. FISHMAN: No, no. Two or three weeks after birth is probably enough, but we would also like to see the mother have independent legal advice. That will solve a lot of the problems.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Mr. Fishman and others, there will be some amendments brought in with respect to 15(2), 15(3), so that the total elapsed time from birth to when

adoption can take place will in fact be 14 days but still with the requirement of the two juridical days.

MR. L. FISHMAN: The two days is, as I've said, also a short period of time in which to have something done, in which to get some new advice or some other advice.

HON. R. PENNER: Thank you.

MR. CHAIRMAN: Thank you, Mr. Fishman.
Susan Devine.

MS. S. DEVINE: Good evening, Mr. Chairperson, members of the committee. I appear this evening on behalf of the Manitoba Association of Women and the Law. Our organization is an organization of persons who are concerned with legal issues, particularly as they affect the status of women. We have about 40 active members, most of whom are lawyers, law students and a large proportion of our membership are women.

I have some comments to make with respect to each of the acts and I have some written comments that I will be able to provide to the committee members tomorrow. My apologies for not having them ready tonight, but there are some corrections that have to be made in the text.

Dealing firstly with Bill 64, the Act to amend The Marital Property Act, our membership generally agrees with the observations that Judge Robert Carr made in his report on Family Law regarding the operation of The Marital Property Act in the Province of Manitoba. We feel that for the most part the act is working well and that there is no need at present for the province to change from the deferred sharing scheme of our legislation to a scheme of instantaneous sharing or community of property. We do, however, recognize that there are some minor improvements to the legislation that could be made and we therefore offer the following comments on Bill 64.

With respect to Clause 1, we disagree with the proposed amendment which would include "jewelry" in the category of shareable family assets. We believe that jewelry is more analogous to the category of personal apparel and should be excluded from an accounting and equalization between the spouses.

With respect to Clause 2, we suggest a proposed amendment which would provide that all assets acquired in contemplation of marriage would be shared by the parties to the marriage regardless of the marital status of the purchaser at the time of acquisition, so long as the asset was not acquired while the purchaser was cohabiting with the former spouse. In that respect, we adopt the remarks of the previous speaker with respect to the problems with the wording of the section as drafted. We think that the test should be whether they were acquired in contemplation of the marriage in question.

With respect to Clause 3, we agree with this amendment and also with Clauses 4 and 10 which is related to it. We feel that these proposals will provide and make explicit the significance of debts in an accounting and we agree that debts incurred with respect to non-shareable assets should not be included in the accounting and that debts referred to in the accounting should be those in existence as at the valuation date.

With respect to Clause 5, we agree with the proposal that the act be amended so as to provide that spouses have the right merely upon application to have an accounting between them, and that there be no necessity for a particular triggering event such as marital breakdown in order to have that accounting take place.

We also have no objection to changing the terminology in Sections 12, 13, and 14 so as to have consistency of terminology throughout the act, but we question whether the proposed changes to the sections as they are drafted will make explicit enough the overall intention of the legislation that there continue to be an explicit 50-percent sharing. For example, does the term, equalization of assets, as used in those sections, and complete equalization suggest clearly enough that this is the division that is to be continued?

With respect to Clauses 6, 7 and 8, we agree with the notion that under The Marital Property Act the court continue to have power in limited cases to very equal sharing, but we would recommend, particularly in light of the recent Supreme Court decision in the Leatherdale case in Ontario, that the discretion to vary commercial assets should be narrowed even further. We would suggest that perhaps enacted in wording similar to the discretion to vary family assets in Section 13(1). We agree with the recommendation that conduct should be specifically eliminated as a relevant consideration and as that is expressed in the proposed Section 13(3).

With respect to Clause 11, we agree that this particular proposed amendment is necessary. As at present there is an anomaly in that if Marital Property Act proceedings are not taken in conjunction with Family Maintenance Act proceedings there is no explicit provision for financial disclosure.

We again would agree with the remarks that Mr. Fishman has made on behalf of the Family Law Subsection with suggestions as to appropriate forms that could be used. We would also, as Mr. Fishman has indicated, recommend that consideration be given to including jointly-owned property within the parameters of The Marital Property Act. We note that was a recommendation of the Carr Report, but that is not one that has been adopted in this particular bill.

Those are the remarks I have on The Marital Property Act, Mr. Chairperson.

MR. CHAIRMAN: Any questions?
Thank you very much.

MS. S. DEVINE: Okay, dealing then with The Act to amend The Family Maintenance Act. The Manitoba Association of Women and the Law believes that it is desirable to have consistency and clarity in the legislation governing family relations and children. We are supportive of the idea of one general Family Relations Act which would incorporate all of the relevant legislation regarding these issues.

Since the government is not proceeding in that direction at this particular time, we recognize the need to rationalize and make consistent the provisions in The Family Maintenance Act, and The Child Welfare Act, and welcome the fact that the government is attempting to do that by the proposed amendments.

We agree with many of the changes that are proposed and disagree with some others. I propose to just go through the bill highlighting the areas that are of particular concern to our association.

Dealing firstly with Clause 3 and the proposed amendment to provide that, prior to or in the course of a hearing affecting a child, a judge may order a psychological, psychiatric, social, medical or other examination of the child or a party to the proceedings, and that those results be submitted in evidence. We adopt all of the concerns that the Family Law Subsection has raised with respect to the inadequacies of the wording of that particular section, but we go further and suggest that this form of compulsory testing as recommended is potentially too great a violation of individual rights of privacy.

We recognize the state concerns as to the welfare of children, but we submit that a court-ordered physical or, particularly, psychiatric examination of a party amounts to a drastic violation of the civil liberties of the adult involved. As with many other issues, it's a question of balancing competing interests and necessitates examining whether or not the evidence obtained by this violation of privacy and the purpose of the litigation in question is such as to warrant these intrusions into the personal lives of the parties.

With respect to the weight of the evidence that is contemplated to be adduced by these reports, it should be remembered that psychiatry in particular is not an exact science. Unless there is a clear-cut situation of mental illness, and I'm not sure that I could identify for you what that might be, it's likely that a psychiatrist or social scientist or a social worker would merely be in the position of offering to the court an opinion, which would certainly not be a conclusive opinion, on which there could well be a diversity of views amongst other members of that particular discipline. Practically speaking, if a person is so mentally unstable or physically incapacitated as to be unfit to care for a child, then the party opposing his or her application for custody should presumably be able to adduce that evidence through some other means.

For example, if the person has a history of psychiatric or physical problems, then a psychiatrist or a physician who has treated him in the past can be subpoenaed to give evidence in court. If there is no past history, then a layperson's evidence of present behaviour which is eccentric or bizarre would be admissible. If the concerns in that area are so pronounced, this would likely have the effect of forcing the person concerned into themselves adducing evidence of their mental stability so as to not risk the court drawing conclusions from that unanswered evidence.

In the throes of marital breakdown, parties often behave in an irrational manner. A frequent refrain of males separating from their wives is that the wife is crazy and that he, the husband, is going to take the children away with him. We submit that the threat of court-ordered psychiatric testing of the parties would be yet another intimidation tool between the persons who are separating. Nowhere else in the civil arena is there any kind of analogous power in the courts to intrude upon the privacy rights of individuals, and particularly merely to obtain this kind of scientifically, unverifiable evidence which is merely of assistance to the court in making its determination.

Superior courts in the Province of Manitoba have inherent jurisdiction, and yet they have no power to encroach on a citizen's person except where it is statutorily provided for. Section 86 of The Queen's Bench Act allows for a compulsory physical examination in bodily injury cases, but that's a very different kind of proceeding in that an applicant for compensation in a bodily injury case is a plaintiff who is, himself, initiating the proceedings and seeking a monetary compensation and if he doesn't like the request that he be ordered by the court, he can withdraw his claim for compensation.

With the legislation that's before you, the choices facing a parent are much more difficult. If for whatever valid reasons, including an inherent dislike or distrust of psychiatrists, a parent is reluctant to submit to a compulsory court-ordered psychiatric examination, then he or she risks losing the custody battle. The framing of the proposed Section 1.3(2) purports to offer some protection to the individual in the circumstances by providing that the order can only be made if the judge is satisfied that it's in the best interests of the child and that the person who makes the examination is independent of the party, but we would submit that this kind of broad discretion in the presiding judge offers very little consolation in terms of the overall considerations that we're looking at.

It is interesting to note that in this legislation there is an attempt to vest in inferior court judges vastly greater powers to interfere with the liberty of the individual than superior courts have traditionally had, as I've indicated. We have no objection to the court in its role of making a determination as a fair parent to order whatever tests it requires of the child who is the subject of the proceedings, particularly in a situation where the child is not represented and does not have its own voice in the proceedings. Such reports may well be of assistance to the court in making their determination, but we strongly resist the notion that a parent in applying for custody lays him or herself open to having the other party persuade a judge that he or she should submit to whatever physical, psychological or psychiatric tests merely to maintain their position in the proceedings.

This section appears to be a clear-cut violation of the Charter protection to life, liberty and security of the person. Therefore, we would submit that there is a very strong burden on the government to demonstrate that this particular intrusion into the rights of the individual is one which is demonstrably justified in a free and democratic society.

With respect to Clause 4, we applaud the government's decision to delete conduct as a factor in assessing maintenance, and we wholeheartedly support this particular amendment.

With respect to Clause 5, the proposal that a new form of common law relationship be created statutorily in a situation where a man and woman have cohabited for more than five years in a relationship where one is substantially dependent on the other and there are no children, this concept is one that has proved to be very controversial for our membership. Therefore, we wish to only highlight some concerns regarding the proposal, both pro and con.

Those persons who support such a proposal argue that there is a certain category of individuals who have

cohabited for extended periods of time and who have perhaps been unable to marry by virtue of a prior existing marriage of one of them. The intention of the proposal is to ensure that, merely because there is no formal bond between these parties, that there nonetheless be some provision in law to protect the person who finds himself in a vulnerable position after such a long period of dependent cohabitation. There can be no quarrel with the desire to protect this category of individual, but the question remains as to whether or not this is the most appropriate mechanism for doing so, and I would like to outline some of the concerns in that respect.

The necessity to prove the relationship is one in which the other person was substantially dependent narrows the category considerably. Of course, there are the automatic problems with the concept of five years of continuous cohabitation. How long a period of time with the parties being apart constitutes a break in that period of continuous cohabitation? There are definitional problems with that.

