LEGISLATIVE ASSEMBLY OF MANITOBA

THE STANDING COMMITTEE ON LAW AMENDMENTS

Thursday, March 8, 1990.

Time — 8 p.m.

LOCATION — Winnipeg, Manitoba

CHAIRMAN — Mr. Helmut Pankratz (La Verendrye)

ATTENDANCE - 10 — QUORUM - 6

Members of the Committee present:

Hon. Messrs. Downey, Ducharme, Ernst, McCrae

Messrs. Doer, Edwards, Evans (Fort Garry), Pankratz, Patterson, Ms. Wasylycia-Leis

WITNESSES:

Ms. Jeri Bjornson, Charter of Rights Coalition (Manitoba)

Mr. Jack King, Family Law Subsection

Ms. Annette Willborn and Ms. Janet Johnson, YM-YWCA Winnipeg

Ms. Mona Brown, Manitoba Association of Women and the Law

Mrs. Berenice Sisler, Private Citizen

MATTERS UNDER DISCUSSION:

Bill No. 47—The Dependants Relief Act

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Mr. Chairman: I would like to call the Standing Committee on Law Amendments to order at this time. Before us we have Bill No. 47, The Dependants Relief Act; Bill No. 48, The Intestate Succession and Consequential Amendments Act; Bill No. 49, The Dower Amendment Act; Bill No. 50, The Wills Amendment Act; Bill No. 51, The Marital Property Amendment Act; Bill No. 52, The Family Maintenance Amendment Act. We have Bill 101, The Statute Re-enactment and By-Law Validation (Municipal) Act; and Bill No. 56, The Workers Compensation Amendment Act (2). Those are the Bills we have before us.

* (2005)

We will proceed in numerical order, and so we will start with Bill No. 47, The Dependants Relief Act. Before us to make a presentation we have Ms. Jeri Bjornson, Mr. Jack King, Ms. Annette Willborn, Ms. Janet Johnson, Ms. Mona Brown. Are there any others to Bill No. 47 who would like to make a presentation and are not on the list? Ms. Wasylycia-Leis.

Ms. Judy Wasylycia-Leis (St. Johns): I just had two points to seek guidance on from the Chair. One is, there is in the presentation a couple of people presenting together, and they are wondering if the mike could be lowered to the table level and have two chairs set at the end. Maybe we could do that for all the presenters. The other is—I gather there is an interest, there is certainly I think agreement in terms of all the Members here to have each presenter deal with the entire package rather than Bill by Bill, so I think we are all in favour of that.

Mr. Chairman: That is the will of the committee? (Agreed) Then maybe the presenters can come forward and also indicate on which Bills they are making their presentation at the time. Is that the will of the committee? (Agreed) So we will ask the first presenter to come forward. Ms. Jeri Bjornson, Charter of Rights Coalition. I believe everybody has her package. Is this correct? Very good.

I would like to stress though that we have a lot of people before us making a presentation, and in fairness to all if we would keep our questions as short as possible and possibly the briefs also. They do not have to be repetitious on every occasion, so if we could try to accommodate each other with that, that would be greatly appreciated. I think that would be good for the presenters and also for the committee Members.

So with that I would like to ask Ms. Bjornson to start with her presentation.

Ms. Jeri Bjornson (Charter of Rights Coalition - Manitoba): I want to thank you for the opportunity to present before this committee tonight on the six family law Bills, the six Bills that make up the family law package.

* (2010)

The Charter of Rights Coalition has been in the conversations and consultations around this package since our inception, I think, in 1985. Some of our members have been working on this legislation for 15 or 20 years. We were pleased to see the package come forward, and we are somewhat disappointed by some of what we have found in the package. I will be presenting on all the Bills, as noted earlier, and not necessarily in the order that they have been called.

First I would like to tell you a little bit about CORC. CORC is a coalition of groups and individuals which organized around the implementation of Section 15 of the Charter of Rights and Freedoms. The work we have been doing is to ensure that all Manitoba legislation complies with Section 15 of the Charter of Rights and Freedoms on the basis of sex.

The member groups of CORC are the Junior League of Winnipeg, the Immigrant Women's Association of Manitoba, the YM-YWCA, the United Church of Canada, the National Action Committee on the Status of Women, the Manitoba Action Committee on the Status of Women, the Manitoba Association of Women in the Law, and a provincial council of women.

As well as those groups, who are our member groups, some of whom will be presenting their own briefs this evening, since the publication of the material that CORC has produced, three other groups have indicated to us that they are in full support of the amendments we are recommending to these Bills. Those groups are the Congress of Black Women of Canada, Manitoba Chapter; the Committee of Women Artists, and the Swan River Committee on Wife Abuse.

The work that CORC has done has been based on a number of principles, four of which we outlined at the beginning of the printed material which we gave to you this evening. We found that as we were working through the legislation there were times when principles had to be weighed one against the other.

Our primary principle is that the Charter of Rights and Freedoms guarantees equality between men and women, and that provincial legislation must be free from discrimination based on sex. This includes blatant discrimination, for example, laws which are written to treat women and men differently, but it also includes laws which have an unequal or disparate impact on one's sex. For example, in succession legislation, which is most of the legislation we are looking at this evening, any provisions which discriminate against surviving spouses can be argued to discriminate against women on the basis of sex because the majority of surviving spouses are women.

Our second principle is the principle that is elucidated in Manitoba's family law, and that is that marriage is a partnership of equals and that anything acquired by a couple during marriage is assumed to have been acquired through the efforts of both. Out of that principle, we believe that legislation should protect the economic security of both spouses during their lifetimes and of the surviving spouse at the time of the spouse's death, that each partner has the right to an equal share of the accumulated assets at the time of marriage breakdown and that a surviving spouse has the right to at least one-half of the estate at the time of the spouse's death.

Our third principle is that where there is no will, the law should reflect the majority of wills. The majority of spouses leave their entire estate to their surviving spouse; therefore, the law should ensure that widowed spouses receive the entire estate where there is no will.

The fourth is that parents have a legal obligation to support their minor children. Once children reach the age of 18, parents may choose to support their adult children, and parents do not have an obligation to support adult children unless they are dependent due to severe mental or physical incapacity, nor do they have an obligation to leave them a portion of their estate.

* (2015)

The first Bill I would like to speak to is Bill No. 49, The Dower Amendment Act. I am going through them in the order that they are in our package. One of the major criticisms of the present succession legislation in Manitoba is that in many instances this legislation affords a widowed spouse rights which are inferior to the rights of spouses upon marriage breakdown. It is our position that this situation is illogical and discriminatory. We believe that, if there are not changes in this legislation, soon may lead to a number of challenges under the Charter of Rights and Freedoms.

The Dower Act amendments that are before us this evening seem to the Charter of Rights Coalition to be for the most part window dressing and, if not addressed, the major problems within The Dower Act.

There are two important amendments to this Act, one which gives priority to a spouse's fixed share of an estate over orders under the new Dependants Relief Act. It is awfully confusing as we are working through this, because we have the change in names of Acts. The second is the inclusion of criteria under which a surviving separated spouse would lose his or her right to claim a portion of the estate under The Dower Act.

Before I speak to those though, I would like to speak to what is missing, the major piece that we think is missing in this piece of legislation. One of the things I will just mention as an aside is that unfortunately, without rewriting The Dower Act, we have an Act in which the language is incredibly sexist, speaking of a testator and his wife, the owner and his wife. It is unfortunate that at this time in our history the entire Act was not redrafted to get rid of that kind of language.

Our other major concern is those provisions of The Dower Act which lead to the situation where the rights of a separated spouse or rights of a spouse at the time of marriage breakdown are superior to those of a surviving spouse. Of major concern to the Charter of Rights and Freedoms are Sections 15 and 16 of The Dower Act. It is in those two sections where we find that surviving spouses are not guaranteed at least one-half of the net share of the estate.

The major problem at this point, and probably the easiest section of the legislation to fix at this point, is the exemptions that are found in Section 16 of the Act. I will not read those exemptions to you; but, for instance, one of the ways to circumvent leaving half of an estate to a spouse is that a testator is allowed to make a limited bequest within a will. With that limited bequest, the surviving spouse would not have the right to take under The Dower Act. That limited bequest is as small as an annual income of $15,000 per year for life. Fifteen thousand dollars, as we all know, is right near the poverty line for single persons.

If the testator includes one of the exemptions in the Act in his or her will, the surviving spouse would have no right to choose to take a fixed share of one-half of the net estate under The Dower Act.

We believe that these are illogical and discriminatory and that the effect, as I mentioned before, is that they afford widowed spouses rights which are inferior to the rights of a spouse upon marriage breakdown.

It is the position of CORC Manitoba that at this point the minimum requirement for The Dower Act is that Section 16 of The Dower Act be deleted and that these exemptions be eliminated. We would like to see a change in Sections 15 and 16, but a change in Section 15 we see as a major drafting job because it is affected

by several other sections of the Act. We can see no reason why the exemptions in Section 16 could not be deleted at this time.

I would like to mention we are very pleased with the inclusion of the priority of the fixed share under The Dower Act over the new Dependants Relief Act. We see this as a good addition to the Act and will ensure that a surviving spouse will not lose his or her rightful share of the estate as a result of an order of support and maintenance under The Dependants Relief Act.

* (2020)

We do have some concerns about the sections of the Act referring to separated surviving spouses, and those are found in Section 22 of the Act. We believe that the intent of these sections is a good intent, that it sets out a time when at the time that separated surviving spouses would not have rights to take under The Dower Act. We are concerned; our position is that if separated spouses have concluded a final property settlement either by agreement or court order or have an application pending under The Marital Property Act, they should not have rights under The Dower Act.

We believe that where no settlement has been concluded, the separating surviving spouse should have the option of taking in accordance with the will, or The Dower Act, or applying for an accounting in equal division of assets under The Marital Property Act. We believe that the loss of dower rights, the way the Bill is presently drafted, is unjust. Our suggestion is that Section 22(1)(a) be deleted. We do not think that it is fair that having been separated for a year would be a criteria under which you would lose the options to elect the option that would give a surviving spouse the greatest economic security.

There is no time limit under which a separated spouse must commence action under The Marital Property Act, and many do not get legal advice for years. So we feel that Section 22(1)(a) should be deleted, that Section 22(1)(b) should be amended, and I believe Mr. McCrae, the Minister of Justice, will be introducing an amendment which will take care of our concerns under Section 22(1)(b). We believe that it should be amended so that an application would be pending or had been dealt with by way of a final order at the time of the intestates death.

I believe that Section 22(1)(c) should be deleted. The language like "attempt" is much too vague. We know of cases where lawyers write letters asking for disclosure, but they are not followed up for a variety of reasons. We also believe that Section 22(1)(d) should be amended by deleting "or appears to have been intended by them" and inserting between "finalize" and "affairs" the word "all". We feel that "appears to have been intended" is too vague.

Our basic position related to separated surviving spouses is that the affairs must have been finalized between the couple prior to losing the options under this Act. There are a number of other areas that are not addressed in the proposed Dower Act, which I will not go into this evening but will draw your attention to at the end of that section.

I would like to now go on to The Intestate Succession Act, Bill No. 48. Under The Intestate Succession Act we were quite excited because we were told that we had an all-to-spouse rule, something that the Charter of Rights Coalition and a number of other groups have been asking for for a number of years. Well, what we got was sort of an all-to-spouse rule.

Although the Department of Justice describes the amendments as an all-to-spouse rule, they are not. There are two situations where a surviving spouse would receive the entire estate. That is where the deceased spouse had no children or where the only children of the deceased were also children of the surviving spouse. When the estate would not go to the surviving spouse is where there were surviving children of a deceased spouse from a previous union. This is not all-to-spouse. Either a surviving spouse gets the entire estate or a surviving spouse does not get the entire estate.

The legislations drafted seem illogical to us. It creates a situation where the children of an existing union have a claim on an estate only if the deceased person has had children from a previous union. This is one of those places where the second-guessing comes in. Most people leave their entire estate to their surviving spouse. It seems to be, to us, that the fairest way to second-guess is to base it on the wishes of the majority of those who die with wills. Most wills leave the entire estate to the surviving spouse and those with very large estates or complex family situations generally leave wills.

We believe that in the proposed Intestate Succession Act, Section 2 should be deleted as we have outlined here, in order that the entire estate would go to the surviving spouse. There are some other sections referred to later in the package which would have to be amended depending upon what happens with Section 2.

* (2025)

We have exactly the same concerns around separated surviving spouses as we had in The Dower Act and would make the same amendments that we recommended for The Dower Act in Section 3 of this Act. I will not go through those again. We believe that this Act also should reflect the principle that a surviving separated spouse would lose none of the options for economic security unless the affairs between the two spouses had been finalized. There are also, under this Act, a number of other amendments that we would have loved to have seen, but are not there and do not propose that they be added this evening, but bring them to your attention.