With respect to the concept of substantially dependent, this would probably not include a situation where both parties were working even if one party received a vastly inferior income, but this would seem to contemplate only situations where one spouse is at home or perhaps at school or working in the other spouse's business. If the parties are young and one spouse has supported the other spouse throughout his or her attendance at university, for example, it is arguable that the particular spouse who has done the supporting should not have to bear a financial burden any longer but, in fact, has done his or her spouse a favour by supporting the individual for a period of time.

This can be seen particularly clearly in a situation, for example, where two young people start living together immediately upon their graduation from high school, and the young woman involved takes a job perhaps as a secretary and supports the male through his university career and perhaps even his attendance at a professional school. If he finds himself at the point of wanting to continue his education at a time when their relationship is ending, then arguably, he could be applying to the court for maintenance from her on the basis that he's been substantially dependent on her over the preceding years while she's been supporting him through school.

On the other hand, if she wishes to go back to school at that juncture and better her own situation, under the proposed definition, she'd have no right whatsoever to apply for maintenance from him, because she hasn't been substantially dependent on him.

A second concern is that the five-year limit is completely arbitrary and leaves out in the cold people who have lived together for a shorter period of time. The arbitrary period of this kind of legislation varies significantly from province to province. In Nova Scotia it's one year. In New Brunswick it's three years. Other provinces have no provision. Why an arbitrary five-year period as opposed to any other period of time?

If a spouse has been working in the other spouse's business or if there has been a lengthy period of cohabitation and parties have accumulated assets, there may well be a remedy in property law by a mechanism of constructive trust or other remedies that the courts have been evolving in cases in the recent past.

For all these reasons then, it's our position that likely there are only a very small number of persons to whom this law would be an important and necessary relief. Some feminists feel that this proposal is a necessary form of protective legislation for the category of individual that we're talking about, no matter how small this category, in order to compensate for past inequities in the law. But there are other feminists who fear the implications of yet another form of institutionalized dependency for women in our laws and view this as a setback in women's progress to achieving equality in the law.

A law such as this proposed amendment also ventures into a form of legislation of morality. Some segments of society may well find this commendable, but they should also be aware then that such a distinction arbitrarily by state interference in the relationship between individuals may ultimately undermine the institution of marriage and the sanctity of that state. If there are to be fewer and fewer differences between cohabitation and marriage, ultimately the reason for persons entering into a formal commitment and status of marriage may well disappear. It may be better to expend funds to educate individuals in society as to the legal implications of making a choice to marry or not to marry than to blur the distinctions between marriage and cohabitation out of a desire to protect less informed individuals in society.

With respect to Clause 6 of the proposed act, we are strongly supportive of the proposed penalties for non-disclosure of financial information, and we also agree with the remarks that Mr. Fishman has made in elaborating on that particular point.

With respect to Clause 7, we disagree with the proposal that a spouse should be able to ask the court to fix maintenance obligations even when no application for maintenance has been made. As Mr. Fishman pointed out, the advantage in this provision is for a respondent who wishes to be able to make income tax deductions. It will strongly mitigate against parties attempting to resolve these matters by separation agreement as they may well be more willing to take their chances in court and see what kind of an order the court makes and thus burden the court system.

With respect to Clause 8, we are agreed that dum casta clauses should be rendered inoperative.

With respect to Clause 11, we agree with the proposal that the obligation for support continue after the death of the spouse and be a debt of his or her estate. However, we have some concerns with respect to the other proposal and particularly as to how the court would enforce such an order of an irrevocable designation of beneficiary. What if the spouse fails to maintain the premiums; what benefit will the proposed order be in that event? Will the court provide for those kinds of contingencies?

With respect to Clause 12, we agree with the notion that a party should be able to pay monies into court as in any other civil action in order to resolve the dispute between them as to the amount that should be payable by way of maintenance. However, we feel that this provision for payment into court should not be available until there has been complete financial disclosure by the party who is preparing to pay the money into court. If this is not done and the person in receipt of the offer does not have sufficient information to make an

appropriate decision as to whether or not the amount proposed is reasonable and may end up going through the litigation in order to ensure that they have that information.

Regarding the proposed Clause 12 and the proposed new section 8(6), we disagree with the amendment that proposes that a maintenance order automatically cease upon remarriage. In most cases, this would be achieved in any event by way of application to the court. An automatic cessation of maintenance as suggested may discourage elderly people who may be in possession of adequate maintenance awards from marrying more impecunious partners, and we feel that such persons should not automatically lose these rights.

There are problems with respect to the effect of provincial orders after divorced decrees have been pronounced, and as Mr. Fishman has pointed out, there are some situations where provincial orders continue after a nisi. If the nisi is silent and there are provisions providing for maintenance, we don't think that the cessation should be automatic.

Clause 14 - with respect to the proposed child status provisions, we have certain concerns, although we applaud the decision to do away with the differentiation between illegitimate and legitimate children.

With respect to Clause 11.6(1), we feel that the period of time within which a declaration of parentage can be sought should be extended to include a period of six months after the death of the parent. This would provide a reasonable period of time for the executor of an estate to ascertain whether there were any such claims in the way that an executor now must ascertain whether there are any claims by illegitimate children under a testator's Family Maintenance Act application.

With respect to Clause 11.7(1) and (3), we have concerns regarding the proposals on blood testing and feel that there should be no statutory enactment allowing for blood testing. The Manitoba Court of Appeal, in 1976, considered the issue of the use of blood tests in affiliation proceedings and Mr. Justice Hall of that court made a statement at that time as follows: "There's no authority for a judge of the Court of Queen's Bench or any other court to order that a blood test be taken of an adult without his or her consent, or in the case of a child, without the consent of the mother. The right of privacy is fundamental to any free society and should not be infringed upon by any court in the absence of clear and unequivocal statutory authority. That right must prevail even in the face of a cogent argument that blood test results may be valuable evidence in paternity proceedings. The best evidence rule ought to be proceeded upon with vigour, but it cannot be allowed to infringe upon the right of privacy in the absence of a clear expression of legislative will. In the present case, the mother refuses to consent to a blood test for herself and her child and in the absence of statutory authority of the kind mentioned, there is no jurisdiction to order that such tests be done and no adverse consequences should result from the refusal of the mother to give her consent." We are suggesting that there be no such such clear expression of legislative will.

The provisions as drafted which allow for the court to give leave to a party to submit blood tests and to draw an inference from the refusal to participate amounts to a compulsion of a form of self-incrimination which, again, may well amount to a violation of the Charter, protections of right to security of the person. Again, there is a balancing of competing interests. There is no question but that the state has an interest in ascertaining the parentage of children who are born out of wedlock. Do the obligations of the state in this arena, however, necessitate a person again submitting to a form of compulsory physical testing?

There may be a variety of factors affecting a person's decision as to whether he or she wishes to participate in having blood tests done, including religious scruples or a mere inability to bear the expense of the tests. The blood tests that are presently being used are very expensive; and is the Family Court going to bear the costs of this kind of expensive procedure if it's going to be drawing inferences of this kind from an individual's failure to submit?

Those are the comments that I have on The Family Maintenance Act.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Thank you very much for that submission. I would just like to discuss for a moment, or at least ask you some questions with respect to 1.3. It seemed to me quite clear that you're totally opposed to it, but I would just want to test that.

Recognizing that 1.3 proceeds on and is based on the best interests of the child, and recognizing that it would appear, perhaps not clearly enough, that before the tests in question can be ordered, the judge may only order, this is under 1.3(2) - "A judge may only order an examination under Subsection (1) if satisfied that it is necessary in order to determine the best interests of the child . . ." - if that section read, although I think it's implied, but if it read explicitly "if satisfied by other evidence," such that the question of due process as it relates to your charter objection would be, I think, met.

That is, there would have to be other extraneous evidence warranting the judge coming to at least a prima facie conclusion that there's a problem about which he ought to know more in the best interests of the child; and if it were clear that the only remedy that could be applied by the judge is the drawing of an inference and that there couldn't be any question of contempt or other compulsion, would you still object outright to 1.3?

MS. S. DEVINE: Yes. With respect to the examination of the parties to the proceeding, we're not objecting to the court having the power to order tests of the child. Again, it's a balancing of competing interests, and the court has to bear in mind at all times the paramount consideration of the best interests of the child.

But what I attempted to say in my presentation was that I cannot anticipate very many situations where a judge would not have clear enough evidence from other kinds of extraneous evidence such as the kind you've mentioned; a psychiatrist testified, who has already been treating the person, or the evidence of neighbours or whatever to the effect that there has been, you know, bizarre behaviour. That would allow a judge, although he may not legally be entitled to draw an inference at

this point in time, he would certainly weigh that against whatever evidence that the party who is the subject of the proposed court order has adduced.

If that person left unanswered evidence, for example, from a neighbour that they'd been behaving in an extremely bizarre way and running out on the street with no clothes on or something that the judge might wonder about, if there were no evidence called to rebut what the significance of that was, then I'd suggest that the judge has sufficient information before him to make a decision as to the best interests of that child. I think that, practically speaking, most judges would probably resolve the question in terms of deciding in favour of the person who's raising the problems and, as I've indicated, whether or not there's a legal inference that can be drawn. Practically speaking, judges will draw those kinds of inferences and will expect those kinds of evidence to be answered.

I'm submitting that it's not appropriate for a judge in those circumstances to be able to order the person who's a party to the proceeding to submit to any of those kinds of compulsory testing, given particularly the problems with the kind of evidence that would come about as a result of the report. You would get a psychiatric report that would not be determinative of the issue in which the judge would just weigh in as one opinion amongst many others in any event or, similarly, with respect to a psychological test.

HON. R. PENNER: Well, just an observation here and, certainly, your concerns will be given very careful attention. The liberty of the subject to a very considerable extent in a criminal case will turn upon psychiatric evidence, and psychiatric evidence is commonly admitted on a whole variety of cases, civil as well as criminal, upon which some very substantial questions are determined. I'm really not quite clear why you feel that if by other evidence, the judge feels that he's unable to decide the question without psychiatric tests, and it is the best interests of the child which is at stake, why that child's best interests can't be served by a court order requiring psychiatric testing?

MS. S. DEVINE: Well, because I said, you know, this is a civil case. It's a civil case between two parties as to the bests interests of the child, and I guess I don't share your confidence that a court order test of this kind is going to resolve the issue, and I don't think the evidence that is going to be obtained by this kind of intrusion into the person's rights is definitive enough to warrant this kind of compulsion in the civil arena.

As I said, just practically speaking, there is a lot of misinformation as it stands in my experience and I do practise family law, and a lot of women, in particular, are very ignorant as to what their rights are and what their husband can and can't do under the law. If there is provision now that the court can order a psychiatric test, as I said, I can foresee that being one other thing - the husbands frequently say to their wives, "You're crazy. When the judge hears how crazy you are, I'm going to get the kids away from you." Now whether or not a judge in that particular case would order the psychiatric test, the damage has been done in terms of the woman being afraid, for example, of the fact that somebody is going to order her to see a psychiatrist, and a lot of people have real fears about dealing with those kinds of professionals.

MR. CHAIRMAN: Mr. Mercier.

MR. G. MERCIER: Well, Mr. Chairman, on a point of order, and I appreciate the submission is not completed, but it's almost 10:20 on a very hot, uncomfortable evening in this building, and I wonder if we might agree as a committee that we will hear a certain number of other delegations, and the rest could leave if they wish and would be notified by the Clerk's office of the next meeting.

MR. CHAIRMAN: Mr. Evans.

HON. L. EVANS: Mr. Chairman, I have a concern about those people who may or may not be here from out of the city of any distance. It seems to me that if there are such, and if they are going to be inconvenienced somehow or other by having to come back another time, assuming we don't get through the list, then I would like to recommend that we see those immediately or soon after this delegation.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Well, I think I would go along with both proposals, that we try to give some indication of a cut-off point that we, after we're through there may be some other questions for Susan Devine, that after that we ascertain if there is someone from out of town, hear that delegation or person, and perhaps one or two more, and for the rest I just might give informal notice here that after consulting with Mr. Mercier, an announcement will be made tommorow, but I expect that we will continue Thursday morning.

MR. CHAIRMAN: Well, if Susan Devine will finish her presentation then we'll ask to see who's from out of town.

MS. S. DEVINE: I don't have extensive comments on Bill 66, The Act to amend The Child Welfare Act. We again welcome the attempt to clarify children's status and the attention paid to child welfare matters in this bill. We are supportive of such proposals as ensuring access rights of parents in child welfare proceedings where the children are under apprehension, and I would just reiterate the concerns that I had with respect to the Clause 1.31 which is also proposed to be enacted in The Child Welfare Act. I would also share those concerns with respect to its enactment in this particular bill as well. Similarly my remarks with respect to blood testing.

I would just like to conclude by saying that we are also very supportive of the idea of the unified family court and a strong conciliation arm to this court and we welcome this proposal as well. Thank you.

MR. CHAIRMAN: Thank you. Any questions?

I wonder if I can get an indication from those who wish to make presentations, who is from out of town.

Mr. Savino, you're not from out of town I know that.

MR. V. SAVINO: Mr. Chairman, I'm obviously not from out of town, but I just did want to express to the

committee on behalf of Mr. Isaac Beaulieu, who is in the speaking order, and the other representatives from DOCFS, who are all from out of town, that we have decided with the First Nations Confederacy to reduce our number of submissions from five to two, and that would be as a package.

If Mr. Beaulieu could be allowed to go first, and then myself to go second, that would be the package for First Nations Confederacy and the Dakota Ojibway Tribal Council if that's acceptable to the committee. I don't expect I'll be near as long as the earlier submissions.

MR. CHAIRMAN: Is that acceptable to the committee? (Agreed).

Mr. Arnold.

MR. ARNOLD: The MARL submission is very short, only about 10 or 15 minutes. I think Mr. Savino's, even with cutting it down will still be quite considerably longer than ours. We are next on the list.

MR. CHAIRMAN: What's the will and pleasure of the committee? MARL was next. There's a private citizen as well, Myrna Bowman, on the list ahead of the DOCFS.

Mr. Evans.

HON. L. EVANS: Would you please ascertain whether there's anyone else from out of town?

MR. CHAIRMAN: Is there anyone else from out of town?

MRS. E. WYZYKOWSKI: I want to confess it's not very far from out of town, it's from Lorette, and I'm with the Catholic Women's League, and I don't feel that it is too far, but I did want to make reference to the fact that we are from out of town.

MR. CHAIRMAN: You're on Bill 97, is that it?

MRS. E. WYZYKOWSKI: Yes.

MR. CHAIRMAN: Can I have your name please?

MRS. E. WYZYKOWSKI: Evelyn Wyzykowski, representing the Catholic Women's League in Manitoba.

MR. CHAIRMAN: Is it a short brief.

MRS. E. WYZYKOWSKI: Our submission, I haven't the number of pages, not terribly long. The other thing is that Thursday morning would be fine but then another member of our group will be out of town after that so it's a problem. I've arrived from Montreal to be here tonight and now the other person has to leave on Thursday.

MR. CHAIRMAN: What is the will and pleasure of the committee?

Mr. Evans.

HON. L. EVANS: Yes, I would suggest we allow the lady to present her brief on 97. I gather it's rather short anyway.

MRS. E. WYZYKOWSKI: It's relatively short, yes.

MR. CHAIRMAN: Is that agreeable?

Mr. Penner.

HON. R. PENNER: Well, I would like to propose so that people who are here have some certainty as to what might happen, that we hear Evelyn Wyzykowski; and that we hear the two submissions with respect to the DOTC, who are from quite far out of town; and perhaps Myrna Bowman; and MARL and that we call it an evening.

MR. CHAIRMAN: Is that agreeable?

HON. R. PENNER: Well, the suggestion was Mrs. Wyzykowski; Savino and Beaulieu; the DOTC; Anne Rieley and Myrna Bowman.

MR. CHAIRMAN: No objections?

Evelyn Wyzykowski, will you proceed.

Pardon? — (Interjection) — 10:00 a.m. Thursday morning.

DR. F. HECHTER: Regrettably I need to count myself amongst the people who will not be able to present on Thursday morning, and I beseech the committee to hear my presentation before this evening is out.

MR. CHAIRMAN: Your name, please.

DR. F. HECHTER: Frank Hechter. I'm listed under Bill 66. I'm primarily interested in Bill 65, it's erroneously entered.

MR. CHAIRMAN: Dr. Frank Hechter, yes.

Well, all right we'll listen to him, too.

Mr. Mercier.

MR. G. MERCIER: Mr. Chairman, I wonder if we might agree also that for those people who will not be able to be heard on Thursday morning, if that is indeed the case that there will be another meeting of the committee in the evening next week for those people who are unable to appear before the committee during the day.

MR. CHAIRMAN: That can be agreed to. Yes?

MS. A. RIELEY: Mr. Fox, if it's possible I could come as the MARL delegate, on Thursday morning but I would like to go first on the list as I have a plane to meet, if that would assist the committee.

MR. CHAIRMAN: Agreed? Very well.

Evelyn Wyzykowski.

MRS. E. WYZYKOWSKI: Mr. Chairman, this is Shirley Scaletta who will be presenting with me if that is agreeable?

MR. CHAIRMAN: Very well.

MRS. S. SCALETTA: Good evening. We have printed copies for the members of the committee.

We represent The Manitoba Provincial Council of the Catholic Women's League of Canada. We have an interlocking four-level structure which provides us with a broad, consultative base. In Manitoba we have a membership of 3,300. In Canada over 120,000 members.

We are pleased to be able to share our thoughts and opinions with you on the proposed amendments to the Family Laws of Manitoba. However, we regret that due to the lack of time and of the fact that it is summertime, we were unable to draw upon the experience and knowledge of our members at large.

Our organization was privileged to have made six presentations re changes in Family Law to government committees during the period from December 1976 to June 1978.

Since that time we have maintained our interest in Family Law matters. We were very pleased to know that the Province of Manitoba's performance re the maintenance enforcement program ranks high in the country. Further, that our province has already entered into more reciprocal agreements with other areas than any other province or territory.

We have noted with some satisfaction proposed improvements in some of the current legislation. We wish now to make a note of a few of these:

1. That The Legitimacy Act, being Chapter L130 of the Revised Statutes is being repealed.

2. That the rights of grandparents to have visiting privileges is being ensured.

3. That children, where deemed feasible, will have the opportunity to have their views heard.

It is our hope that we will have other opportunities to study more closely all the proposed bills and to make further presentations to you; for example, The Marriage Act and The Change of Name Act.

In June of 1978, we presented to the Standing Committee on Statutory Regulations and Orders the concept of Supportive Services for a Unified Family Court. We have a genuine concern for all elements of Family Law, but for the purposes of this presention we will deal exclusively with Bill 97.

MRS. E. WYZYKOWKSI: The effective "working-through" process inherent in any or most of the bills coming under Family Law will hinge primarily on the services for conciliation/mediation being part of the Unified Family Court system.

On reading Bill 97, we were disappointed to find virtually nothing to indicate that there will be full supportive services attached to the Unified Family Court. The exception is in Section 52(4) "Referral to conciliation officer," and Section 52(5) "Action by conciliation officer."

In Section 52(4), the wording is not concete enough in our opinion as it does not indicate a strong emphasis towards encouraging the spouses to utilize the conciliation services.

If you will look at the attached copy of the Family Court Conciliation Service - Two Year Summary under Comments at the middle right-hand side of the attached paper in front of you, you will note that "All referrals are from a legal source: lawyers, judges or Legal Aid . . . Approximately half of these came from lawyers . . . "

With the wording in the recommended amendments, it appears that only the judge will refer spouses for conciliatory services and that the word "may" indicates a less than firm inclination to do so.

We spent much time and effort during previous Family Law revisions researching and reporting to government committees on places where conciliatory services were already being practised and with much valued success. We have read Judge Carr's recent report and draw your attention to some specific points in his study of the Saskatoon and Hamilton-Wentworth Unified Family Courts:

On Page 144(c) of his report, I quote: "Lack of Auxiliary support services - both the Federal Law Reform and the Ontario Law Reform Commission reported that the existing court system lacked the necessary support services to adequately resolve complex family problems. Particularly, superior courts are lacking in this area. Family law can simply not be administered without support services, it was contended."

The second quote is from Page 147(d), "there is a very "folksy" atmosphere about the court. The judges and support staff are fervently dedicated to helping people."

(e) "proceedings are as informal as possible"

(h) "the court regards itself as an adjunct to the conciliation service, not vice versa."

Then on Page 153(1), "although the creating statute does not make a pre-trial conference compulsory, it does require that the parties meet prior to trial and de facto all trials are subject to a pre-trial conference. The combined effect of conciliation (mediation as it is sometimes called), assessments and pre-trial conferences is that almost all cases that are originally contested are settled without a trial."

To quote Page 149 in Judge Carr's report, he gives some "guaranteed ways" he was told in his study that would ensure failure of a Unifed Family Court. One of which is:

(e) to "de-emphasize conciliation and regard it as a "luxury" or mere incidental to the main function, which is adjudication."