I would like to turn now to The Dependants Relief Act. This Act which will replace the existing Intestate or Family Maintenance Act, makes some provisions which we think are excellent. These include the provision that shifts the test of entitlement from moral duty to one of dependency. This should preclude, we believe, the possibility of able-bodied economically secure individuals contesting wills because they are piqued about not having received their share. One of our concerns about the legislation though is that there is

no definition of dependency. We also support the fact that this legislation recognizes the needs of dependent common law spouses, a move that was greatly needed in this legislation. If also, in cases where the surviving spouses share of the estate under The Dower Act is not sufficient to provide economic security, she or he would be able to apply for additional support under this Act, and that we believe that is a very good addition to the Act.

We also support the addition to the Act which provides for the possibility of interim orders for those who are in immediate need. We certainly are aware of cases where that has arisen, and it is a good addition.

As well as these improvements to the existing legislation, there are amendments which we believe are problematic. This is in the area where the proposed legislation extends the definition of dependants to grandparents, parents, grandchildren and siblings of the deceased. We believe that these categories of dependants should be deleted for a number of reasons, and they are outlined in the clause-by-clause section. Basically we believe that there is a danger, with more possible claimants to share the estate, that it is more likely there will be a loss of economic security for a surviving spouse and his or her dependent children.

We believe that these additions could have the effect of discouraging people from helping family members during their lifetime, that their altruism while alive could result in diminishing the estate and penalizing their immediate families after death. The result could be a refusal to support family members during one's lifetime, increasing welfare costs. We are also of the belief that if the deceased desires to continue support after his or her death, the most appropriate way to do that is through a will.

As I said, we believe that under "Definitions," Nos. e, f and g, which extend the definition of dependants to grandchildren, grandparents, siblings and parents, should be deleted. We also have a concern under Section C, under dependant definition. We believe that the phrase "of the opposite sex to the deceased" should be deleted, that as presently drafted, it is contrary to the Manitoba Human Rights Code to exclude on the grounds of sexual orientation.

* (2030)

We also firmly recommend that Section 5 and Section 10(2)(f) of the legislation be deleted. These are new sections which, along with the extension of categories, we see as quite dangerous. In fact it is our position that they release society from legitimate obligations to those who are in need.

Now going on to The Wills Act, Bill 50. The Charter of Rights Coalition supports the amendment as proposed to The Wills Act only if the exemptions to The Dower Act, the exemptions in Section 16 of The Dower Act, are deleted from that Act.

A few quick comments on The Marital Property Amendment Act. The proposed amendment is one which we support because it clarifies the right of the court to make interim orders under the Act. We certainly believe that this will afford protection to spouses in situations where there is lengthy and complicated accounting, but would like to raise a concern about what is not in this Act, and that is the whole idea of when marital property becomes community property. We would like to raise again our concern that we have a community of property regime only at the time of marriage breakdown and not at the time of marriage. This certainly has a disparate impact on women and if we had community of property at the beginning of marriage a number of the concerns that we have raised in the rest of this package would no longer be concerns because it would have been taken care of with the joint ownership of property at the beginning of marriage.

Also, under The Family Maintenance Act, we certainly support the three amendments which have been made to this Act, especially the amendment which clarifies the present section of the Act giving non-custodial parents the right to receive information for their children. We were very distressed in the Twaddle decision where the courts gave such a broad interpretation of that section of the Act that it became in effect joint custody when the courts had given only sole custody.

We also support very strongly the possibility of making child support obligations binding on the payor's estate as well as allowing the court to order imprisonment for failure of payment of support on an intermittent basis.

Those recommendations we support strongly. We would like to raise one of our concerns about what is not in this Act and that is, the entire area of spousal maintenance and child support needs to be re-examined in light of present inequities and there need to be some clear guidelines for the amount of supporter maintenance. The legislation needs to be amended soon, although I am not suggesting you do it tonight, to achieve a system which would seek to equalize the economic positions of payor spouses and of recipient spouses and their children.

That is the completion of my prepared—

Mr. Paul Edwards (St. James): Thank you very much for your presentation tonight. I just have a couple of questions. First of all, with respect to The Dower Act, you have made the comment that Section 16 should be deleted in its entirety, and you have referenced that the figures included in Section 16 are grossly unjust and certainly out of step, and it is probably not wise for legislators ever to put dollar amounts into legislation because I think we can all see from this Act the fruit that that bears which is that they almost immediately become obsolete.

I want to ask you with respect to Section 16, if we were to move to delete that tonight from The Dower Act, I suspect that there would be objections about that being included in this amendment Act from the Minister. I also suspect that he may decide that this Act should not go forward, this amendment Act, if that move were to be made. I am wondering what your response to that would be in the event that happened here tonight.

Ms. Bjornson: I choose to believe that on International Women's Day, a day when a Minister of this Government

tabled the document which stated that discrimination against women on the basis of sex is unacceptable in Manitoba and goes on to say that the Government in its actions and programs will move to prohibit and to hold accountable those who practise such discrimination, that on this day the Minister would not withdraw a Bill on the grounds that an attempt was made to get rid of the grossest inequalities in the succession legislation in this province. I would hope that the Minister would not withdraw the Bill on those grounds, especially on International Women's Day.

Mr. Edwards: With respect to this Dower Act generally, this has been quite a drawn-out process. I think we have been at this at least a couple of years in terms of producing papers and consultations. I know that your group has been involved.

It was somewhat disappointing to myself and to our caucus that The Dower Act was not overhauled. I note your comments that Section 15 needs some serious amendments. The Act is generally gender specific rather than gender neutral. It needs a review in a comprehensive way. That has not happened obviously with respect to this package. Were you anticipating that it would happen at this time, given the length of consultation and the specific consultation on this Act that had preceded the tabling of this package?

Ms. Bjornson: We had expected a major overhaul of The Dower Act at this time. A major overhaul of The Dower Act has certainly been discussed since the introduction of the family law package in the 1970s. Having gone through about four years of consultation around this legislation, a discussion paper which led us to believe that The Dower Act would be overhauled, discussions with staff in the Attorney General's Department, we had expected more than window dressing. I think on The Dower Act all we got was window dressing.

Mr. Edwards: Again with respect to The Dower Act, if we were to delete Section 16, that would mean that the spouse would receive half of all net property, albeit the imperfections of that in Section 15. That to my knowledge is more or different than The Marital Property Act where on the termination of a marriage, what is given is half of marital property rather than all of the property that an individual has.

Can you give us any guidance on that as to whether or not you think it is necessary for there to be consistency between the dissolution of a marriage through divorce or separation and the dissolution of a marriage through the death of one of the spouses?

Ms. Bjornson: I think the consistency has to be in the minimums that one would receive, that the principle of one-half is the minimum. Some people have called some of our suggestions a bonus for staying married. If you want to call them that, that is fine, but I think it is in the minimums. Our principle has been that a surviving spouse has a right to at least one-half of the estate. We have no problems with inconsistencies—when you have stayed married, you would be guaranteed somewhat more than half of what you had accumulated during a marriage.

Mr. Edwards: I anticipate there will be other advantages to staying married, but going on to the dependants I certainly take your comments, and your point is taken.

With respect to The Dependants Relief Act, one thing you did not mention and which I know may be a concern of yours and, quite frankly, at least at the outset caused me some confusion as to why it was there—and I am speaking of Bill 47, The Dependants Relief Act—is Section 5 and Section 10(2)(f). Specifically those appear to give some rights to the province to apply to get money with respect to people who are receiving social allowances.

I must admit that when I read it at first, I thought perhaps this just gave the state the right to apply to supplement what perhaps the dependant had been receiving, supplement the social allowance that person was receiving. On rereading it I see—and in particular with respect to 10(2)(f) which uses the word "reimbursement"—that it quite likely means that the state will be looking to take out of the estate what they would have paid in social allowances, that is recoup the monies they are paying out.

* (2040)

Can you give us your thoughts on that, whether or not that is an appropriate thing for the province to be including in this Act?

Ms. Bjornson: I had thought I had mentioned it. I do have a note here that says delete 10(2)(f) and 5, but I may have missed it as I was going through.

We have recommended all along that those two sections be deleted. One of our comments is that there are some accepted responsibilities of the state, and that one of those is that the state supports those who cannot support themselves. When you have this increase in the number of categories of dependants, along with Section 5 and Section 10(2)(f), we think there is quite a danger to the economic security of the surviving spouse in those cases.

Mr. Edwards: Do you see any reason why the state should be able to in fact take money away from a surviving spouse to recoup its legislative obligation to give social allowances to a dependent person?

Ms. Bjornson: No.

Mr. Edwards: Well, I agree with you, and I am quite shocked that this is in here. I must admit, as I say, when I first read it I did not pick up, I think, the full meaning. Perhaps the Minister can enlighten us if some of the things we have talked about are not intended, but it appears from the wording that would be the effect.

Again, let me just close by thanking you for your work on this, the work of your group which has been legion throughout this process and indeed right through to the end in assisting all of us to better understand the concerns of, in particular, women in this province with respect to family law, which of course is of the utmost importance to all Manitobans but, I do acknowledge, in particular women. Thank you again.

Ms. Bjornson: Thank you.

Mr. Chairman: Thank you. Ms. Wasylycia-Leis.

Ms. Wasylycia-Leis: First I too would like to thank the presenter for taking the time this evening to make such a detailed presentation, and also for the work of the Charter of Rights Coalition in terms of putting together such a major extensive brief on all of these Bills. It has certainly helped all of us regardless of our positions, I am sure, to understand some of the intricacies of these Bills, because they are complex and the language is quite unfamiliar to many of us. We appreciate the work you have done, not only in terms of the present set of Bills, but also the years you have spent on the very extensive audit of all legislation from the point of view of the Charter of Rights and Freedoms.

I want to focus in on several key areas that you have singled out and that I also believe, and my colleagues in the New Democratic Party believe, are major concerns and contentious issues with respect to this package. They will follow along some of the questioning raised by my colleague, the Member for St. James (Mr. Edwards).

The first area, of course, has to do with The Dower Act. I will deal with these in the order, I think, as you presented them. I think there is general agreement that this Bill before us, Bill 49, is very minor in terms of what needed to be addressed with respect to this area, that much has been left out of significance and that there is certainly a long overdue action in this area.

One of the arguments we have heard is that time did not permit a more extensive review or assessment of the consensus in the community in terms of The Dower Act and that this will come at a later point. I was also under the impression that it had been thoroughly discussed over a number of years, but I would like clarification on that. Has The Dower Act not been part of the whole review of family law in Manitoba over the last several years?

Ms. Bjornson: My understanding and in my experience The Dower Act has been part of those discussions and was part of the discussions in the major initiative in family law in the 1970s, and certainly was included in the discussion paper a number of years ago. Unfortunately, I think that what had not happened around The Dower Act and these other Acts was the kind of consultation that could have come out of a White Paper, where some principles could have been outlined, and then there could have been some response to those principles.

The concerns of The Dower Act have been under scrutiny and have been discussed for a number of years, as long as the Intestate Succession or Devolution of Estates Act certainly.

Ms. Wasylycia-Leis: Related to that it has been suggested that with respect to your concerns and recommendations around Section 15 of The Dower Act there is not yet a consensus in the community. Could you give us your sort of reaction to that view? What are the differences in the community with respect to moving clearly towards the principle of equality and the principle of marriage as a partnership of equals?

Ms. Bjornson: There is certainly consensus within our groups, which I think covers a large part of the community. There are some differences in our position, and I do not have them at the top of my head. I do not have the file with me, but there certainly are differences between our position and the Family Law Reform Commission on some of the ways of fixing Section 15.

A number of years ago, it must have been four or five years ago, we went through a spate of correspondence. We produced the audit. The Law Reform Commission responded to our suggestions in the audit. We responded to the Family Law Reform suggestions around The Dower Act, and then the Family Law Reform Commission responded to our responses. There has been some correspondence, but I think on some things we will never come to true consensus because we are working from different principles, and the principle of the Charter of Rights Coalition and its members is a round charter. I think we tend, more so than some other groups who have been steeped in the law a long time, to look at new wine skins rather than putting new wine in old wine skins and occasionally come up with suggestions that are somewhat different from those that come from groups that look at changing what is on the paper rather than erasing it and starting over again.

* (2050)

Ms. Wasylycia-Leis: You hinted at this in terms of your response, the difference between CORC's position and the Law Reform Commission's position with respect to Section 15. It is my understanding that your position is, in a very simple terms, one-half of the net estate. If I understand the Law Reform Commission's position, at least based on the discussion paper, that position is a deferred one-half share of the spouse's marital property. Could you tell us just briefly the difference between those and the merits of your position over the Law Reform Commission's?

Ms. Bjornson: No, but I bet Mona will think about it, and you can ask her.

Ms. Wasylycia-Leis: Sorry if that was an unfair question. I am struggling as well with all the different concepts, and it is not all clear in my head. I will ask Mona and I will ask the Law Reform Commission representative as well. Would it be fair to say that CORC represents a significant number of women in our population when it comes to proposing this concept of one-half of net estate?

Ms. Bjornson: I would say that we do represent a significant number of women within the province, as well as a few men among some of those groups.