And from speaking to members of the Private Bar, the judges and the clerks (registrars), he also learned:

Page 151(c) "the Hamilton court is seriously understaffed in the conciliation area. Saskatoon learned from this error - Hamilton-Wentworth has learned too but has not yet secured the funds to correct the problem."

And in (d) "offer high salaries to your social workers or your conciliation service will attract second-rate professionals and will fail."

MRS. S. SCALETTA: We believe that Manitoba is at the crossroads of developing a family law system which will be beneficial for present and future generations. We are being given a golden opportunity to provide a proper atmosphere and method of lessening the trauma of marital breakdown and to help prevent the occurrence of "serial" marriages in our province.

I quote, " . . . If marriages are indeed the building blocks of our society, the judiciary is in pathetic shape if it is suited to do no more than sweep up the debris after watching the foundations crumble. Furthermore,

. . . the marital relationship is such a complex of human needs and its dissolution a trauma of such magnitude that society and its legal system should be required to provide something more than our adversary judicial system for dealing with the situation." (Taken from a book written by J.V. MacLean, "Marriage Counselling Through the Divorce Courts - Another Look")

Many couples sincerely desire to meet their spouses half-way, but lack the opportunity to settle their problems in a conciliatory manner. Supportive Services, as a vital part of the Unified Family Court, will provide such opportunities as has been proven elsewhere.

J.V. MacLean also writes in this book: "If counselling can serve to lessen the trauma of marital breakup, it is valuable even in those cases where a true reconciliation is unrealistic. In the context of societal needs, this value may be measured in children who are not fought over or in adults capable of bringing a greater degree of maturity and wisdom to their subsequent marriages."

Further affirmation of the value of conciliation counselling is stated in an article, "Divorce Courts and Conciliation Services: An Interface of Law and the Social Sciences" (Written by Dean I. Scaletta and printed in Volume 11, 1981, Number 3 of the Manitoba Law Journal).

We quote: "It is commonly acknowledged by judges, lawyers and academics alike that proper conciliation counselling can yield some or all of the following benefits:

"(a) it can save time and money for courts, lawyers and clients by reducing unnecessary litigation (both initial and repeated). Footnote listed under Number 53 in the paper: "The wave of applications to vary or rescind divorce relief orders has reached epidemic proportions in Nova Scotia . . . " Chief Justice Cowan was quoted as saying he had 35 such applications upcoming in a two-week period in which he had only five other ordinary civil cases. It was also noted that there was a "three-month backlog in setting down hearing dates for corollary relief actions." In light of the successes in Los Angeles and Edmonton, one tends to believe that many of these applications to vary or rescind could have been completely avoided by proper conciliation counselling at a much earlier point in time.

"(b) it can mitigate conflict, bitterness and anxiety at the time of divorce by helping the parties reach mutual and voluntary agreements concerning ancillary matters in the more informal atmosphere of the conciliation interview room;

"(c) It may permit a face-saving way to stop an unwanted divorce action which is already in progress;

"(d) It can provide lawyers and judges with "an effective means of satisfying the moral and ethical obligations under Sections 7 and 8 of The Divorce Act";

"(e) It may even restore a measure of good will between the parties, notwithstanding their decision to divorce.

"It has been suggested further by J.C. MacDonald, Q.C., that such counselling can prepare the spouses and children for the future (including the prospect of loneliness) without the parent or partner, and can also help the parties to accept and clarify their continuing obligations to themselves and to their children."

All of which leads us to recognize the urgent need to ensure that the Manitoba Unified Family Court will contain strong, well-designed supportive services, and that funding for this essential service will be ensured.

It is our sincere hope then that the following quote will not be said about Manitoba in 5, 10 or 30 years from now, and the quote reads:

". . . the legislators have responded quite favourably to these positive results and have set up numerous conciliation services throughout the family courts in the State of California. It is interesting to note that even with this good track record, the conciliation court services of California have to fight yearly in order to obtain funds to sustain their services." This quote is taken from "Divorce Mediation" by Dr. Howard H. Irving.

Further information of the value and success achieved with conciliatory services as part of a Unified Family Court are available, and we wish to name a few:

(1) "Supportive Services for Unified Family Courts" is a report by Marjorie Bowker, judge for Family Court, Edmonton.

(2) "The Conciliation Court: A Pioneering Approach to the Divorce Problem" by Meyer Elkin, Supervising Conciliation Counsellor of the Conciliation Court of the Superior Court of the Los Angeles County, California.

(3) "So Sue Me," the history and workings of the Jewish Conciliation Court of New York by James Yaffe.

(4) "Divorce Mediation" by Dr. Howard H. Irving.

(5) "Divorce Courts and Conciliation Services: An Interface of Law and the Social Sciences" by Dean I. Scaletta, Vol. 11, 1981, No. 3, Manitoba Law Journal.

We continue to earnestly petition the government to establish full supportive services (conciliation counselling) in the proposed structure of the Unified Family Court system.

We further recommend that a voluntary group of citizens be incorporated under The Societies Act as a board of directors to administer the development of the conciliation service as per the Edmonton Project 1972, and the reference is "Supportive Services for a Unified Family Court" by Marjorie Bowker, Page 23.

We strongly concur with the opening paragraph of Judge Carr's conclusion on Page 160 of his recent report, which states:

"Children are Manitoba's most valuable resource. They are an investment upon which our future depends. Investments require the input of capital. Governments have been stingy in this area, and if one wanted to take a purely business-like approach (leave aside the obvious humanitarian considerations) we have not been prudent at all."

We believe that we speak for many persons who would benefit from a well-organized conciliation counselling service, but who, because of time and resources, are not able to be here to share their needs and concerns with you.

We are further convinced that an alternative to adversarial divorce is desired by a great many people. Solutions reached through conciliation counselling will benefit the entire family, the community and our country. It has often been said that there must be a better way. There is a better way, and action must be taken now. Respectfully submitted.

MR. CHAIRMAN: Thank you.

Mr. Penner.

HON. R. PENNER: May I thank you very much for an excellent brief, and I concur, I think, with just about

everything that you have said; simply to point out that indeed there will be a strong conciliation unit with the court with a minimum of 10 conciliator mediators and other support staff, and that will be there right from Day One.

With respect to the question raised by yourselves about pre-trial conferences, I agree. It's not in the statute. We hope to be in a position to have the Associate Chief Judge of the Family Division named by early September, although the court will not come in for some months after that because obtaining space takes some time, but the purpose there is that the Associate Chief Justice of the Family Division will work on the rules, and one of the rules will include or deal with, it is expected, pre-trial conferences.

So, again, let me thank you and assert very positively that we, in fact, are upgrading the present family conciliation unit that comes under the administration of the Department of Community Services, and the Minister is here, and that will be transferred over, at least functionally, to the court.

MR. CHAIRMAN: Mr. Mercier.

MR. G. MERCIER: Mr. Chairman, I too would like to thank Mrs. Wryzykowski and Mrs. Scaletta for their brief which is well done. I had a question for them.

It seems to me, I think, as Mr. Penner has indicated, that the provision of an adequate counselling service is more of a policy of a government in charge, but I was wondering whether in your review of family counselling services in these other jurisdictions, whether you are recommending any changes to the legislation which is before us in Bill 97, which perhaps would go further than it does to guarantee an adequate counselling service; or do you recognize it as a policy decision by government and not a legislative one?

MRS. E. WYZYKOWSKI: I would say that we hoped that there was such a thing going to evolve, the policy taking care of the details, but we still feel that reading the bill leaves it very very vague, and that concerns us. If there was some way, and we wouldn't dare to tell you how to word that in this situation in the bill, but we would hope that it was more firm, more indicative, more forceful about the importance of this aspect.

MR. CHAIRMAN: Thank you very much.

MRS. E. WYZYKOWSKI: Mr. Chairman, if I could just ask a question of Mr. Penner?

MR. CHAIRMAN: Go ahead.

MRS. E. WYZYKOWSKI: Is there any way in which we from the community are able to follow along as this procedure manual, whatever, is being developed, that we could understand and hear how it's going, to monitor it?

HON. R. PENNER: I think probably there is. I'll certainly bring your concern to the attention of the Associate Chief Justice to be appointed. I can't say who that will be at this juncture, but that will be fairly soon, and I assure you that your concerns about being involved in the rule-making process will be brought to his or her attention.

MRS. E. WYZYKOWSKI: Thank you very much.

MRS. S. SCALETTA: Thank you.

MR. CHAIRMAN: Isaac Beaulieu and Vic Savino.

MR. I. BEAULIEU: Mr. Chairman, ladies and gentlemen, I wish to take this opportunity to thank you for giving me this opportunity to appear before the committee. I have lots of opportunities to appear before legislative committees in Ottawa, but for the province, this is quite an unusual situation for us. I wish that we would have more opportunities to present our views to Legislative Assemblies.

I will be speaking on behalf of the Four Nations Confederacy and the Dakota-Ojibway Tribal Council.

First of all, I'd like to mention that our participation in any provincial legislation does not indicate in any way that we have withdrawn the responsibility of the Federal Government, but we wish to participate in partnership with the Federal Government in provincial matters, as well as citizens of the province.

The other thing I'd like to mention is that we were advised the bills being presented, particularly 65 and 66 - and we'll be dealing primarily with 66 - were housekeeping bills. But after reviewing the bills we find that they are, in our opinion, some major considerations being taken. With that in mind, some of the major issues being taken up, we would like to see some of those being transferred to a major bill after the presentation of the Kimelman Report, rather than trying to deal with some of the matters now in this bill as proposed. At any rate, we will be talking about some of those in more detail with our presentation.

First, to make a presentation on behalf of FNC. I have a short paper which I wish to present on their behalf. I know it's been a long day. It's been a long day for me, from 8:00 o'clock this morning, with meetings and hearings, and also on record I wore a tie for the longest any given one period.

MR. CHAIRMAN: Join the club.

MR. I. BEAULIEU: Section 1.1 of the amending bill states that "In all proceedings under this act, other than proceedings under Part III to determine whether a child in need of protection, the best interests of the child shall be in the paramount consideration of the court regardless of the wishes or interest of any other party to the proceedings."

What is "in the best interests of the child" has always been the guiding principle used by the courts to determine issues involving children before them. It is a sound principle and the proposed amendment has apparently statutorily confirmed as Common Law Principle.

This principle is referred to in Section 57 of Part V of the present act, but it is used in conjunction with an unmarried mothers' application for assistance before a child caring agency. In this case the agency is given the discretion as to what action it should take having

in mind "the bests interest of the mother and child." Presumably, the amendment will now make it necessary for a court to consider that it is in the best interests of the child in rendering a decision under Part V.

It is of interest to note that under Part VI, (Adoptions) Section 89, the judge must, before issuing an order of adoption, consider what is "in the best interests of the child."

It would appear the principle of what is "in the best interests of the child" has always been part of The Child Welfare Act. The proposed amendment has the principle identified under the definition section with what appears to be added emphasis. This does not mean that other evidence will not become irrelevant if given. It is important to keep in mind that in all proceedings all evidence which is relevant is admissible before any judicial tribunal, unless it is specifically excluded on the part of Parliament or legislation, and this part will be further mentioned as to the definition of "in the best interest of the child."

Part III on Child Protection of Section 15. The time frame under which a surrender of "partnership" must take place seems repugnant. A parent of a child should be given more than five days (seven days at present) to decide whether or not the child should be surrendered for adoption. Factors such as the following ought to be considered before a parent is requested to sign any documents:

1. Age of the parent;
2. Education of the parent;
3. Physcial and mental health of the mother after delivery;
4. Whether or not proper legal representation for the mother, child, and the father, if he is known, has been provided.

In the view of FNC the period of five to seven days is unconscionable and it is not in the best interest of the child. They suggest that a period of 30 to 60 days should be given to a parent to consider what should be done to his or her child.

There is another view which the government might wish to consider and that is, the present seven-day waiting period and the proposed five-day waiting period might be construed to violate Section 7 of the Canadian Charter of Rights and Freedoms. The section provides:

> "Everyone has the right, liberty and security of the person and the right of not to be deprived thereof except in accordance with the principles of fundamental justice."

The proposed provisions of the existing provisions violates the "security of the person" of the child and the parent in that principle of fundamental justice and that the principles of fundamental justice are completely absent from the procedure used to sever parental relations of a child. The child and the mother are not guaranteed legal representation in the whole process. It is strongly suggest that a lawyer be appointed for the mother and child in each situation and this should be set out in the proposed amendments. If the father of the child is known, he should be given the same constitutional guarantee of legal representation. It is submitted that such a provision would render Section 1.1 of the proposed amendment more meaningful.

This is the First Nations Confederacy presentation. The major points of that is the time frame. There should be a longer period for the mother to reconsider a decision to surrender guardianship. We have some information as to the notes, for example, Ontario has 21 days; Saskatchewan has 30 days; even Newfoundland has 21 days, and not 21 and a half days. Two days to reconsider is insufficient; that's what our legal people feel about it.

Now, for the DOTC presentation in a more detailed manner, I will call on Victor Savino.

MR. CHAIRMAN: Before Mr. Savino proceeds, there may be a few questions.

Mr. Mercier and then Mr. Penner.

MR. G. MERCIER: Mr. Beaulieu, you've presented this on behalf of the First Nations Confederacy. How did the First Nations Confederacy adopt this brief?

MR. I. BEAULIEU: We had a meeting on the 13th and 14th of July, just this past week, and I'm the chairman of the Conference of the Assembly of First Nations. These were the principles adopted at that conference.

MR. G. MERCIER: How many people were there?

MR. I. BEAULIEU: Twenty-seven people are represented in that council

MR. G. MERCIER: Twenty-seven people. Mr. Beaulieu, would you not concede that a mother who gives up a child for adoption thinks about that very significant decision for months before that child is born?

MR. I. BEAULIEU: Yes, and in the months of consideration also considers the consequences, you see. This is where we find the areas of concern, is that sometimes when we're talking about the interest of the child, the definition is very important to the mother to be, even if it's months before that. Because if there is no consideration of the mother, or the possibility of the mother considering linguistic or cultural aspects of the child to be born, then that is eliminated from her to consider. She only feels there is the alternative of giving up the child, if the child caring agency says that their best interest of the child is to give the child this, this and that, according to this, this, and that.

This is why we say beforehand that you have to really know what the definition of the best interest of the child is and that the time frame be allowed so that the mother, once the child is born, is totally aware of that and not be misled, or even feel the tendency that such decisions will be made outside of her own definition of what's the best interest for her child.

MR. G. MERCIER: How do you define the best interests of the child?

MR. I. BEAULIEU: I define it the way it's defined, plus the addition of the consideration of the cultural and linguistic interests of the child which is a social aspect and other aspects which are part of the bill. It says, " . . . social and other."

MR. G. MERCIER: Are you of the view then that, for example, a child of Roman Catholic parents should only be placed in Roman Catholic homes; that the child

of, for example, German or Ukrainian or Polish or Yugoslavian or other nationalities should only be placed in homes of those nationalities?

MR. I. BEAULIEU: If they wish so, yes. They should have the proper opportunity to do so.

MR. G. MERCIER: That's how you would define the best interests of the child?

MR. I. BEAULIEU: No, I wouldn't, but I would put that as part of the best interests for the Ukrainian people, Jewish people, Catholic people and Native people.

HON. R. PENNER: Just because this may come up in other presentations, I just want to emphasize that the time frame is the minimum, obviously not the maximum. That is, a mother can take a year, can take two years, can take three years to consider. That should not be lost sight of.

Secondly - I think I made this point earlier - there will be some amendments that will effectively increase the time frame from birth such that from birth, where one recognizes there may be more acutely some emotional problems, I think it would be approximately 14 days that will have to expire as a minimum. In any event with respect to the ability of the woman to get advice, there will have to be a minimum of two juridical days between signing the appropriate form and its taking effect. I just wanted to make those points clear.

MR. CHAIRMAN: Thank you.

MR. I. BEAULIEU: Thank you. I would just like to also make the point that Chief Ken Courchene and Chief Ernie Daniels were supposed to be here this evening. Ken Courchene is ill and Ernie Daniels, I guess, is in Toronto with the other national organization meeting.

MR. CHAIRMAN: Thank you, Mr. Beaulieu.

Mr. Savino.

MR. V. SAVINO: Mr. Chairperson and members of the committee, in view of the heat, I hope you don't mind if I don't have my jacket on for my presentation.

Good evening, Mr. Chairperson and members of the committee. My name is Vic Savino. I'm a lawyer, and I am here representing the interests of the Dakota-Ojibway Child and Family Services, a child-caring agency under Section 7 of The Manitoba Child Welfare Act. And we feel, I'm here representing the best interests of the children of communities represented by Dakota-Ojibway Tribal Council.

Dakota-Ojibway Child and Family Services (DOCFS) is a community-based child and family service, operated by the Dakota-Ojibway Tribal Council. It serves eight Indian communities in southwestern Manitoba, namely, the Roseau River, Long Plains, Sioux Valley, Swan Lake, Oak Lake, Birdtail Sioux, Sandy Bay and Dakota Plains Indian Reserves. DOCFS has, since 1981, been at the forefront of the child welfare aspect of the developing concept of Indian self-government. DOCFS sits as a member of the Kimelman Inquiry and also sits on the government's Child Welfare Legislative Review Committee.

We are here tonight to express concerns that we have about some of the proposals contained in Bills 65 and 66, and to offer some positive suggestions as to how these bills could be made better.

Firstly, let me indicate that although my clients have grave concerns with respect to the major nature of some of the changes proposed, there are other changes that my clients feel are positive. We're not going to cover all of them at this point in time and take up your time with that. We will just mention a few in passing.

The abolition of the distinction between legitimate and illegitimate children is welcomed by DOTC.

The amendments to Section 24 and 27 respecting visiting rights of parents of children who have been apprehended under the child-protection provisions of the act represent, in our view, a very positive step finally and go some small way towards protecting the rights of natural parents and the family relationship, pending determination by the courts of allegations by child care agencies against natural parents.

In addition, my clients feel that the repeal and substitution of Section 32(4), regarding the status of a child during an appeal, is a very positive change. The onus will now be on the child-care agency to establish before a judge of the Court of Appeal why a child should not be returned to its natural parents where there has been a finding at the trial level that the child is not in need of protection.

I now want to deal with the nature of my clients' concerns in a general way, and then turn to specific sections of the act and some of the suggestions that we have.

It was our understanding, as Mr. Beaulieu pointed out, that Bills 65 and 66 were intended to be changes of a "housekeeping nature" and any substantive changes, as they are referred to by lawyers, would only be giving effect to those portions of Judge Carr's report which are uncontroversial. However, there is at least one major change, which we regard as a sweeping change in this legislative package, which we feel should not be made at this time. There are other aspects of the proposed legislation which we feel do not go far enough, and we have made suggestions as to how these could be improved.

Firstly, with respect to the major change that I referred to, Mr. Beaulieu dealt briefly with it, Section 1.1 of both Bills 65 and 66 would legislate that "the best interests of the child" shall be the paramount consideration of a court hearing child welfare matters, regardless of the wishes or interests of any other party to the proceedings.

While we are in agreement, and I would say in very strong agreement, that the best interests of the child should always be the paramount consideration in child welfare matters, we are concerned that at the same time as the common law principles respecting the rights of natural parents are being abolished, there should be some provision in the definition of best interests of the child to take account of the positive principle, a natural law principle, that a child's best interests lie first in remaining with his or her natural family.

We are particularly concerned with Native children, and the recognition that the best interests of such children must include a concept of cultural and linguistic appropriateness when courts make decisions as to the future of these children.

There is a long line of authority of common law establishing the principle that a natural parent ought not to lose his or her right to custody, except where the parent has abandoned the child or so misconducted himself or herself that it would be improper for the child to remain with him or her, or where there are serious and important reasons for disregarding the wishes of the parents. Reference has already been made to the Supreme Court of Canada case of Hepton v. Maat.

In certain situations, one regarding Judge Carr, some courts have pointed to the principle of Hepton and Maat and ruled that although the judge felt it would be in the best interests of the child that the child be raised by a party to a custody proceeding who is not the natural parent, the court was constrained by Hepton v. Maat not to order custody to the natural parents.

There has been a gradual shift away from this position from the Courts. Passage of Sec. 1.1 would be taken as a signal by the Courts to ignore the principles set out in Hepton v. Maat. One of those principles, one that's not referred to very often, but one of those principles is that the best interest of a child first lie in the home of the natural parents together with the racial, cultural, religious background and heritage that the natural parent has to offer to the child when the child is part of a particular community. In our view, the issue boils down to a definition of what is in the "best interest of the child."

The present definition of best interest of the child does not include a statement of the very basic principle that has been recognized by The Child Welfare Act Committee, namely, that the best interests of the child must include a consideration by the court, of what is culturally and linguistically appropriate for the particular child.

Now there appears to be a misconception that the problem of inappropriate placement of Native children only arises in child protection proceedings under Part III of the Act when the child is placed in a foster home or for adoption. This, however I must stress, simply is not the case.