Ms. Wasylycia-Leis: Going on to Section 15, I also, based on my preliminary analysis, tend to question the purpose of keeping that list of exemptions in The Dower

Act if we are moving a little bit closer through this package to being in line with the Charter of Rights and Freedoms. It has been suggested that deleting Section 16, however, needs a bit of time in terms of thinking and education and communication to the public. What is your assessment of the impact of deletion of Section 16? Will it throw our society upside down in terms of doing that? Will it have major ramification in terms of people's approach to wills?

Ms. Bjornson: In our analysis of the effects of deleting the exemptions in Section 16 we can see no way in which it would turn the world upside down in looking at wills. Where it would make a difference is in those cases where either—sometimes I think it is not certainly an attempt to cheat a woman or cheat a surviving spouse, but I think it would. The principle of allowing someone to circumvent the principle of leaving half of the net estate seems to me to be quite a faulty principle. It is not only the numbers that stink, it is the principle that you can circumvent an accepted principle in family law. I can see no reason why the elimination of the exemptions in Section 16 should cause any sort of major concern within the population of Manitoba or the legal community in Manitoba.

Ms. Wasylycia-Leis: Given, I believe, the Minister of Justice's (Mr. McCrae) concern about making changes now with respect to 15 and 16, if any kind of compromise can be reached in terms of perhaps deleting Section 16 and putting on hold Section 15, is that a significant move in the right direction, and would it be acceptable to the women and the people that you represent?

Ms. Bjornson: It is a significant move and, I think, would would go a long way to eliminate the major discrimination and succession legislation in this province. We would be somewhat patient about the introduction of more amendments to The Dower Act. We will not say totally patient. We will not let anybody forget that The Dower Act continues to need amendment, but the eliminations of the exemptions in Section 16 would certainly if not satisfy us at least keep us quiet for a week or two.

Ms. Wasylycia-Leis: And that would be something. I can say that.

I have a last question on Section 16 in The Dower Act. Would it be fair to say that Section 16, or these exemptions to the provision of one-half of—or a fixed share, or one-half of the estate to the surviving spouse is used primarily by those who want to do anything to avoid ensuring that their surviving spouse gets a fair share out of the estate?

Ms. Bjornson: It is hard to know why people do it. I think in a lot of cases spouses trust, for instance, their children to take care of mother if I die, so I will leave the $15,000.00. She can stay in the house, and I will trust the children to take care of her if she needs more. I think there is a lot of that thinking. It is hard to—I am not a lawyer. I do not practise law. I do not hear what people say when they want to draft these kinds of wills, so I am just not sure why. It is often related to very large estates.

Ms. Wasylycia-Leis: While we may never be able to understand fully why that provision is used, I think there is certainly a general feeling on the part of many of us that it does move away from that whole notion of ensuring economic security for the surviving spouse.

I think it would be helpful, in terms of this point and all of the other Bills that we must go through, for perhaps you to give us some idea of the kind of economic insecurity we are dealing with as a society when we are talking about older women, when we are talking about women generally. I think that is something that is often neglected when we start looking at detailed intricacies of laws but we forget the poverty and the economic insecurity of women and older women.

I am sure CORC has talked about that. Can you give us your position and your understanding of the situation?

Ms. Bjornson: Certainly; the catch phrase recently has been the feminization of poverty. Certainly that is what we have seen throughout Canada. The face of most of that poverty is elderly women, and there are a number of factors that go into that: The fact that many women have not been employed outside of the home and have no pension in their own right; the fact that there are times when they do not get a fair share of the estate. There are a number of factors.

Clearly the face of poverty in this country, at the present time, is the face of elderly women. It is not the face of nondependent, 35-year-old children. It is generally the face of elderly women. That is the reality in this country. Certainly the economic security of a surviving spouse is one of our major principles in doing the analysis of this legislation.

Ms. Wasylycia-Leis: I think that comment partly addresses my next set of questioning around The Intestate Succession something or other Act.-(interjection)- That is right. We have actually a constructive suggestion later on for the Minister. We think we should change this to the people-dying-without-wills Act and clarify matters.

The comments about the feminization of poverty and the face of poverty in our society today relates to the question of all-to-spouse in this Act. I think there would be general agreement that the provisions in this Bill do not clearly leave us with an all-to-spouse principle, that in fact it creates exceptions and it waters down the principle and that in fact—what I want to ask you, would the intention of this Act to leave a window for dependent children of the first marriage be based on another principle? It does not seem to need to be based on the equality principle or all-to-spouse rule. Is it based on another principle, another sort of pull from within our society?

Ms. Bjornson: I just have a comment before I answer your question. I also heard not only the people-who-die-without-wills Act—I was discussing this with someone who said I think they should just put it all in one Bill and call it the what-to-do-when-someone-dies Act.

I think that the all-to-spouse rule, as it is written here, is not based on the principle of the economic security

of the surviving spouse. I think that the way it is written, it is written somewhat on an assumption that there is a moral obligation to leave something to surviving children. It is also based on a situation where a second spouse cannot be trusted to do that with children from a first marriage.

I think both those assumptions go against the basic principles that we believe should be applied when there is no will. This is one of those cases where you have two or three competing principles and have to juggle them and weigh them. We think that the principle of economic security for the surviving spouse and the principle that there is no moral or legal obligation to leave an estate to children—I would like to mention at this point that The Wills Act never says that you have to leave anything to your children. I mean, there is no principle that you have to leave anything to your children. Those two override any other principles or assumptions that may be included in this Act.

* (2100)

Ms. Wasylycia-Leis: I am wondering, it seemed to me that it is based perhaps on a feeling or a principle of inheritance and a desire to leave something for one's children for when they reach adulthood, in terms of education and future economic security. That is more an editorial comment than a question.

Perhaps if I roll that into a question you can answer on all fronts, although I am known to ramble on and you may lose track of my question. Related to that it seems to me we are trading off that kind of a principle versus ensuring economic security for a surviving spouse who is likely quite possibly responsible for, with of course her new partner, the dependent children of the first marriage and the second marriage, that in fact you could have a situation of a surviving spouse with those responsibilities, in the case of a small estate, being left with barely enough to live on while a chunk of that estate has been carved off and is sitting in trust until the dependent children of the first marriage reach adulthood. Is that a fair comment in terms of what is one possibility that might happen? Would you agree that it makes more sense to worry about the economic security of that family unit, and that it is probably more an investment in the future doing it that way than putting some in the bank for down the road?

Ms. Bjornson: Yes, I think that is a good point. One of the major problems with the old Devolution of Estates Act was that often young women who were left widowed ended up with the money that went to their children in trust, and they had barely enough to live on.

This Act, I think, maintains that situation the way it is written. Even if you had dependent children from a second marriage and children who were not dependent from the deceased person's first marriage, the surviving spouse would be left with a smaller share of the estate and a piece of the estate then in trust and would not be easily accessible while at the same time having the responsibility of raising those children.

Ms. Wasylycia-Leis: On that, it seems to me that a surviving spouse is not going to abandon children from her first marriage, even though she may have remarried and has children from that marriage. In fact, she will maintain that responsibility for those children as dependants and be worried about their future. That is my sort of gut reaction to the trade offs here and the picking and choosing that one must do when looking at this Bill. Is that a fair assessment?

Ms. Bjornson: Certainly in our discussions with groups, one of the things we hear about is a fear of the wicked stepmother. I think that the time has come in this society to get rid of this myth of the wicked stepmother, and that we must trust women to do what is right, which is to maintain—there is a legal responsibility and we trust women to maintain the economic well-being of dependent children, and that there is no moral or legal obligation once they are no longer dependent to maintain them. Then that is a gift.

Ms. Wasylycia-Leis: I know I am taking a little longer than I said at the outset I would take. I will try to just ask a couple more questions moving on to The Dependants Relief Act. I think the contentious clause for all of us is the new listing of dependants. It did come, I think, as a surprise to us as well as to your organization. I could not find reference to this notion in the discussion paper, in the dialogue that took place leading up to these Bills. Was it ever raised with your organization? Was it presented in a brief by any other organization? Have you any idea where it comes from? I know this is a bit of a repeat from the Member for St. James' (Mr. Edwards) question.

Ms. Bjornson: I traced back our briefs, our discussions and our letters, and I did not find anywhere where at least we had responded to any proposals for an expansion of the categories under The Dependants Relief Act. It came as a surprise to us too. I do not know where it came from, although I think it may be related to Sections 5, and 10(2)(f) and the fact that under those sections we have the increased responsibility of the state to keep people off of or recoup what has been paid by social assistance.

Ms. Wasylycia-Leis: I think one of the concerns that many people raise when speaking in support of this new amendment is when it comes to children with disabilities, particularly children with mental disabilities and the concern that one has a financial and moral obligation in one's lifetime and therefore that should be respected after death. What is your reaction to that position? I would like your reaction to my own view, which is that I would think that a family with a child with a disability, concerned about the future prospects of that child, given the lack of resources and supports in our society for such people, would likely ensure through will primarily that that kind of economic prospect was dealt with. Is that a fair assumption or not?

Ms. Bjornson: Well, under our proposals, children would maintain their right to access under The Dependants Relief Act, so in the case where it was a child of the deceased person, there would be no change. It is our feeling—we have no research, have found no

research, have no way of finding this out, but it is our sense that in cases where a family was taking care of a sibling of the deceased, or who was dependent for some serious medical reasons, that generally in those cases families who take on that added responsibility, which is certainly not demanded anywhere in the law in the case of more distant relatives, that families who take on that kind of responsibility are very concerned about the future care of those dependants and do include in wills and do include provisions either in wills or within the family unit which would take care of the care of such persons.

Ms. Wasylycia-Leis: I will stop my questioning there and just thank again the presenter and her organization for their very detailed work and presentation.

Mr. Chairman: Any more questions? If not, we want to thank Ms. Bjornson for her presentation. Next presenter, Mr. Jack King, Family Law Subsection.

Mr. Jack King (Family Law Subsection): Good evening.

Mr. Chairman: Good evening. You may proceed.

Mr. King: I am the chairperson of the Family Law Subsection, which is a branch of the Manitoba Bar Association, which is then affiliated to the Canadian Bar Association. We do not have an impressive list of affiliates; we just happen to be practising lawyers from the Family Law Subsection made up of lawyers who practise family law. I am here on their behalf to speak to Bills 47, 48, 49, 51 and 52. I am going to proceed in the order that I have just mentioned. I then start off with The Dependants Relief Act, Bill 47. The Family Law Subsection agrees with the following changes: The change from a moral to a financial dependency test, because we believe that change will preclude the courts from having to determine, as they have had to do in the past with some mixed and quite bizarre results, moral responsibility on the basis of some vague social standard.

* (2110)

We are also in favour of the expansion of eligibility, because we believe it deals with the reality that in not all families is the giving of support limited to the children and spouses. It has been suggested that there exists the possibility that some people will cease to follow what they would otherwise consider their moral duty because of the fear that the person to whom they are giving support might make an application under this Act after the donee's death. We say that is, as far as we know, not supported by any extrinsic evidence, and it is insufficient. It would suggest to pass or not pass legislation upon some vague fear of feeling. It also has to be remembered that the proposal gives the right to apply. It does not give a guarantee that the relief sought will be granted.

Furthermore, there are stringent tests that are going to have to be met before there is a charge to the estate. I also understand it was not mentioned earlier, but I understand that it has been suggested in certain written briefs that the definition of in loco parentis needs to be defined and that arises out of a concern from a recent court of Appeal Decision. Family Law Subsection take a position that it is not necessary to define that term. The definition is well established in law and all the Court of Appeal did was decide that in certain circumstances the relationship created would terminate, that further obligation to the person who stood in loco parentis. I would also like to point out that the concept of in loco parentis is one of quite grave complexity, and the existing definition should not be changed without considerable discussion with interested groups. That discussion has not to this time taken place.

We also agree with the limitation period being limited to six months. We do not agree that it should be longer. To have it longer would be detrimental and unfair to a person to take under otherwise valid provisions of a will. It is also, talking quite pragmatically, difficult to envisage why someone who is in a state of dependency, substantial dependency as the act has it, or proposal has it, would wish to take a longer period of time than six months to bring the application. In reality, the limitation is actually longer than six months, because it runs from the grants of probate or Letters of Administration. Generally that means it is going to be about a seven-month, sometimes a longer limitation period. We are certainly in favour of the amendment which provides the Act supplements the rights under The Dower Act rather than being in place of those rights.

The next one is the jaw breaking legislation, The Intestate Succession and Consequential Amendments Act. While much of the controversy surrounding this proposed legislation relates to the so-called all-to-spouse rule, and I agree, it is a rather unfortunate term in light of the provisions. Now the proposed change was one that was hotly debated by the Family Law Subsection, which is prepared to accept the proposal though it is of the opinion that it is in fact unduly harsh to issue who are not issue of the surviving spouse. The proposal made by this legislation seems to us however to be a reasonable compromise between those who would say on the one hand that there should be no all-to-spouse rule in a true sense and those who would say that everything must go to the surviving spouse despite the existence of children from another relationship.