There are many situations that arise in custody disputes between natural parents, in guardianship applications by relatives of the child other than the natural parents and in adoption situations under Secs. 101 (parent's own adoptions), 102 (private adoptions) and 103 (de facto adoptions) all under The Child Welfare Act which will be affected by the legislating of the best interests test in determining the outcome of the proceedings.

In fact, under The Child Welfare Act, with this proposed amendment, it is only the guardianship and adoption situations that will be affected by the best interests test as Bill 66 clearly states that proceedings under Part III are not affected by this change, Part III being the part that deals with child protection proceedings.

Let me give you some examples of the situations of which I speak that we're concerned about, the introduction of best interests at this time without the companion improvement in the definition of best interest of the child:

(a) Grandparents who live a comfortable, middle-class existence in the City make application for guardianship of the child of a Native family which resides on a reserve and continues to practice their Native heritage and lifestyle. Or another example:

(b) A child is place temporarily with non-Indian foster parents while the natural parent(s) are attempting to overcome some adversity such as illness, family breakdown and so on. The foster parents apply for guardianship of the child.

In both of these situations, if the common law rule of Hepton v. Maat is replaced by a straight "best interests" test, the natural parents of the child could lose their right to custody of the child simply because they have less material means than the persons applying for guardianship or they are, at the present time, the natural parents that is, trying to overcome some adversity and, in the best interest of their children, have temporarily placed them elsewhere.

We feel very strongly that unless the legislating of the "best interests" test is accompanied by a change in the definition of "best interests of the child" to take account of cultural and linguistic appropriateness, Native parents could find themselves losing rights to custody in situations where they should not.

It is for these reasons that we see this particular change as being a major substantive change to the scheme of The Child Welfare Act and one which we cannot support at this time.

We would point out that major changes are contemplated on the delivery of the Kimelman Report and we strongly urge that the change to the best interest test be delayed until after the Kimelman Report is received. Our objections to this change apply equally to Bill 65 (The Family Maintenance Act) as they do to Bill 66 (The Child Welfare Act).

We note that on February 25, 1983, The Child Welfare Legislative Review Committee agreed to the insertion of cultural and linguistic appropriateness in the definition of best interests of the child. On this committee are represented all kinds of interests in the community including the establishment of Child Welfare Agencies in the city not just Native Child Welfare Agencies. Our position simply is, if the cultural and linguistic appropriateness question is to wait until the next Session of the Legislature, so should the abolition of the principles protecting the rights of natural parents.

I now want to deal with a number of other provisions of the act that we have problems with and make some suggestions with respect to how we feel these provisions could be improved.

There's been much discussion of Sec. 15, The Voluntary Surrender of Guardianship Section of the Child Welfare Act which permits an unmarried mother to voluntarily surrender the guardianship of her child to a child caring agency.

The situation in practice commonly arises immediately following the birth of a child and in the vast majority of cases involves young mothers in the age range of 13-18. The section permits minors to enter into this contract which is binding upon both the mother and the father in spite of her being under the normal age for capacity to enter into a contract.

The Children's Aid society of Winnipeg and other Children's Aids have long lists of adoptive parents. Most of them want "a new baby". In response to this need, the agencies have developed a paranatal department which functions right on-site in the maternity wards of our hospitals. These parantal departments have the

conflicting aims, and I would suggest the aims are obviously conflicting, of assisting the natural mothers and obtaining babies for adoption to their long list of adoptive parents.

It is quite apparent that a large number of the single mothers giving birth to children in city hospitals are Indian women with very little means of support for themselves and/or their newborn children. It is very difficult for these mothers to consider keeping their children and we suspect that some of them at least are put up for adoption by the established child-welfare agencies pursuant to voluntary surrenders.

We are very concerned that the provisions in Section 15 do not make adequate protections for the mothers of these children who may later regret their decision to give up the baby for adoption. In addition, we are concerned that the children of Indian women are being put up for adoption by city child welfare agencies without reference to the Native child welfare agency that serves the home community of the mother.

Another concern which we have is the right of the natural father to plan and care for the child, should the mother be unable or unwilling to do so.

The present legislation requires that a voluntary surrender cannot be taken except seven days after the birth of the child. The mother can withdraw her surrender within one year of the agreement or up to the time the child is placed for adoption. However, with the paranatal departments being right on-site in the maternity wards, placements have been occuring virtually the day after the voluntary surrender is signed, making the one-year provision meaningless.

The proposed amendments would reduce the period within which a voluntary surrender can be taken from seven days to five days and it would also enact that a child could only be placed for adoption two juridical days after the signing of the voluntary surrender. The changes would also prohibit the placement of a child where the natural father had made an application to be declared a parent of the child, pursuant to the new Section 11 of The Family Maintenance Act.

We feel that these changes do not provide adequate protection for natural parents, and that the legislation continues to exclude Native child welfare agencies from planning for Native children who are the subjects of voluntary surrenders of guardianship.

We have made four suggestions with respect to Section 15 to the government:

(1) there should be a longer time for the mother to reconsider her decision to surrender the child;

And I'm pleased to hear from the Attorney-General that an amendment is intended to be introduced on that subject.

(2) there should be a right of independent legal advice for the mothers signing voluntary surrenders;

(3) there should be notification to the appropriate Native child welfare agency of the birth of a Native child; and

(4) notification of the birth of the child or of the mother's intention to surrender the child should be given to the natural father.

Now, I think virtually all of those points were canvassed by other presentations this evening, and I think there is quite a bit of agreement on those three points, other than the new one which we raise now about the notification of the Native child welfare agency.

I'm not going to dwell on the time limits issue, as I understand that there is an amendment coming forward, but there are one or two points that I wish to mention. There is much confusion with the various permutations and combinations of time frames within which a voluntary surrender can be signed and then when the surrender can be withdrawn after it's signed.

We strongly recommend simplification of these time frames. We have proposed that a voluntary surrender agreement can be signed at any time following the birth of the child, but that the mother should have 14 days following the birth of the child to withdraw her voluntary surrender. The two juridical days proposed in the legislation is not sufficient time for a young mother to give full consideration to this very important and difficult decision.

On the question of "Independent Legal Advice," we note that under the child welfare legislation, a mother in this situation essentially has four options:

(a) she can keep the child (this often involves going on welfare);

(b) she can surrender the child to a child welfar agency for adoption;

(c) she can place the child with family or friends for a private adoption; or

(d) subject to the discretion of the agency, which all too often is exercised against the mother, she could temporarily place the child with the child caring agency under a temporary contract placement under Section 13.

We suspect that many young mothers are not aware of all of these options at the time that they are considering voluntary surrender. The only advice these young mothers are getting is from the child-caring agency itself. The agency has a conflict between helping the mother to keep the child and obtaining the child for adoption for the long list of adoptive parents.

We appreciate that child care agencies would shudder at the thought of each and every potential subject of a voluntary surrender of guardianship having a lawyer appointed to assist her, and the time delays that this might involve. However, we feel that this problem can be very simply overcome by, for example, having independent legal counsel available through the office of the Director of Child Welfare.

The practice in Ontario is that counsel from the office of the Official Guardian advises single mothers of their legal options. It should not be too difficult to develop a model of independent legal advice which would accomplish the twin aims of ensuring that a mother appreciates what she's doing when she signs this agreement and avoiding unnecessary time delays.

The next point I'd like to deal with is "Notification of Native Child Welfare Agencies" under the voluntary surrender provisions. We feel very strongly that Native child welfare agencies should be notified of the pending birth of a Native child. Indian communities have a collective interest in the future of their children, and we echo Judge Carr's statement that children are the most important resource that a community has. This is reflected in the philosophy of Dakota-Ojibway Child and Family Services and other Native child welfare agencies.

Placement of Native children in Native adoptive homes is no less important for children obtained by voluntary surrender than it is for children who are the

subject of child-protection proceedings; in fact, it's probably more important. It only makes sense that Native child welfare agencies should be involved in planning for newly-born Indian children who are surrendered by their mothers for adoption in hospitals that are not located in the community where the child welfare agency is functioning.

Finally, on Section 15, the question of "Notification of the Natural Father," we see that under The Family Maintenance Act, the proposed new 11.6(1) would allow the father of a child, whether born or unborn, to apply to a court for a declaratory order that he is the father of the child. If such an application has been made and the Director of Child Welfare has been served with the application, the child could not be placed for adoption until the application had been dealt with.

This section is designed, in part, I understand, to overcome the Charter of Rights problem, whereby the natural father of a child could lose his rights by the mere act of the mother signing the voluntary surrender.

While we regard this as a positive step, the father's rights become rather illusory when you consider the proposed 11.6(8), which directs that a court shall not hear a father's application where the Director of Child Welfare certifies that the child was placed for adoption prior to the notice of application being served upon the Director of Child Welfare.

The summary of all that complicated language is that, in effect, it becomes a race between the natural father who has to get his application in before the child is placed, and the Director of Child Welfare who has to get the child placed before the natural father files his application if the child is going to be dealt with without reference to the father.

We suspect that many fathers, particularly fathers who live in rural areas, will not even know that they have such a right, let alone exercise it. In order for the father to be able to exercise his right under Section 11 of The Family Maintenance Act, there will be situations where, unless the father has notification, he will not be able to exercise that right. We feel the father should be notified where the mother intends to sign a voluntary surrender of guardianship and the father can be ascertained. I think that suggestion has been made in other terms by other people appearing before you this evening.

The next portion of the proposed amendments which I'd like to turn to is "Notificaton of Apprehension of Children by a Child Welfare Agency." Section 24(1) presently provides, and the amendment will continue that, that only the parents or guardian of the child would be notified upon an apprehension of a child.

We have recommended to the government, and we hope that it will consider an amendment to this effect, that not only parents and guardians should be notified of an apprehension, but where Native children are involved, the Native child welfare agencies serving the community of the child's origin and/or the Indian band of which the child is a member should be notified of the child's apprehension. We strongly urge an amendment to Section 24 along these lines at the stages of this committee.

I want to spend a moment on Section 25, that portion of the act which removes the right for Examination for Discovery and compels cross-examination of the parents. The Child Welfare Act presently, under Section 25(9), provides parents, parties with the right to Examination for Discovery or particulars.

Bill 66 would remove this right altogether and replace it with the right to demand particulars. Child protection proceedings, although they are civil proceedings, often take on the character of a criminal trial. The repeal of Section 25(9) takes child protection proceedings right out of the realm of normal civil proceedings. The particular procedure set out in the new Section 25(9) and (10) may be a workable substitute, but I think it's something that should be watched very closely by both the Legislature and the courts.