The Family Law Subsection's position is based on the knowledge of many of its members that a lot of people getting married for the second time are not aware that a second marriage destroys a will made before the marriage and which will generally have provided for the children of the former relationship. It is very common for someone to get married a second time and have children of an earlier relationship. It happens every day. Surprisingly, more often than not, that person's relationship with those children of that earlier relationship is a warm and loving relationship, and I can tell you that people like that would be astonished to find that upon their death the second marriage had abrogated their will with the result that they died intestate, and their whole estate goes to the second spouse to whom they may have been married but for a short time.

It is indeed true that most wills leave the entire estate to the surviving spouse, but that is only true if there are not children of another relationship.

I would suggest to you that it is rare indeed that a person ignores, in his or her will, the existence of those other children. Those comments come from the common and shared experiences of practising lawyers.

It has also been suggested that it is an illogicality that the children of the surviving spouse only have a claim where there are children of the deceased by a former or another relationship. I suggest that is only apparently illogical. If there are no children of a previous relationship and the spouse takes all, as this Act would provide now, then the presumption has to be that the survivor will make proper provision for his or her own children, hence the lack of any right to claim by those children.

In the situation where there are children of an earlier marriage, or earlier relationship, and they are children of the surviving spouse, then I would suggest it would be manifestly unfair to favour the children of the former relationship without giving the children of the surviving spouse a corresponding claim.

There is no doubt about it, it is a compromise. Most of the law is a compromise. It is a series of compromises devised in order to reduce problems and not create them. This compromise is an attempt to balance the views of two extremes. The concern on the other side, those people who do not agree with an all-to-spouse rule, is that there are circumstances which would mean that the surviving spouse had a windfall only coincidentally related to his or her needs.

I would also like to point out that as far as the Family Law Subsection knows, there is no evidence which would indicate that a true all-to-spouse rule is just as has been advocated by the speaker before me, is needed because there is a particular social evil that has to be cured. There is no evidence that the lack of such a rule will result in the impoverishment of surviving spouses. In fact I would suggest to you that the other proposals in this package will ensure that is not the case despite this particular proposal not being that true all gold all-to-spouse rule.

In considering this, I would ask you to bear in mind, and speaking as a lawyer, that is what I do, that the law has not suddenly come in the door in the last few minutes. The law that we have has been something that has developed over centuries and there are reasons for it.

There is a theory behind intestate succession legislation, in all the common-law jurisdictions, and that is to allow to be done what the average prudent and caring person would have been expected to have done. Intestate legislation does not really have very much to do with the question of dependency and that is why you have other legislation because other legislation is there to deal with dependency.

* (2120)

The other controversial issue under this particular Bill seems to me to be the rights of a separated spouse. We do not really disagree that the criteria under which a surviving separated spouse would lose her or his rights under the Act could cause problems. Those are problems that are curable because of the system that we have by evidence. The fact is that in many, many cases separated spouses resolve the property issues between them by negotiation and by subsequent written agreement, and capsulating that negotiation, it is far more common for property matters to be settled between spouses in that fashion than for it to be fought out in court and the court impose an order. Marital property orders made by a court without consent are a rarity.

Look at the other side. If there was a change to these proposals, which would ensure that there was not the evidentiary problem that would otherwise exist, I know exactly what will happen. Every prudent counsel in this province will immediately, upon his or her client's separation, if it is in that client's interest, file an application under The Marital Property Act, thus creating undoubtedly a far more difficult environment for negotiation. Well, in a sense that is great for lawyers because it gives us more work, because now we have something that is going to take five times as long to negotiate a resolution for. It is not very good for the people who are in the middle of that negotiation. The effect would be, I would suggest, that reasonable people who are prepared to negotiate are going to be penalized and the litigious are going to be protected.

I might suggest of course that another way the prudent counsel could protect his or her client's interests would be to draft up a will immediately. Unfortunately, wills—and the lower courts are full of them—are things that are very easily attacked, not necessarily successfully, but it is easy to mount an attack against a will.

Moving now to The Dower Amendment Act, regarding the rights of the separated spouse in Section 22, the same comments apply here as I have just made.

There have been some suggestions that Section 16 of The Dower Act be repealed. Family Law Subsection would not disagree that The Dower Act is probably due for a complete review. Its opposition however, that it would be undesirable, it would be dangerous at this stage to make piecemeal changes to that legislation and that the safest and most prudent cause is for a complete review of the Act with the involvement of various relevant community groups.

The fact is that over the last few years there has not been that comprehensive review, that comprehensive consultation. One must remember that there are a number of people in this province who have planned their affairs taking into account the existing Dower Act. In the main they have not done it because they wish to be nasty and mean to their spouse. They have done it because there are bona fide tax planning reasons to do it.

Those people have a right to be consulted before any comprehensive change is made to that Dower Act. Well, I would agree, The Dower Act needs some stringent scrutiny. Sections 15 and 16 are nightmares when you read them.

The next Bill I wish to speak to is The Marital Property Amendment Act. We, the Family Law Subsection, are strongly in support of that proposed amendment. The lack of that provision has created an enormous amount of hardship. Generally that hardship has fallen on the shoulders of women. This change will allow a far fairer application of The Marital Property Act and will take away the hardship that a number of people now have to suffer until there is a final resolution.

I also want under this heading to just make one or two comments about suggestions as to further changes to this legislation. It has been suggested by some that the Act should be changed by incorporating jointly owned assets. That is a major and significant change to the scope and the intention of this Act. That would need, I would suggest, far more public debate and consultation than has taken place within the context of these proposals. It has also been suggested that the whole thrust and philosophy of the legislation be changed to create in this province a community property scheme. That change is so huge, it is so awesome, it has so many ramifications on so many things that I find it quite impossible to envisage appropriate and proper legislation being passed in that regard without the utmost consultation with every group. That consultation most certainly has not taken place.

The last Bill that I wish to speak to is The Family Maintenance Amendment Act. With one caveat, Family Law Subsection agrees with these amendments. The caveat is that the clarification of the rights of the the non-custodial parent to receive certain records goes further than is necessary. That Manitoba Court of Appeal decision firstly was not a decision from a trial judge granting custody. The trial judge in that case was careful not to use the word "custody" at all.

Also I would suggest that case only interpreted the existing section, as giving a right of consultation, did not give a right to the non-custodial parent to make decisions. Effectively the change now proposed not only clarifies the fact that the non-custodial parent does not have a right to make decisions, we do not object to that, but it also states that person is not to have the right to involvement in the child's life through consultation about decisions that the other party has the final say on. The other party, the non-custodial party, is in effect by this amendment relegated to a status that the Court of Appeal said that person should not have, and that is the status of a second-class citizen as far as his or her child is concerned. Thank you.

Mr. Edwards: Thank you, Mr. King, for coming forward.

Mr. Chairman: It is okay, go ahead, Mr. Edwards.

Mr. Edwards: Thank you, Mr. Chairperson.

Mr. King, with respect to Bill 48, The Intestate Succession and Consequential Amendments Act, with respect to your comment that people getting married for the second time may not be aware that the second marriage destroys a will made before that marriage. I appreciate that that, I am sure, comes from experience and the experience of the Members of your association. Do you suggest that is in and of itself an adequate reason for keeping the rule or putting this rule into place that allows an estate to be shared with children if and only if there are children from a prior marriage? I am not trying to be facetious, but it strikes me that there are ways of educating the public when they get remarried and alerting them to the fact that they will have to change their will. It may take the form of a notice in bold print on a marriage certificate application. I am not disputing that is a real problem. I am saying, is that not a problem that could be cured other than to put something into legislation which otherwise we may not want.

* (2130)

Mr. King: I am suggesting to you that a true all-to-spouse rule is based upon a fallacy, and the fallacy is that people, when they draw wills, will leave all to the surviving spouse. That is only true as far as it goes, and it only goes to the case where there is one spouse and has always been one spouse and there are not children of another marriage. I am saying there is another reality when there are children of an earlier relationship.

Mr. Edwards: That seems to me to be a different point, and I take that point. The question I had asked was specific to the question of people who were not aware that their will was nullified when they remarried. That seems to me to be a problem you have raised that the second marriage destroys a will.

I am asking you—and maybe I will just ask again, I do not know if you have an answer—is that not something we could solve through other means than putting this rule into legislation to simply protect against it? If it is something we do not want, surely we can deal with that through educational means or otherwise.

Mr. King: I am a little cynical about informing through educational means. You, Mr. Edwards, are a lawyer yourself and you know very well that the public at large are notoriously ill-informed about most aspects of law. The educational effort that would be needed to create the fairness that you suggest might be created by putting something, a stamp on a marriage certificate, would be one not worth the effort because of the cost, I would suggest. Secondly, it is not going to be effective. I do not think that is going to kill you at all.

Mr. Edwards: With respect to those children from a first marriage—correct me if I am wrong—if those children are dependants at the time of death, it is quite likely they would also be receiving maintenance payments in particular if they were still at home. Secondly, they would not be precluded from applying under The Dependants Relief Act for part of the estate.

Mr. King: I do not quite take the point. That is a given, is it not? If you are saying, is that sufficient for them? No. I am saying that completely ignores the reality. What about the situation where you have husband and wife, they are happily married and the wife dies? Their property is joint and she has left it all to her husband. They have children, the husband remarries, the second

spouse and the husband have children and then the husband dies. Surely it was the intention—one could reasonably assume it was the intention of the first spouse that those family assets she gave to her husband by her will were intended in due course to filter down to her children whether they were dependent or not.

Mr. Edwards: Let us deal with that analogy, that situation. In the second marriage are you suggesting the children are under the age of majority and would they not be taken into the second family, or are you saying they would not be—I am not questioning, I am simply asking would they not be part of the second family?

Mr. King: Not necessarily. What happens if they are 18 and 19? What happens if they are in their 20s? It was still the intention of that first spouse that her children, at whatever stage of life they were at when she and the husband died, would benefit. People do not forget their children just because they happen to have reached the age of 18.

Mr. Edwards: Mr. King, if we go back to the first marriage, let us say the first wife had never in fact died and those children became 18 or 19 and then she died, those kids do not get any money anyway, they do not get any money in the first marriage, they do not get any money in the second marriage if they are 18 or 19. I do not understand the magic of the kids from the first or the second marriage. If they are truly in need of money, they get money under The Marital Property Act when someone is alive. They can apply under The Dependants Relief Act for further financial assistance. What is the magic distinguishing between marriage from a first or a prior marriage exactly?

Mr. King: You use the word magic. We are not talking about magic, we are talking about reality. If you have a husband and wife, have children, and they lived together until death parts and the survivor does not remarry, eventually the estate became combined in the hands of one adult or one of the spouses, will pass down to those children, that is the most common occurrence. Should those children be deprived from what would normally happen or from sharing in part in the estate of their mother or father because the surviving parent married somebody else later?

Mr. Edwards: I guess my point would be if the - (interjection)- Mr. Downey seems clearly on your side, Mr. King, you will be happy to know.

If the marriage occurs even later in life and the children are from that marriage, let us say there has never been a remarriage, then those same children, who you speak so passionately about, now do not get a cent. You are saying just because their mother or father happens to have remarried someone else, then they should get some money, but they would not have gotten any money if had been their own same parents. I am sorry, what is the magic, Mr. King, of the fact that they come from the existing marriage or a prior marriage?

Mr. King: I thought I had explained already to you, sir. We are not talking about magic.

Mr. Edwards: Well, you are. No, you are.

Mr. King: We are talking about reality. Well, then we will have to differ.

Mr. Chairman: Order, please; order, please. The presenter has made his presentation, and it is the committee Members who can question him on his presentation. This is now becoming a debate in itself and argumental. At this point I would suggest that, Mr. King, if you have anything more to say go ahead, and maybe Mr. Edwards has a few more questions.

Mr. Edwards: Mr. Chairperson, I only use the word magic because it seems highly illogical to me that distinction be drawn. It is drawn by you. It is drawn by the Minister. I cannot think of any other reason except there is some magical reason that we do not know about, because I frankly cannot see it.

With respect to your comments about The Dower Amendment Act, you talk about, you do not in your brief, but you mentioned when you spoke about it, the dangers of deleting Section 16 of The Dower Act. You talk about consultations which would need to occur.

Mr. King, in 1986 the Department of Justice solicited comments from a number of community organizations and groups regarding the Manitoba Law Reform Commission Report. I do not know if your group was involved. I suspect they were. I see that in January of 1987, a policy paper was issued and written submissions were taken from many people including yourself. Then in June 1987 the Family Law Branch prepared an issues paper. I am sure you were involved in that.

In April of'89 a committee was formed through the Family Law Branch, and I think that was primarily internal. October'89 a booklet dealing with family law was prepared and distributed to members of the Bar in part as well as others. December'89 there were meetings between the department members. I do not know if they had an opportunity to meet with your group. I suspect they may have. Finally, February of 1990 the package comes to the stage that it is at now, and there were some final meetings.

We are into the fourth year of consultation and various reports being published. Your group has been involved since very early on. How much consultation do you think we should go through before we deal with The Dower Act?

Mr. King: A lot more than we have had and not just family law lawyers. There are other areas of legal practice upon which this would impinge.