However, the idea contained in the proposed new Section 25(11), compelling a parent to testify against him or herself, is repugnant to the principles of our legal system. It places the parent in a child protection proceeding, or it could place the parent in a more precarious legal position than persons accused of the most serious crimes. We can see no need for such a "star chamber" type of procedure, and urge the deletion of the proposed Section 25(11) from this bill.

I would like now to turn to Sections 27 and 31 regarding the maximum periods during which temporary orders can run. These changes contain a complex formula limiting the period during which temporary orders of guardianship can run. Where the child is under five, the total period covered by maximum six-months temporary orders is 15 months. Where the child is between the ages of five and 12, an initial temporary order can run a maximum of 12, and the total period for an original temporary order and continuation cannot exceed 24 months.

We are concerned that these time frames may be too short in situations where natural parents may have a social or medical problem that requires rehabilitation over an extended period of time; for example, people who are afflicted with the disease of alcoholism. We are aware of many situations where courts have ended up making children permanent wards of a child caring agency after a few temporary orders. These situations often involve parents who have made progress towards rehabilitation, but simply require a little more time. We fear that if the time frames set out in the new Section 27 remain, courts may be left with no option but to give the agency a permanent order in spite of the fact that the natural parent or parents may be near rehabilitation.

We feel that the rationale for these changes arises from too much use of the temporary guardianship provisions of the act in situations where natural parents require rehabilitation. We urge that measures be taken to ensure that court proceedings against these parents are resorted to only as a last resort. Much more use could be made of the temporary contract placement provision in Section 13 of the act in these situations. We certainly hope that child care agencies will put more stress on trying to help the family with its problems, rather than going to court to take the children away from the families.

With respect to children over 12 years of age who are frequently described as "difficult to manage" children, we have the same concerns. There is too much use of the temporary order sections of the act, rather than temporary contract placement. In this regard, we would recommend that there be a provision in the act giving judges hearing child care agency guardianship

applications the discretion to adjourn proceedings to allow the parties to consider termporary contract placement in appropriate circumstances. We feel that this might encourage more use of temporary contract placement, rather than proceeding through a long and arduous trial.

I want to now deal briefly with Section 32(2) and Section 28 and the effect on the right of appeal. Section 32(2) presently requires that an appeal shall be made within 21 days from the date on which the judge signed an order of protective guardianship. I should note that the Court of Appeal has interpreted this time limitation very strictly.

Section 28 presently requires that orders of protective guardianship be distributed by the court to the Director, the Society and the parents and person who had custody of the child. It would be through that process that some parents would become aware of such an order.

In Bill 66, it is proposed that Section 28 would be amended so that the court should mail a copy of the order to the parents at their last address known to the court.

The bill would also change Section 32(2) so as to require that an appeal must be undertaken within 21 days of pronouncement of the order, as opposed to signing.

In the vast majority of cases, orders are pronounced at the conclusion of the trial. Lawyers prepare the form of order for the judge, and he or she signs it. Apparently, there is a problem with the promptness of some judges signing orders. This seems to be the rationale behind the proposed change to Section 32(2).

However, we fear that if these changes are implemented as is, many people will lose their right to appeal. The only requirement of the service of the order on the parent(s) is the mailing of the order. The parent(s) might well receive the order after the 21 days has already elapsed. If the lawyer for the child welfare agency was very busy and didn't get the order into the judge for signing promptly enough, the order might not be mailed until after the 21-day appeal period from the pronouncement of the order had elapsed.

We can see no reason for threatening parents' rights of appeal in this manner. If the problem is tardiness on the part of the judges in signing orders, we would suggest a better solution would be to require that judges sign an order within a specified time frame after the pronouncement of judgment, rather than amending the section on appeal so as to result in many people losing their right to appeal.

Mr. Chairman, I only have two more parts of the act to deal with and, if you'll bear with me, I will scoot through them as quickly as I can.

Section 33 and Consulting with the Wishes of the Child upon an Application by The Director or an Agency for Termination of an Order of Guardianship: Section 33 provides that where a child has been made a permanent ward, the Director of child care agency may apply to terminate the guardianship. If the judge is satisfied that the termination is in the best interests of the child, he may make an order terminating the guardianship and/or appointing another person to be guardian of the child.

Section 33(2) permits a judge "if he deems it advisable" to consult the wishes of the child in such applications. Section 33(2) would be repealed by Bill 66. We appreciate that the reason for this repeal is the enactment of a broader section permitting the consideration by the judge of the child's views with respect to the alternatives available to the judge. However, in the context of the situations arising under Section 33, we feel strongly that this new proposal is not sufficient.

More often than not, when a child care agency applies to terminate an order of permanent guardianship, it involves the situation of a teen-age child who has become, in the parlance of the child care profession, an "unmanageable ward." As a ward, the child's financial and maintenance needs are met out of the budget of the agency.

In the typical situation of an "unmanageable ward," there is tension between the social worker and the child. Termination of an order of permanent guardianship can be used as a threat to the child. Further, we would point out that it is quite conceivable that an agency, experiencing financial difficulties, might look first to terminating wardship orders on unmanageable wards as a cost-cutting measure.

With this view of the context of Section 33 applications, we would strongly recommend that Section 33 be retained and strengthened so as to require a judge to consult the wishes of a child over the age of 12 years who is the subject of an application for termination of guardianship by an agency.

My final point, Mr. Chairperson, is with respect to the new access rights proposed under the act, the new Section 1.5 would permit any person who has had - or ought to have - the opportunity to visit a child, the right to apply for access.

This application could be taken by members of the extended family of the child; or in situations where the child was in the custody of guardians who were not his parents; or where the child is an adopted child, application could be made by the natural parents of the child, if it were in the best interests of the child for that natural parent to see the child.

It is the last two types of applications that we are concerned about.

Under Section 1.5(2), no such application could be successful while the child is "residing with both parents." "Parent" is redefined in Bill 65 to mean "a biological parent or adoptive parent and includes the person declared to be a parent under Part II." The problem we see with Section 1.5 is what the right hand giveth the left hand taketh away.

If it is in the best interests of a particular child that he or she have visits with the extended family or his or her natural parents, why should it make any difference to the child whether the child is living one "parent" or two? The proposed Section 1.5(2), in our view, makes absolutely no sense in this context and we would propose its removal from Bill 66, leaving in Section 1.5(1) as proposed, and inserting in Section 1.5(1) - if we don't go with the best interests test now - a clear statement that it would have to in the best interests of the child for that access order to be granted.

Just before concluding, I would like to state that I think we agree with earlier comments that have been made with respect to psychiatric, psychological and blood testing and the civil liberties issues involved there. We would just lend our support to that concept.

Finally, in conclusion, ladies and gentlemen of the committee, I hope that this adequately sets out our concerns with the proposed legislation. We are hopeful that the government will accept some or all of our suggestions.

I wish to stress, again, our concern with the introduction of the best interests test at a time when "the best interests of the child" has not been adequately defined in the legislation.

We look forward to continuing to participate in the process of reshaping Manitoba's Child Welfare system, and on behalf of Dakota-Ojibway Child and Family Services, I wish to thank this committee for giving us an opportunity to express our concerns to you.

MR. CHAIRMAN: Thank you, Mr. Savino.
Ms. Phillips.

MS. M. PHILLIPS: Thank you, Mr. Chairperson. First of all, I'd just like to make a comment, Mr. Savino, not to be taken in a derogatory way, but just with an element of surprise. I'm quite surprised that one as enlightened as yourself, when hearing that this legislation had been labelled somewhere as "housekeeping", that you wouldn't have immediately informed your clients that some extremely important amendments were being proposed.

MR. V. SAVINO: Well, that's exactly what we did.

MS. M. PHILLIPS: All right. The only section I want to comment on - it's partly because I'm getting rather confused tonight, is 15.2 in Bill 66. I find it rather contradictory that where the concern is for the best interest of the child and this section only stipulates that a mother cannot give up the child before five days. It doesn't say that it can't be 14 or 21 or 30, or whatever, later; that it's a minimum, that they can't give it up before five days, like not the day after the child is born or the minute after the child is born, that there's that short waiting period there.

In both your concern and the concerns from the First Nations and other briefs presented, seems to be suggesting that the kind of support services a mother would need to make that decision - she already has made the decision she is going to carry that child to term; she delivers the baby and then has to make a decision on whether she is going to keep the child or not; and whether she has the financial means to support the child; whether she has adequate education to support it; whether she's in sufficient physical or mental health to care for the child.

It would seem to me - I think you mentioned it in your brief, I have a copy - but I think you were mentioning that what she needed was additional support services and information and advice and counselling - independent legal counsel. It would seem to me that postnatal support services for adolescent mothers or whatever would be more of a deciding factor, as to whether she was going to be able to financially keep the child.

If she decided in the prenatal period that she was going to give up the child because those were not available, it would seem to me, in the best interest of the both the child and the mother, the sooner that departure between the two were taken, in terms of bonding for the child and to lessen the trauma for the mother, of having to part with that baby of hers, the better it would be for both parties.

So to suggest we should not have a minimum or that the minimum should be longer, and those support services weren't there anyway, and she was going to have to part with that child, in the best interests of both the child and the mother, it seems contradictory to me what you're saying, that that waiting period should be extended; that that mother should have to care for that child for 30 days or 60 days, as the other brief referred to, or be torn between whether she could see the child, or in some cases and some agencies, they have to look after the child. There's some maternity homes. They have to feed the child every four hours, or whatever. It would seem to me the sooner that decision was made, if the support services were not available, if she had no alternative but to give up the child.

MR. V. SAVINO: There's really two issues involved in the time frames. I stated in the brief that all the permutations and combinations can get very confusing. One is the amount of time after the birth of the child that the mother has, before a voluntary surrender of agreement can actually be signed. The other is the time after which she has signed a voluntary surrender, that she can withdraw that, that she can change her mind.

What we have suggested is simplification and part of that simplification would be, to be not so concerned about when the agreement is signed. I think what we stated in the brief that anytime after the birth of the child would be adequate wording, but to be more concerned about the time within which the mother has to change her mind.

We understand from the child care officials, in terms of the important bonding issues and that sort of thing, the period of 14 days would satisfy both the best interests of the child and give the mother an opportunity for sober second thought. I would suggest that the situations where the mother would change her mind are rare, but those situations should be given consideration by the legislation.

MS. M. PHILLIPS: So actually, Mr. Savino, you're talking more about - I lost the number - the one where it says the two days business.

MR. V. SAVINO: That's right.

MS. M. PHILLIPS: That that one is more critical than the 5, 14, 30, 60.

MR. V. SAVINO: Right, especially if the mother, during her time of hospitalization, has some advice, for example, from the Director of Child Welfare, as to what her options are.