Mr. Edwards: Well, interestingly in January of'87 the Wills and Trusts Subsection of the Manitoba Bar Association was also consulted. There were, by my count, approximately 15 groups and/or individuals as well as others who were consulted at that very early stage. Their opinions were solicited. You yourself say The Dower Act is in need of an overhaul of some real amendments. Why would we as legislators not want to take our responsibility seriously, do the right thing, and deal with The Dower Act at this point after four years of looking at it?

* (2140)

Mr. King: It is a little bit difficult for me to speak as to how you should view your responsibilities, I would have thought.

Mr. Edwards: You are giving advice here?

Mr. King: Well, I am just making that comment, Mr. Edwards.

The fact is you do not have specific proposals in front of you about The Dower Act other than the ones that are in the proposal right now. You are debating or wanting to debate things that are intangible, because they are not there at the moment. That is my view, Mr. Edwards, and you might not like it and you might wish to debate it with me further, but that is my answer. There has not been sufficient consultation. There must be more.

Mr. Edwards: With respect to your comment that there are dangers, it would be dangerous for us to consider deleting Section 16. Can you explain what those dangers would be?

Mr. King: I think it is very dangerous for those people who have already planned their affairs, made their wills, on the basis of the existing Section 16. Have they been consulted? No, I do not believe they have.

Mr. Edwards: Indeed, Mr. King, you are saying it may be dangerous for those who have provided for their wife to the amount of $15,000 per year under The Dower Act. That may be quite a danger, and we may want to hold up the entire process in order to consult those people. Is that what you are saying?

Hon. James McCrae (Minister of Justice and Attorney General): Mr. Chairman, I think my honourable friend is going far beyond seeking questions and answers of clarification to Mr. King's presentation. I think he is going well, well beyond that and to the point of being somewhat rude with the presenter. I think it should stop.

Mr. Chairman: Was there a question posed?

Mr. Edwards: Yes, there was.

Mr. Chairman: Mr. King, did you want to respond? If not, then I will ask Mr. Edwards. He had his hand up. He maybe has another question.

Mr. King: That was such a gross misinterpretation of what I have said, Mr. Edwards, that it quite frankly is not worthy of an answer, sir.

Mr. Edwards: Perhaps it was my tone. The dangers, Mr. King, I just want to know what they are. I mean if there are dangers out there that I do not know about aside from the fact that people who have provided in their wills to use Section 16—I appreciate you have said that—are there other dangers that I should know about besides people who have written wills specifically using part of Section 16?

Mr. King: I think that the danger that might result to people who have entered into prenuptial agreements on the basis of the existing legislation, and there are many of them.

Mr. Edwards: I am going to ask for some clarification of that. I am not questioning the validity of it. Can you explain what a prenuptial agreement might include that would bring Section 16 in place, just briefly from your own experience perhaps?

Mr. King: A prenuptial agreement may be two pages, it may be 16 pages. Most prenuptial agreements will take into account the fact that The Dower Act exists, and The Dower Act has certain specific provisions. Any prudent counsel drafting a prenuptial agreement is going to take into account those provisions, will be speaking to the client about those provisions, and the draft of the nuptial agreement may well take into account those provisions.

Mr. Edwards: With respect to (a) through (d) to separated spouses, and I believe this is both under The Dower Act and The Intestate Succession and Consequential Amendments Act, you have made a point that, and I believe it is specifically with respect to Sub (c), this may encourage people to file early for division of assets or an application for divorce.

Can you give us your thoughts on Sub (a), that is the separation subsisting for at least one year prior to the intestate's death? Specifically I am thinking about the case where people may separate but still within that year may be very prone to reconcile. A year does not seem a long time to me. Now I do not have perhaps experience in dealing with marital situations like you do. Does a year seem appropriate to you in Sub (a)?

Mr. King: Yes, it does. My experience has been that if a separation has lasted for a year or more, the chances of reconciliation occurring are minimal. If a reconciliation is going to occur, it is going to occur before that. I cannot say that is so in 100 percent of the cases, but I would suggest it is so in 98 percent of them.

Mr. Edwards: If in fact you have come to a year, and there is not a reconciliation that is going to occur or even it is longer than a year, if you reach that point where reconciliation is not going to happen, is it not logical to think that people might have under (d) divided their property or under (b) filed an application either for division of property under The Marital Property Act or for The Divorce Act? In other words, I am saying, do we really need (a) in there in the sense that we want to deal with people who have truly come to the realization that they are separated and that they are not going to be getting back together? It seems to me that (b) and (d) come fairly close to covering the situations where people would have divided their property or at least made that application if they truly were not going to reconcile. Can you give me your thoughts on that?

Mr. King: I think there is some validity to what you say, but I do not think that in all cases there will have

also been a division of property. It depends quite often on the nature of the property. If the people have chattels, tangible goods, then those generally are going to be separated. Things like life insurance policies, pension plans, the financial assets, those may well not have been divided.

Mr. Edwards: With respect to (c), that seems to me to be, by using the words "course of conduct," evidencing an attempt, a bit of an invitation to go to court and fight that one out. They are not concrete terms. They are terms which I think will lead to a lot of litigation. Is that something that you would agree with?

Mr. King: I think it certainly has the possibility of creating litigation. I am not sure though that it is a huge problem. I suspect in the majority of cases a course of conduct would be fairly easily discernable. A single letter obviously cannot create in itself a course of conduct. Probably a letter and a reply is not going to be a course of conduct, but there will be gray areas.

Mr. Edwards: If we have said in (b) that as soon as the application is filed, obviously then that is the critical date, yet in (c) we are saying whereas people have gone to lawyers, obviously that application for division of property has not been made, is it not reasonable to assume that perhaps people, when they go to their lawyers, may not really be 100 percent sure about getting divorced or separating, or they would have divided their assets or made the application under Sub (b)? Is it not possible that people go to their lawyers, and I am asking you, someone with a lot of experience in this area, that they go, and a lawyer's duty in many cases is to look for the potential for reconciliation between the spouses?

* (2150)

What I am worried about is (c) will come into effect where people have gone to lawyers in those situations thinking there may still be reconciliation possible. I worry that (c) is going to mean that once someone has come to a lawyer, the lawyer will say: Look, you have already come, it is a course of conduct, you both have lawyers, we might as well file, because even under (c) The Dower Act and The Intestate Succession Act have already come into play. Do we really need (c)?

Mr. King: I think so. The separator and finalize is there too. So if there is—and you are right, counsel has a duty to assist reconciliation. That is what the divorce Act for one thing says, but you have to separate and finalize. There is obviously a huge difference between sending letters or having negotiations which are aimed at reconciliation on the one hand and negotiations which are aimed at separating and finalizing the affairs.

The problem with chucking out (c) is that you are then going to rely on (b). That means if the client comes in and says, it is all over, the other party may wish to reconcile, but I do not care, it is all over for me, then counsel is going to file an application under The Marital Property Act just to ensure that Section 3 applies.

Once you have filed the application you have created a different temperature for the negotiations. You are getting the matter into court before it is time. You are reducing your chances of negotiating a proper resolution. The people who suffer if they have to go to court are the clients, because it is their assets and their income that has to be used to fuel that litigation battle. That is the money that most of them really need to look after themselves, to help them in their new changed circumstances.

Mr. Edwards: I guess what I am worried about—

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Hon. Jim Ernst (Minister of Industry, Trade and Tourism): Point of order, Mr. Chairman.

Mr. Chairman: On a point of order, Mr. Ernst.

Mr. Ernst: I wonder if -(inaudible)- that we do away with all lawyers.

Mr. Chairman: On committee?

Mr. Ernst: Everywhere.

Mr. Chairman: It is not a point of order, but you have made your point.

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Mr. Edwards: With respect to Sub (c), my concern, Mr. King, is that once those individuals have gone to lawyers that action in and of itself will give grounds at least to a contest as to whether or not there had been a course of conduct evidencing an attempt to separate and finalize affairs.

Again, I draw you not just to Sub (b) but Sub (d), where there is provision for the division of assets, division of property, to bring these Acts into play. Again, do you have that concern at all, that Sub (c) means that when you go to a lawyer independently, you are all of a sudden outside of these two pieces of legislation? Maybe you can tell me what, in your mind, you think "course of conduct" is going to mean?

Mr. King: I would certainly disagree with your definition, because there has to be, in my mind, a series, something that is as ongoing or has been ongoing over a discernible period of time. I do not disagree with you that there is a potential for litigation in Sub (c).

It is a question, in my mind, as to which is the greater evil. I think throwing out Sub (c) creates a greater evil, because it reduces your chances to negotiate your eventual settlement.

Mr. Edwards: In conclusion, let me just say that if I did in any way insult or speak insultingly I certainly did not mean to. I certainly appreciate your presentation here tonight. I also acknowledge and thank you for your participation in this process for a very, very long time.

I remember you in front of this committee last year on the Access Assistance Program—or approximately

a year and a half ago. I know you have been involved with this part of the Bar Association and indeed a participant in legislative reform for many years now. Thank you again for your efforts and again coming here tonight.

Mr. Chairman: Any more questions? Ms. Wasylycia-Leis.

Ms. Wasylycia-Leis: Not being a lawyer, I think the dynamic here will be a little different and certainly not as lengthy.

Mr. Chairman: Go ahead with your question, please.

Ms. Wasylycia-Leis: First of all, I would like to thank the presenter for taking the time to come here this evening and make this presentation to us. Again, it is helpful in our deliberations.

I do not want to get into a long debate over every nitty-gritty of all of these Bills. I think I will focus on just a couple of areas and some of the broad principles.

Let me start by saying that as you can probably tell my position is based on the principles not unlike that presented in the brief by the Charter of Rights Coalition and the Manitoba Association of Women and the Law.

I am just wondering, as a starting question, if there is a major disagreement on the part of the Law Reform Commission, in terms of the principles enunciated by those organizations with respect to this family law package. Are there other principles the Law Reform Commission brings into force when assessing Bills and when moving in terms of reform in the family law area, particularly in the area of succession legislation?

Mr. King: The Family Law Subsection is of course a collection of individuals. As a group I would like to think that we try and strive for fairness. Fairness is never measurable against some objective standard. What we consider to be fair and reasonable might not be considered by someone else to be fair and reasonable. That is why there are people to pass laws, because there cannot always be societal consensus.

Ms. Wasylycia-Leis: Applying that to your comments first with respect to The Dower Act, I know you have taken the position that much more work needs to be done with respect to a major overhaul of The Dower Act. However, we are still interested in at least looking at the possibilities of amendments around 15 and 16.

I am wondering, with respect to Section 15—and this relates to my earlier question to the previous presenter—what is the position of the Law Reform Commission in terms of response to the fixed-share scheme under The Dower Act presently, and how does it differ, in your view, from other organizations, particularly CORC?

Mr. King: Can I just say, this is the Family Law Subsection. I am speaking on behalf of the Family Law Subsection.

Ms. Wasylycia-Leis: Oh, sorry, excuse me. I keep mixing this up.

Mr. King: We have not discussed this. I cannot speak for the Family Law Subsection. In fact, I would be very uncomfortable speaking for myself on Section 15 tonight.

Ms. Wasylycia-Leis: I apologize for the confusion I have created. Do you have an opinion, in terms of the group you represent, regarding what we should be looking at in terms of the future, with respect to a response for the fixed-share scheme under The Dower Act presently? What would your response be to the previous presenter's position in terms of half of the net estate?

Mr. King: I can speak to the last comment. It seems to me that half the net estate gives the person certainly more than The Martial Property Act would give. If you are going to have a half share, then that half share, I would think, should be a constant. You should not be giving a person more rights because they happen to fall under one Act, less rights because they happen to fall under another. Half of the net estate you suggested would—not always and probably not in 90 percent of the cases but in a certain number of the cases—create an inequality between the application of the two pieces of legislation.

* (2200)

Ms. Wasylycia-Leis: Would you have a serious problem with moving in the direction either now or in the future with the position taken by the Charter of Rights Coalition and moving in the direction of a fixed or a half of the net estate approach?

Mr. King: I think I have already told you what my position is on the net estate. I cannot speak for the Family Law Subsection, I could not really, just having spoken. Ask me personally, in principle right now I do not know that I do have a problem if the rights onto both pieces of legislation are the same, the rights under The Dower Act parallel to the rights under The Marital Property Act.

Ms. Wasylycia-Leis: Let me just ask a bit about Section 16. You have talked a bit about the consequences of deleting Section 16 and about relating that to people who have already finalized their affairs. Do I take it from that that you and your organization would have strong opposition to an attempt to delete Section 16 at this juncture?

Mr. King: Yes, I think I have already indicated that we would.

Ms. Wasylycia-Leis: Given that you primarily expressed concern around the fact that people who have already finalized their affairs would be left with an unfair advantage, would you be supportive of an attempt to move, at this time, for the deletion of Section 16 in The Dower Act but to make it effective upon proclamation, thereby allowing the proper amount of time for this to be communicated and for people to rethink their final affairs?

Mr. King: A sort of deferred repeal? I would be uncomfortable with it.

Ms. Wasylycia-Leis: Sorry, you would?