MS. M. PHILLIPS: Well, I take your comments very seriously about the support services and the kinds of policy and funding kinds of decisions that a government has to make in terms of making that a legitimate choice. I would assume from, you know, my experience with social agencies and services, and those in need of those

services, that oftentimes the choice is taken out of one's hands simply because of lack of support services.

I take your advice seriously on provision of those but in terms of this legislation where the minimum requirement, and you know, I agree a person should be able to take as long as they need to make that decision, but the minimum requirement to me should not be prolonged under those circumstances. I'm finding tonight very difficult.

MR. V. SAVINO: Well, I'm suggesting that simplification along the lines that we've suggested would streamline the system and at the same time protect those rights that need to be protected. I think it would simplify the system considerably compared to what it is now.

MR. G. MERCIER: Just one brief question, Mr. Savino.

I wasn't quite clear on your position on Section 1.3(1), Mr. Savino. Do you have the same concerns that Mr. Fishman, and Ms. Devine expressed with respect to that?

MR. V. SAVINO: Yes, that was the remark that I threw in. In the end there about the civil liberties issue of compelling people to submit to physical tests, yes.

HON. R. PENNER: Just two questions.

With respect to best interests and statutory definition, of course, there is considerable body of case law, and statutory definitions, or plain statutory statements will draw their sustenance from case law. Why is it assumed, or is it, I may be misreading what you said, that this interest does not include the importance of keeping a child within the bosom of the family, if I may use the cliche, why is it assumed that best interest in the case law does not include, I believe it does, the importance of keeping a child, or at least considering as one of the best interest variables the question of linguistic and cultural background? Are you suggesting that as the law now is, and it wouldn't be altered by this, the best interest do not include these factors?

MR. V. SAVINO: I'm suggesting that the courts have not defined best interest to include these factors. There's only one case that I'm aware of in Manitoba where it was considered as a major factor but I'm also suggesting that the courts have, in the past, set up in opposition to each other Hepton v. Maat, and best interests of the child, and they will now take it as a signal to ignore Hepton v. Maat, and some of the principles that are contained in Hepton v. Maat, I'm afraid will fall with it unless we enact those principles into legislation.

HON. R. PENNER: My second question, I take your point that these proceedings should be civil in nature, and not in any way criminal, or like criminal proceedings. I state that as a premise to my question related to 25.11, cross-examination. It is certainly the case, is it not, in civil proceedings in this province, I believe in all provinces, that a party may call - a party adverse in interest now. There's nothing new here, this is not a departure from civil proceedings.

MR. V. SAVINO: Under the Queen's Bench Rules as Mr. Fishman has pointed out earlier, but it hasn't been a common practice to my knowledge in Child Welfare Court that parents have been compelled to testify.

MR. CHAIRMAN: Thank you. Mr. Evans.

HON. L. EVANS: Just one question.

As a member, or as a representative, of an organization that is represented, or that is on the Child Welfare Act Review Committee, I would gather that you are aware that a number of the suggestions and comments that you made are under consideration by that committee for inclusion in major amendments, major revisions that are proposed for this Child Welfare Act next year.

MR. V. SAVINO: That's correct, and what we're suggesting very strongly is that just as many of those suggestions are going to be included in that major review after Judge Kimelman makes his report, so should the suggestion that best interests of the child now be the test be put into that major package coming up in the next Session. We feel that it's really disrespectful of Judge Kimelman's deliberations for you to put in that best interest test when Judge Kimelman has already stated that the cultural and linguistic appropriateness issue is so important.

HON. L. EVANS: Thank you for the information. We'll read your presentation. I will refrain from comment and debate with the delegate because that is against the rules of the committee. I say that for my colleague from Wolseley.

MR. CHAIRMAN: Thank you, Mr. Evans.

Thank you, Mr. Savino.

We have one more presentation.

MR. V. SAVINO: Thank you, ladies and gentlemen of the committee.

MR. CHAIRMAN: Frank Hechter is it?

DR. F. HECHTER: Mr. Chairman, ladies and gentlemen of this committee, I'd like to express my appreciation for the opportunity to express my views. I present them as a private citizen, not necessarily representing anybody else other then my own specific interests and concerns with regard to the legislation that's now impending before the Legislature.

My specific concerns relate to custody and particularly the lack and the expressed disappointment that I have that the impending legislation does not include and has not seen fit to include joint custody as a presumption for custody with regard to dissolution of marriage. It seems both ironic and unjust, if not immoral, that we have specific and very expanded rules that are definitive and all-encompassing with regard to property which has been accrued during the time in which any two individuals have been partners in a marriage.

Yet, the most important, and the paramount concern, and the greatest benefit of any marriage, has to be the children that are produced from such an arrangement. It's ironic that there is no equality in the provision for non-custodial parents, as they are now

being commonly considered, to have expanded and equal rights to their children. After all, as Mr. Fishman, and several other of the speakers, have commonly referred to, it becomes a matter of an adversary system. What we see are non-custodial parents, in Mr. Fishman's words, being described essentially as warmongers, interfering with the day-to-day life of the custodial parent, interfering and harassing the custodial parent. Who are these terrible people to which reference is commonly made? They are no more and no less than loving, considerate, compassionate human beings who love and care for their children as much as the custodial parent. They have no horns, they bear no malice. In fact, the vast majority of individuals who have become divorced manage to remarry again. It isn't the institution of marriage that's caused the dilemma, it's that spouses find themselves in a situation where they're no longer compatible. Maintaining a non-compatible marriage is not beneficial either for the participants nor for the offsprings of such a marriage.

Is it the wish of this Legislature and is it the wish of the community to put non-custodial parents, the vast majority of whom happen to be fathers, in a position in which they beg virtually on an annual basis to acquire more and greater expanded time to see their own children?

Is it the wish of the Legislature and is it the wish of the legal community and is it the wish of the impending legislation to make it so that non-custodial parents, and again I emphasize that the vast majority of them are fathers, find themselves in a position where they not only are confronted with the responsibility of providing maintenance in terms of financial support, but find themselves in the outreaches of the ability to share with their children their upgrowing?

Is it too much to ask that a parent who is loving and compassionate and educated and willing, is restricted from access to their children?

I present to you the basic presumption that that is not fair. It is not just and, worse than that, it's immoral. It brings us to the position where a counsel for the opposition finds themselves suggesting to the counsel for the non-custodial parent that they present themselves of ghosts of Christmas' past when they wish to proceed and participate in activities of their children. Such is not, I believe, the intent of this legislative community. It is not the intent in this discussion of best interests for children. The best interests of children are to have many loving, considerate, compassionate people surrounding them and expending their love to them.

It is not the intent, I don't believe, of this court or of this Legislature to present us with a situation where parents, particularly fathers, are contemplating kidnapping their children only because they have to beg for an additional hour here, there and everywhere. When you contemplate what's commonly given for access to non-custodial parents, three hours in an evening during the week and every alternate weekend, which comprises a grand total of five days over a course of a 28-day month, is that considered to be equitable? Hardly so. Yet by the same token, the same Legislature demands the equal distribution of financial resources that are party to the marriage; again, not equitable, not just and truly immoral.

My basic concern is that joint custody should have been a presumption of this legislation. The fact that it is not, I find a major misgiving and failing of the legislation; beyond which even the act, as it's presented, doesn't adequately approach the concerns and love and the affection of the non-custodial parent, even to the negative.

I refer to Clause 14.1(4), and you'll excuse my inability to detail these legalese, and I read: "Unless a court otherwise orders, the parent who is denied custody of a child . . ." Denied custody - what a negative term! Wouldn't it be better to have said the non-custodial parent? Denied custody - how is it that the vast majority of the fathers who, in fact, are denied custody aren't able for lots of reasons, other than the fact that they need to support and maintain their former spouse and their offsprings, aren't able, in fact, to take the time off to care for them on a day-to-day basis? That is not just opportunity to build up brick walls and prevent the access of children by their natural fathers. In truth, Big Brothers are even more capable and have easier access to spend time with their little brothers than non-custodial parents do in the system in which we have currently.

The legislation suggests that, and again I take odds with Mr. Fishman suggesting that a non-custodial parent, again, is going to harass the custodial parent by suggesting or requesting reports that are related to school, medical, psychological, dental and other reports that affect the child. How about the opportunity of non-custodial parents to participate in extra-curricular activities? There is no provision in this legislation, albeit not involving joint custody for that effect.

What opportunity does the non-custodial parent have? In fact, he has virtually no rights, nor does he have the opportunity - and I keep emphasizing "he" because the vast majority of non-custodial parents are in fact "he" - what impact can he have on the day-to-day activity of the child, their extracurricular activities, any guarantees that they'll be notified of school functions or, again, extracurricular activities? What's to prevent the custodial parent in the legislation that's promoted to allow for the scheduling of events during the supposed non-custodial parent's access time? There isn't anything in this legislation that will allow for that to happen.

My request is only that the legislation be reviewed. If, in fact, joint custody is not going to be the prevailing factor, and it is my deep regret that it will not be, then the legislation needs to be made significantly more liberal for the non-custodial parent. It's no longer a matter of two individuals, particularly the non-custodial parent being a warmonger, looking to upset or harass the custodial parent. It's only a deep entrenched desire to share and participate in the growing and development of his own child. Don't interrupt and don't interfere with that from happening; in fact, you should be harnessing all of your resources to encourage the non-custodial parent to establish better and more expanded relationships with his children by allowing less restrictions on his access and more opportunities for that relationship to grow.

The vast majority of non-custodial parents and the bad rap that they've often had has been a result of the system. They finally find themselves in a position where the frustration and the disappointment and all of the factors that involve themselves with the inability

to explore and share with their children, they finally throw up their hands and walk away. The consequence of that is that the legislators interpret that as a lack of interest by non-custodial male parents. Such is not the case. Let the system contribute to the participation of fathers, not stand in its way.

Thank you for receiving my presentation.

MR. CHAIRMAN: Any questions? Thank you.

Mr. Penner.

HON. R. PENNER: I just want to thank Dr. Hechter for the presentation. It was very thoughtful. I just want to tell him that very serious consideration was given to the recommendation, in fact, in the Carr Report for joint custody. It did not garner sufficient support to proceed with it at this time, but I think I would like to assure him that the matter has not been dropped into oblivion.

DR. F. HECHTER: Thank you.

MR. CHAIRMAN: What is the will and pleasure of the committee?

HON. R. PENNER: Committee rise.

MR. CHAIRMAN: Committee rise and reconvene on Thursday, 10:00 a.m. (July 21, 1983).