Mr. King: I would be uncomfortable with it.

Ms. Wasylycia-Leis: Could I ask why you would be uncomfortable with it?

Mr. King: Well, I think I have already said that in my presentation in answer to Mr. Edwards. I do not believe there has been sufficient consultation with all the groups that could be concerned about that. It may well be that after such consultation the repeal of Section 16 is indeed the best thing since sliced bread, but I think there has to be some consultation first and some focusing of minds to that particular issue rather than trying to sort of evade review around this table.

Ms. Wasylycia-Leis: What would be your reaction to a situation whereby there was majority of support here at the committee for deletion of Section 16, and the Minister made a decision to pull The Dower Act or this amendment to this Act?

Mr. King: I think I would rather The Dower Act was pulled than that was done.

Ms. Wasylycia-Leis: If I could just move briefly on to The Intestate Succession Act, I am a bit confused because in your presentation you said at one point that this Act does not deal primarily with dependants, that there are ways that, I can just check your words here, other mechanisms for dealing with dependency, and you mention The Dependants Relief Act. I am wondering therefore in that context why you would be supporting an attempt to include something in this Act that addresses the needs of dependants of a first marriage?

Mr. King: Well then, perhaps I expressed myself inadequately. I did not say that this Act—I know what you just said, but I did not say this. I said that the scheme of this type of legislation in common-law jurisdictions was not to do with dependency. I am not talking about people who are necessarily dependent who come from the first marriage, the first relationship.

Ms. Wasylycia-Leis: You have referred to specific examples, for example, in your remarks I think in response to the Member for St. James (Mr. Edwards) talked about a situation in terms of someone who is remarried and died after, say, only four months and the unfairness of the estate going to the surviving spouse in that instance. I do not want to get into a dialogue around specific situations, since it seems to me that for every one of those kinds of circumstances one could probably point to many, many more situations where the surviving spouse is left with dependent children but without the wherewithall to provide a decent economic arrangement for that family.

I would ask you, since we are talking about applying certain principles and ruling on and making hard decisions, would it not make sense to rule on the side of the surviving spouse with dependants in order to avoid that kind of possible impoverishment and economic insecurity?

Mr. King: Well, you and I could sit here for the rest of the night and we could each come up with facts in areas that supported what we say is the fairness of our respective positions. I think I have already indicated why I believe that the quasi all-to-spouse rule proposed by this legislation is a reasonable compromise—not perfect compromise.

Ms. Wasylycia-Leis: Would you agree that this Act with this new change could mean less to the surviving spouse?

Mr. King: It is quite obvious that could be the case, because there is a possibility that someone else is going to have a claim to a portion of the residue.

Ms. Wasylycia-Leis: Would you agree that it could possibly result in improverished situations for individuals because of this provision?

Mr. King: It could possibly. I have no idea of the number of occasions in which it would do so. I have not seen any evidence of that.

Ms. Wasylycia-Leis: I simply ask those questions because it seems to me that this is about hard choices, and to some extent compromise, although I think more hard choices than compromise, and that if one was going to rule on one side or another, we should do it in terms of the surviving spouse, given the fact, as the statistics show, that the surviving spouse is most likely to be a woman. The statistics also show that women do still live longer than men and that older women are the poorest of poor in our society. I guess on that basis I would still come out on the side of that end of the equation. Is there any hope with that scenario persuading you otherwise in terms of your position?

Mr. King: I acknowledge that poverty exists. It is not always female poverty and it is not always old-age poverty. There is also reality. I am suggesting that what is here in this proposal is a compromise between those two realities and the possibilities that result from those two realities.

Ms. Wasylycia-Leis: Would you though disagree with the statistics that show that the poorest of the poor in our society are older women?

* (2210)

Mr. King: Are you telling me that those are the statistics?

Ms. Wasylycia-Leis: Yes.

Mr. King: If those are properly compiled, then I would not disagree with you. I may disagree about the causes, though.

Ms. Wasylycia-Leis: I do not want to take up much more time of the committee, I simply want to again thank Mr. King for his presentation. I think we obviously disagree on most of these issues. However, we certainly

respect your position, and thank you again for appearing before the committee.

Mr. McCrae: Mr. King, we are talking about intestate succession in a lot of our discussion here. It seems to me it is a good idea for us when we are talking about people who die without a will to examine what happens in those cases when people do have wills. I would ask you to comment on how you and your—what has been the experience of you and your colleagues with respect to clients with children from first marriages who do write wills? Can you tell me what you write in those wills with regard to those children?

Mr. King: I think the great predominance of those wills will make some provision for the children of that earlier or other relationship. Those children will not be ignored.

Mr. McCrae: By the way you framed your answer, I just want to make it a wee bit clearer if I can. Do you speak, when you answer in that way, from experience in that area of the law? Can you tell me any information about the experience of you and your colleagues and your clients?

Mr. King: I can certainly speak from my personal experience. I practise family law. I have practised it for years, which means that I help people get separated, divorced, and eventually they come along to me and say I have met someone else and I want to get married. What do you think I should do about a will? Now, we have a little chat, we sit down and draft a will, and those wills make provisions for the children of that other relationship. Those children are not forgotten. That is not to say that the person making the will in those circumstances forgets his new spouse either or her new spouse.

Mr. McCrae: Thank you, Mr. Chairman.

Mr. Chairman: Okay. Thank you, Mr. King, no more questions. We want to thank you for your presentation.

We will call on the next presenter, Ms. Annette Willborn, YM-YWCA Winnipeg. Ms. Annette Willborn and Ms. Janet Johnson, is that the spokesperson? Janet Johnson, you may proceed. Just identify yourself. Who is going to start?

Ms. Annette Willborn (YM-YWCA Winnipeg): My name is Annette Willborn. I am executive director of the downtown branch of the YM-YWCA. I have brought along with me this evening Janet Johnson, who is the Widows' Consultation Centre co-ordinator—

Mr. Chairman: Excuse me, may I stop you? I have just been notified that we will have to change the tape, so we will have to have a couple of minutes break at this time.

Ms. Willborn: Good timing.

Mr. Chairman: It happened at a very appropriate time. Okay, about three or four minutes.

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Mr. Chairman: I call the committee back to order. Ms. Annette Willborn, did you have a brief? Has it been distributed? You do not have a brief? You may proceed.

Ms. Willborn: As I said earlier, my name is Annette Willborn. I am the assistant director of the downtown branch. Janet Johnson, who is with me this evening, is our Widows' Consultation Centre co-ordinator. We are really pleased to be here this evening and to be given the opportunity to provide some input into the family law legislative package that is before you here.

As members of CORC, we support the recommendations that were presented to you earlier on this evening. We would like to embellish upon those recommendations with some of our own experiences, specifically with the work we do with widows in our centre. Over an average year we have 250 women who seek the support of the services at the Y's Consultation Centre. Through our programs, like one-on-one widows' visitation services that we have with volunteers, we also have one-on-one counselling available with Janet.

We run a number of support groups for women who have been widowed, support groups that help women re-establish themselves or establish themselves after they have become widowed. We are really proud of the programs that we offer at the Y and feel that they are an important component of the services at our operation.

The package that is before you here this evening directly affects the women that we serve. We also have a very practical question on hand, and that is our widow's guide which is what could be described as the what-to-do-when-someone-dies package of resource information. We have it available at the Y.

* (2220)

We can hardly wait to do a revision of it, rewrite it and put in the new information that is going to be coming out as a result of this legislation. We have been waiting for the last two years specifically and have been putting off reprinting on the information that this is coming forward. We are glad that it is finally here. At the same time, we wanted to be saying things that we feel the legislation needs to be saying in order to most appropriately meet the needs of the women that we serve at the Y.

Specifically, we are going to be looking at, or we are going to be giving you some input on three of the Bills, specifically The Dower Act, The Intestate Succession and Consequential Amendments Act and The Dependants Relief Act, and I will ask Jan to begin.

Ms. Janet Johnson (YM-YWCA Winnipeg): I am not used to being in this kind of a setting. I am used to dealing with the people who are the widows or the widowers of people. So I do not have the legal expertise, but I would like to tell you what my experience has been in dealing with some of the women.

If there is a specified amount, concerning The Dower Act, I strongly recommend that there be 50 percent.

This is what I feel personally. If there is so much per year given, it may not even be enough to maintain the family home, and then you are adding a great deal of burden onto a widow who only gets $15,000 a year and is supposed to maintain a home that maybe costs every bit of that and support the children.

I have had cases in which women have been left a specified amount, and they have not been able to keep the family home. They have had to sell the family home, simply because they could not afford to live there. That is adding a great burden at a time when the whole family is in upheaval. All of the literature recommends that a family should not have to move unless it is absolutely necessary for at least a year or two. That is not always the case.

You were talking about elderly widows. I can tell you that there are 40,000 widows in Manitoba, and the average age of the Canadian woman becoming widowed is age 57. We are living in a society in which a lot of women will be aging more. From that standpoint, $15,000 a year is really obscene. So I do believe in the dower's right that the surviving spouse needs to have the right to live in the family home and receive 50 percent of the estate.

Another part of The Dower Act that I find difficult in the present legislation we are looking at is the right of the separated spouse. I have also dealt with widows who have been separated longer than a year and there was no division of assets. There was no attempt to make any division of assets. It is not uncommon. In fact, I can tell you of one widow where they were separated for five years and had never made any declaration of division of property. He developed a terminal illness and she came over and regularly took care of him until his death. If you pass this legislation, she would have no right, even though she had come back and taken care of this gentlemen, still maintaining her separate premises but felt a sense of loyalty. They had never, ever divided anything. In that case, that particular widow would not have been—if you pass this legislation, that widow would have no rights at all.

I think it is important to realize that many people separate and for various reasons. I have also dealt with widows who separated. Either the husband left or the wife left and before anything could be done he had a heart attack and died. In another case, the woman developed a brain tumor and she died. When you have lived with someone for five or 10 years, you do not necessarily decide to separate everything. It is too traumatic just to separate, period, let alone to divide everything up.

Sometimes there is a refusal of one spouse to co-operate. One may have made an attempt but the other one is not agreeable to it, because they are hoping for a reconciliation long beyond a year. So those are terms where if this legislation is passed in the state that it is in, the surviving spouse will be denied a right to a share of the estate.

As I said before, I think the surviving spouse should be entitled to 50 percent of the estate whether they are separated or living together. Otherwise it discriminates against the marital—in the case of a divorce, they are not living together, they still get 50 percent.

Bill 48, the one with the big long name all-to-spouse, I am not sure that I agree that in all cases all goes to the spouse. My one exception is if there are dependent children—this is the way I define dependent children, children 18 and under or still in secondary schools or disabled. If there is that issue from a previous marriage, I am wondering how they are protected. If they are not living with their present surviving spouse, if they are children of a previous marriage, I do have concerns about how they are protected. However, I think you can answer that.

Ms. Willborn: Well, my understanding is that the children of a previous marriage would be protected under The Dependants Relief Act, as well as the amendment within The Family Maintenance Act, which we support, having to do with ensuring that child support obligations are made binding to the estate. So in the event that there are dependent children from a previous marriage, I would assume they would be looked after through either one of those cases. In that event, we would support the all-to-spouse rule as presented by CORC.

Ms. Johnson: Then my second question is, who acts on behalf of those dependent children, if they are dependent and minors and do not know the rules and the laws? Who acts on their behalf? That is another question I have.

* (2230)

Ms. Willborn: Again I think we would recommend that some changes happen within the system. I do not know the intricacies, but I like the idea of, not necessarily responding to the same thing, of having a stamp on any marriage certificate saying that a second marriage nullifies a will concerning a first marriage. There may be some mechanisms like that that could address the types of concerns that Janet is bringing forward. The questions being, who is acting on behalf of those dependants and how do you get that information to people, I think basically is a concern.

Ms. Johnson: Thank you. I am a counsellor, so I am used to asking questions, but I always expect the client to have the answers or that we discover the answers. I will still pose the questions because then maybe you can discover the answers.

I am a widow myself. I have four children. They are all adults at this point in time. They were not when I became a widow. If I were to remarry and I married someone who also had children, adult, and I died and 50 percent of my estate went to my spouse, that would leave, in my opinion, not enough for my children, because if it went to his estate, it might be going to some of his children. I would prefer that estate to go to my children even though they are all adults. I would prefer it to go to my children and my grandchildren. That is why I would consider it very important to have a will.

However, in a case where there is not a will and that were to happen and my children were all adults, they

would have no claim on that estate at all under the present legislation, and that to me is unfair. I do believe it is important to have—the important part here is I could waive my dower rights and ask him to waive his dower rights in a premarital agreement and then my estate would go to my children and his estate would go to his children. So there are possibilities of waiving the dower rights and which would protect estates in second and third marriages.

Ms. Willborn: Which we think is a good idea—just to finish off Jan's sentence.

I guess our major concern is that some of these specific case kinds of things not be addressed in the legislation but be addressed in other information that should be available to people. I guess my concerns around specifically adult, dependent children of other unions to place those regulations, that law, in legislation, I think entrenches it to not a very good degree. It would be too rigid, too inflexible, for a lot of individual cases that I could see coming up.

I think the next thing we wanted to talk about was The Dependants Relief Act.

Ms. Johnson: I agree with CORC's recommendation that siblings, brothers and sisters, grandparents, parents and grandchildren not be a part of those recommendations or of being able to apply for the estate. My immediate concern is to provide for a surviving spouse and dependent children, whether of the present marriage or the previous marriage. To include all the above may diminish the estate to such an extent that you may create increased welfare rather than decreased.

Again, I define a dependant as someone 18 or still in secondary school or disabled, either mentally or physically, so that they are unable to work.

As I understand it now, adult children can make a claim. They may be perfectly capable and perfectly well off financially, and they are getting a claim of estate that may diminish the estate so that the surviving spouse is left more destitute. In fact, there are many children who are living in much higher lifestyles than their parents are, particularly in the elderly now.

That concludes my statements.

Mr. Chairman: Thank you. Questions? Mr. Edwards.

Mr. Edwards: Thank you, Mr. Chairperson, and thank you both for coming to see us tonight. I do not know that you will go away with many answers, but we certainly appreciate your comments.

I just want to deal with one of the last things you talked about, The Dependants Relief Act. You indicate you are worried that an estate will be diminished by adding others able to claim under The Dependants Relief Act. With respect to your concern that adult children who are well off may get to diminish the estate, I do not see that as a concern in the sense that the test is financial dependency. In other words, if children are well off, they are not financially dependent and presumably under this legislation would not have a claim on the estate.

However, I do want to—and joined to that it is my understanding, and I appreciate that the Minister has experts in this field with him, and maybe they will correct me if I am wrong and help us both out. It is my understanding that a claim under The Dependants Relief Act would not be allowed to diminish a spouse's dower rights claim.

The dower rights, of course, I think are first and foremost. Then it is only out of the remainder that any claim under The Dependants Relief could be made, I think. I am not absolutely positive. Perhaps one of the lawyers at the other end can get back to us on that.

Leaving that aside, with respect to grandparents, parents who oftentimes, at least amongst my constituents I find, live in the same home as the children, perhaps the mother of one of the spouses, and there is a relationship of dependency. Oftentimes they are there, they often are helping to raise the children and they are living in. I find that with a fair amount of regularity certainly in the area that I represent.

I worry that if we do not allow that parent or grandparent to go to the court and say, even though my son, my daughter, did not specify that I was to get some of the estate, I, for my livelihood, require assistance out of this estate. I am concerned in particular with parents and grandparents. We are dealing with the elderly in many cases, and if they have become dependent, they should be able to have some opportunity to ask the court to assist them. I think the court balances and, hopefully, would have the sense not to deplete the spouse's share beyond what would be reasonable.

* (2240)

Of course, I assume that dower rights are protected, but do you at all share that concern? Let me just say in conclusion that the grandparents and parents would not automatically get part of the estate. It is a question of having the right to apply. There is no percentage allocated to them. It is simply a right to apply and claim dependency. I have that concern. Is that one that you share?

Ms. Johnson: There are always exceptions to a law. Certainly the way you phrased that, I can see that, and I suppose under certain circumstances that ought to be allowed. I would imagine if they were living and being supporting, the person would probably continue to do that if they were living together. I wonder if there would be a real need to make it in black and white if it has been done without being in black and white for 10 years.

Mr. Edwards: I get your point, and I think the fact that we can assume that if it is being done, then likely the person who may have died would want it to have continued. I guess to that extent I am willing to accept that we should make some allowance for those people, not to automatically get part of the estate, but to have the right to apply, to tell a court, my circumstances are those exceptional circumstances. In other words, I am concerned if we were to take out grandparents and parents, then you forever and always deny them the

right to go to a court and say, my situation is this exceptional circumstance. I guess my feeling at this time anyway is that we leave that right to apply in the legislation.

Maybe I will just ask the question and then we can get a comment on the other. With respect to your question about who acts on behalf of a dependent child, there is a rule in here that you only get six months to apply, so I have a lot of sympathy for what you say.

If the person is dependent, perhaps retarded, physically incapable, six months seems fairly arbitrary to cut off all of a sudden someone's rights. I too have those concerns, and perhaps we can ask the Minister at some point in this discussion to address that concern. I think if it is a question of children who are dependent, from a prior marriage, or indeed the marriage that the person is in, then the other parent will probably take the initiative.

If you are truly dependent, I think the argument could be made that within six months, if you are really dependent, you are going to turn to somebody. If you do not have the money coming in for six months, you are likely to be turning to someone, but I just want to indicate to you that I do share your concern about that. I also want to simply say that it is my experience, unfortunate as it is, that there are an awful lot of people out there without wills who should have wills. It is just a fact of life, and it is unfortunate we need this Act, but we sure do.

I certainly appreciate you coming forward tonight,and, hopefully, the Minister, on some of the concerns which I share, may help us out a bit.

Ms. Willborn: I would just like to make a further comment to The Dependants Relief Act. I agree with Jan that the picture you drew about the grandparent, and I am sure there are a lot of hardship cases that could be talked about.

It is difficult. It sounds terrible to say, no, I do not think a grandparent should have the opportunity to apply under this legislation. I think the important thing, which is where I feel maybe Jan and I do not agree, that you need to consider are the principles. Once the principles are established and you can agree on the principles that should be applied or should be used in development of this kind of an Act, the legislation falls out of those principles.

I think that if a person during their lifetime is supporting another person, be it relative or friend, whoever, they are doing that out of their own decision, their own will to do that. If they would like that to continue after their death, then that should be written in a will. The fact that most people do not write wills—or many people do not, not necessarily most, but lots of people do not write wills—does not mean that we should build in the exceptions into this kind of an Act, I do not think.

I would strongly recommend that you look at the principles, and the principles that should be applied are that in this kind of a case a person has a legal obligation to support a surviving spouse and dependent children. Aside from that, there should not be a legal obligation beyond that. Once it goes beyond that, then the state begins messing into areas that I do not think they should be.

Mr. Edwards: Just one further comment or question. I agree that we should identify the principles. One of the principles that I agreed with, with respect to the Intestate Succession whatever Act, was that insofar as possible, attempt to reflect what people would have done, had they written a will. The fact is, we have a lot of people out there who never get around to writing a will. We can all admonish them and say, you should have done it, but the fact is they are dead by time we get it. That can be achieved and the principle articulated by CORC was, we should try to get as close as possible to what that person would likely have done. It does strike me that in the case of a dependent grandparent or parent, we can say that it is likely that the person would want to continue some form of support, had they been doing it for a sufficient period of time.

I do not say that we make hard-and-fast rules about this. I ask you to consider whether or not we should not maintain some flexibility to allow the application, and I know you understand, not to allow the automatic taking off of certain sums of money, but to allow the opportunity to make a case in front of a judge that this is one of those exceptional circumstances. They may seem exceptional. I have seen a lot of them, and I guess that is what really concerns me. I have seen a lot of cases where they really are truly dependent parents and grandparents. I cannot say that in those cases there is not a will and that they are not provided for, but I can just say that it is certainly a common thing among a lot of people. So I just ask you to consider that principle and consider why not we should not retain some flexibility.

Ms. Willborn: I guess my concern would be that if this would go forward, it leaves lots of room for judicial discretion, and unless there are some guidelines in place the chances of diminishing an estate and having—I would be concerned about the opportunities for judicial discretion in that.

Mr. Edwards: As you spoke, I was thinking I do agree that the one thing this Dependants Relief Act, in my view, needs more than anything else is a sufficient definition of what dependency is. One of the problems with it is that Section 2(1) says, "If it appears to the court that the dependant is in financial need, ..." That is the test. That strikes me as simply not giving enough guidance from the Legislature to the courts. While we do not want to bind the courts, I take your comment, and I tend to agree. I think that is where it can be focused. It seems to me that we should come up with a definition, a better definition, of what dependency is and what we mean by it, and, in particular, if we are expanding the numbers of people that can be applying this and the opportunity for abuse and diminishment of an estate. We should certainly perhaps—judges might want us to give them some further guidance on that.

Mr. Chairman: Thank you. Any more questions? Ms. Wasylycia-Leis.

Ms. Wasylycia-Leis: Just a few questions, clarifications in terms of some of the major issues discussed by the previous presenters. If I understand your presentation, I believe that you would support the further purification of the all-to-spouse principle as long as those dependants under 18, in school, or disabled, not living with the new family unit. Let me just clarify—perhaps you can do that clarification for me. I understand that you would support the further move to all-to-spouse principle as long as those individuals that I have just listed are living with the surviving spouse.

* (2250)

Ms. Willborn: No.

Ms. Wasylycia-Leis: Perhaps you could clarify that for me.

Ms. Willborn: I think our concern would be addressed through The Dependants Relief Act or The Family Maintenance Amendment Act, which talks about that any child support obligations would be binding on the estate. I think that with that in place and with The Dependants Relief Act and the concerns of dependent children being covered through those two things, our concerns would be covered.

Ms. Wasylycia-Leis: I think I understand now. So if we can get assurances that those categories of individuals are protected through other mechanisms such as The Dependants Relief Act, then it makes sense to move to a straightforward all-to-spouse principle in Bill 48.

Ms. Johnson: I forgot a comment that I wanted to make a little bit earlier, and that is in regard to the six-months application time. I did have a case where the first wife with the dependent children of the first marriage was living in another province and had no notification for some time long after six months that the children's father had died. Now, if that is the case, a six-months application for dependant relief would not—if there is a six-month limit, the parent of those children did not find out till after six months. I do believe that six months is much too short because of our mobile economy and the way families are scattered all over. It is not unusual, especially if there was no communication between those two divorced spouses. She found out quite by accident through a distant relative, and she did not know.

Ms. Wasylycia-Leis: Thank you for that clarification. I will just move quickly on to The Dower Act and seek a clarification with respect to your views about Section 16 particularly, and to ascertain clearly whether or not you are concerned, as other groups have indicated, with respect to current exemptions which allow a spouse to ensure that a surviving spouse receives less than one-half the net value of the estate.

I think I have a pretty clear answer based on your comments and the personal experiences that you shared with us, but I would like to get clarification in terms of your support for any attempt on our part in this process to move to delete Section 16 of The Dower Act.

Ms. Johnson: Yes, I understand it and I am only going by an overview that I have, because I do not have that part of the Bill. It is the part that allows the testator to make a limited bequest, is that your concern?

Ms. Wasylycia-Leis: Yes.

Ms. Johnson: Such as providing an annual income of $15,000 for life. I think setting a monetary amount, with the way the economy and inflation, it will be obsolete in a very short time. The poverty line is $10,000 now. In a very short time it is going to be $15,000, so I would say delete that or at least set a much higher—50 percent, yes, 50 percent of the net estate, but it goes all at once, it is not limited. She may not live for very long and may have had to move because she could not afford to live on $15,000 a year in her present house.

Ms. Wasylycia-Leis: Mr. Chairperson, it would appear then that in effect your suggestion to change that specific exemption to 50 percent would in effect be the same as moving to delete Section 16, either way it would ensure at least 50 percent of the net value of the estate.

My final question has to do with The Dependants Relief Act and the proposal to amend in this area with respect to the definition of dependent and adding a list of dependent categories. I am getting a little confused, given the Member for St. James' (Mr. Edwards) comments, because I had thought at one point earlier he was quite clearly concerned about this addition and seems to have changed his mind on the basis that it only provides for the right to apply.

I tend to believe the opinion you have expressed that anything that has the possibility of diminishing the estate for the surviving spouse is problematic and creates the possibility for impoverishment. Our view, in terms of the NDP, would be to move to delete that section, and I would like to just check with you, if I have read your presentation correctly, and if you feel strongly about opposing our attempts to oppose the addition of these categories of dependants.

Ms. Willborn: Yes.

Ms. Wasylycia-Leis: Finally, I just want to thank the two presenters for coming to us this evening with your expertise and personal experience in this field. It has been very enlightening and helpful. Thank you.

Mr. McCrae: Ms. Johnson, I would like to ask you a question. It is a hypothetical question, it is one to clarify the position you have taken. It is a personal question—I am not going to ask you your age. It is a personal question, and if you do not—

Ms. Johnson: My age? I am 58. I became widowed at 45.

Mr. McCrae: I was not asking that. Thank you, anyway. If you feel it is not appropriate to answer, I hope you

will say so. I want to ask you, if you were to remarry and make a will, would you want to leave part of your estate to your four children?

Ms. Johnson: Yes, I would.

Mr. McCrae: A similar question then, if you remarried and did not make a will, would you want part of that estate to go to your four children, or would you want all of it to go to your husband?

Ms. Johnson: At my present age, no. I mean, at my present age, yes.

Mr. McCrae: Yes, you would want—

Ms. Johnson: Yes, I would want my estate to go, part of my estate, and that is exactly why I would make a will, to protect that. May I comment a little bit?

Mr. McCrae: Indeed.

Ms. Johnson: When we were young, we did not have much of an estate, and we both had wills that left everything to each other, what little there was to leave, including the bills.

I think when you are dealing with second marriages, and at a time later in life when you have built up assets, that I think is the responsibility of individuals who have grown and accumulated, and hopefully learned something along the way about settling their affairs.

You may not think about that when you are young and when you are raising children, and that is what I think the law needs to be able to deal with, is those situations where people do not make a will, but to be able to allow them to exist. So you are making decisions for them when they did not think about providing for the future or making a will because they did not think they had anything to leave.

Mr. McCrae: Thank you very much, that is all I had.

Mr. Chairman: Thank you for making your presentation. The next person on our list is Ms. Mona Brown, Manitoba Association of Women and the Law. Ms. Mona Brown, do you have a written presentation?

Ms. Mona Brown (Manitoba Association of Women and the Law): The written presentation that I am relying on is the one that was a joint brief of the Charter of Rights Coalition Manitoba and the Manitoba Association of Women and the Law and was distributed by the first presenter.

Mr. Chairman: Very good, thank you. Go ahead with your presentation.

Ms. Brown: Good evening. I would like to thank you for the opportunity to present here tonight. I think that it is really important that the public become involved in the law-making process, and although we may sit here and say, oh, it is taking a long time, it is important that we give our views to our elected representatives.

* (2300)

By introduction, my name is Mona Brown. I am a practising lawyer in Carmen, Manitoba. I have been practising in the rural areas for 10 years. I have practised in Winnipeg at a large downtown city firm for two years prior to that. Approximately 20 percent of my practice is drafting wills, doing estate planning and administering estates for my clients, both people who have wills and people who have died without wills, so I have some experience in that field. I also teach the Bar admission course to law students after they have graduated and before they actually get licensed to practice in the Wills and Estate Planning section, and have done so for the last four years. I have been involved in writing the sections of that course that deal with administration of estates and dealing with estate problems.

I am speaking tonight in really two capacities. I am speaking in my own capacity as a lawyer who works in the area, who teaches students in the area and who can see some of the problems, and also as co-chairperson of the Manitoba Association of Women and the Law, which is an organization of male and female Manitobans who are interested in promoting equality rights for both sexes by looking at legal issues as they affect equality rights for the sexes. Mainly our group is comprised of female members, although we do have some male members and we also have some non-lawyer members or non-law student members, so we are comprised of a fair subsection of the population. We are part of the National Association of Women and the Law, which has 27 caucuses across Canada.

I will be commenting on the package of Bills tonight. Basically, we endorse the presentation made by CORC. I do not want to go through all of the same principles that CORC has gone through, but simply to say that we endorse those. I will simply highlight a few that I would particularly like to have the chance to comment on, and also comment on some of the comments and concerns raised by my learned colleague, Mr. King, on behalf of the Manitoba Family Law Subsection.

The principles I sort of adhere to, the first one being marriage is a partnership of legal equals and the assets acquired during the marriage should be shared equally, the second principle is that a spouse who stays married to their spouse until death should never, ever get less upon death than they would get had they separated from their spouse the day before the death and made a claim under The Marital Property Act.

The present situation in my view is abominable, where my clients who remain married to parties perhaps under difficult situations at times, perhaps not an easy life with them, but have maintained a marriage over 40 or 50 years, could have gotten way more money had they left their spouse and made a claim under The Marital Property Act than they are presently entitled to by virtue of the combined provisions of our present or even the proposed amendments by virtue of particularly Section 15 and especially Section 16 of The Dower Act.

I see that in my practice on a regular basis, and it certainly disturbs me to see women coming in and being told they have been left a $15,000 life estate. In today's day and age, $15,000 is a very nominal sum of money—

and to be able to tell them that they do not have a right to more than that and that they should have left their spouse before he died. The third principle is the majority of spouses making a will will leave everything to their surviving spouse. It is my experience that approximately 90 percent of my clients will do that. So if they address their mind to it—now there has been some testimony tonight in questioning as to what about particularly spouses who have had, say, children of a previous marriage. I have seen the gambit there.

I have seen lots of spouses who are coming in, who have remarried and have children of a previous marriage, who are still saying, no, my first obligation is to my second spouse. I am going to leave all to my spouse first, and I am going to trust that spouse to share with the children. Especially that happens almost all the time in a situation where some of those children are still dependent, because they know the secondary spouse needs the money to care for the children of both marriages, especially if they have custody of the children and that spouse is going to retain custody of those children. The primary consideration is they will definitely want to leave everything to the spouse because they are very concerned about the possibility of it being tied up into trust for the infant children until the children become of age.

That has always been a concern under our present Devolution of Estates Act, that mom has to go to court and get an order to use some of the trust funds or to sell land that is held in trust for these infant children because there is not enough money to put clothes on their backs or food on the table in the meantime. So we have to look at the practicalities of the kind of law we are creating.

The second comment I would make is that some people definitely do come in, like the previous presenter indicated, and prefer to make a will that leaves either part of their estate to the children of a previous marriage and existing children from that marriage, to set up trusts for the children or something of that sort.

We also very often, in cases where parties or perhaps older men have amassed assets, will see them come in, prior to remarrying or just at the time they are about to remarry, and enter into what we call prenuptial agreements where each party will waive their rights under The Dower Act, and they will each agree that their each estates will go to their own children. Perhaps each of them have sizable estates for tax planning purposes and for other purposes; it is simply better for them to make those arrangements. They know that each one of them has been adequately provided for.

However, in situations where there is a nominal estate, I see in my experience that parties want to first look after that second wife. How do we know in terms of dollars today how much you are going to need 15 years from now to support yourself? You as legislators will know with what is happening with our Medicare system and that today with transfer payments being cut, how do we know how much money we are going to need to help people if they become ill? I see people raising those concerns to me and saying, first, I want to provide for my spouse whether it is a second marriage or a first marriage, then I will provide for my children. Of course they are always concerned if there are dependent children, if they are under age or somehow dependent, but talking of adult children here. The primary concern is for spouse first then adult children second.

* (2310)

The further principle that I am concerned about is the economic security of surviving spouses in their old age. In my view that should be paramount. We have already had testimony here tonight as to the destitute state of elderly women, and particularly elderly widowed women. I think that those statistics speak for themselves.

The final principle is that adult children are not at law entitled to a share of their parents estate. My parents farmed together in the Letellier area on 75 highway for 30-some years. They are going to celebrate their 40th anniversary next year, but if one of my parents died, and I believe they have all their assets in joint tenancy and it would automatically go to the survivor of the two of them as they would have stipulated in their wills as well, and then one of my parents remarried, I fully believe that my parents are entitled to leave that entire estate to their new spouse.

I do not feel that I have a claim on that estate as an individual. I feel my parents had an obligation to support me, to raise me, to give me a good foundation, to give me a good education. I am on my own now. I am a self-sufficient person. If I am a dependant, if I am mentally disabled or something that is a different story, but as a adult individual I do not feel that I have a claim against my parents' estate, and I do not see that we should foresake the rights of surviving spouses to the claims of able-bodied adult children. I do not see that there is that claim there and I do not think there should be that claim at law.

To go on to comment on a little more specifics, having outlined those general principles, we were very pleased that the Government brought forward this package and although it might seem like we are harping on some of the concerns, there was also quite a lot of good in this report. You will note some of those comments in the CORC and MARL joint presentation, and I will attempt to highlight some of those as we are going through as well.

There are some areas as well that are disappointing. I guess the first area that I might comment that is disappointing is the amendments to The Family Maintenance Act. I would have hoped to have seen a more equitable definition of financial independence in that Act and specific guidelines for maintenance enforcement. On the other hand, we do support the three major amendments that were made in that legislation and I think they will go a long way to helping to make our laws in Manitoba more equitable. We commend the Government for those three amendments.

I would like to move on now to deal with Bill 49, The Dower Act. That is the Act I was referring to previously. I guess my most major concern with Bill 49 is Sections 15 and 16 of the Act, and in particular Section 16. I would agree with the CORC presentation wherein we stated although we would have like to seen the whole

Act rewritten, and whereas the Law Reform Commission has put out a major report on dower and succession revisions some three years ago and we have responded to that and responses back. We were hoping for a more major rewrite. We are promised it is coming shortly in terms of taking the sexism out of the drafting and major amendments to Section 15(2). It may be at this late date that it is better left for another Session.

With Section 16 I disagree. Section 16 is affecting people's rights today. Today I can draft a will for someone, leave a spouse $15,000 per annum and they are home free. The wife has no claim, the wife has no right, or vice versa. That is affecting people every day, and to continue that inequality for longer I think is just not tenable. Even if we look at the other exemptions in Section 16, the $250,000, many of my farming clients who have worked for 30 or 40 years on the farm, have amassed assets where the wife would get half a million dollars if she made a claim under the Marital Property Act. Why should he be allowed to leave her only $250,000? In some instances—I was just counselling clients the other day on a tax-planning vehicle, and one thing they were looking at doing was buying a large chunk of life insurance to assist with children, in paying out some children in the estate mechanism.

They were talking about having annual premiums for this life insurance of $20,000. That is coming out of their pocket, the spouses' annual income, and yet life insurance is not to be considered as part of the estate for the purposes of Section 16. That to me all seems untenable.

I have done a fairly thorough read of The Dower Act, and it is my belief that Section 16 could be repealed without any harm being done to the balance of the Act. Furthermore, the suggestions of dangers that were brought up by Mr. King are not really dangerous in my view. Mr. King raised two points. The first one was prenuptial agreements. Well, any prenuptial agreement will contemplate changes and accommodate that in the event The Dower Act provisions changed, it will be read to be whatever the Dower Act provisions are. No lawyer—they could be sued if they did not put that in—would draft a prenuptial agreement that did not contemplate that there might be changes in the numbers from time to time.

The secondary point he raised is with respect to tax planning, that people will have tax planned around these numbers and these laws, and we should not disrupt that tax planning without adequate notice. Well, as a tax planner, I can tell you that it is very true that people do tax plan and say, well I am not going to leave anything more to my wife or my husband, because they are only going to pay more tax on it. We will leave it directly to the children. I often recommend to people who have large estates for them to do exactly that.

However, The Dower Act requirements only give the surviving spouse a right to elect to take under The Dower Act, so I often say to my clients when I am drafting this will, now you are not leaving your wife or husband what they are entitled under The Dower Act and you know they will have the right to elect. Similarly if Section 16 were repealed and there were different numbers now. They say, oh, that is fine, because they will not elect because we have agreed on this tax planning vehicle. So there is no problem with respect to tax planning if both parties have agreed that this is what should happen.

The problem comes in when one party is secretly going in and making a will and not telling the other party, which of course is their right at law to do, and only leaving them a nominal annual income of $15,000 or a nominal share of their estate, less than they should be entitled to receive had they separated.

I believe I can answer Mr. King's concerns, and in my view there is not a good reason why Section 16 could not be repealed immediately. I believe fully that this Government does adhere to the principles of true equality of the sexes and of attempting to eliminate as much inequality in the law as they can, and I am sure that they will agree to some kind of an amendment dealing with Section 16 to have Section 16 repealed immediately.

I would caution you that it is still men who own most of the property in Manitoba, so Section 16 basically benefits that property-owning sex, and in my view is probably contrary to the Charter of Rights and could be challenged under the Charter in any event. I also wish to deal with Section 22 of The Dower Act, and it is exactly the same wording in The Intestate Succession Act. I would like to deal with that wording fairly specifically.

I would like to reiterate what presenting parties before have said with respect to concerns over the one-year rule. It is definitely my experience in many instances where clients have consulted me, and it is way after one year from the date of separation, to say that people lose their rights after one short year without any notice, without anything happening, is extreme in my view.

Under the present Dower Act I do not believe that is the case. Under the present Dower Act there is a section that deals with separated spouses, but it has not been interpreted. It has been interpreted very narrowly by the courts. The basic rule is that you still retain your dower rights until there has been a division or until the parties have died. I myself do not see how we can suggest that there is going to be simply a one-year provision.

Mr. King suggests that if we had it otherwise, we would encourage parties to apply under Section 22(1)(b) to immediately apply under The Marital Property Act. I say fabulous, great, that is exactly what we want to do. I often find myself in the position where I am acting for female clients who have very little money. It is extremely expensive to start the application rolling, to get all the numbers, to get all the assets from the spouse who has most of the assets. It costs a lot of money. Sometimes we have to go and get orders for financial disclosure. It would be ideal if we could put the onus on the spouse who has most of the property to start the application.

Mr. King, in his own presentation, admitted that would be the effect of this. I do not think that would in any way hamper negotiations of an out-of-court settlement. What it would do would be to start the ball rolling

quickly to get the assets all known, because you cannot negotiate a settlement until you have disclosure of the full assets in any event, so we usually spend months back and forth in letter writing asking for more assets and asking for clarification of this, and if somebody would have just gone ahead and filed a Marital Property Act application first, we would have had all that information there and the spouse who has less assets will have less lawyer time in deciphering what all those assets are. I think that it would be very advisable to promote the requirement that the spouse who has most of the assets is forced to file an application sooner.

A comment with respect to 22(1)(b) is that they have applied for and that the application is still pending or has been finalized. That I think sort of speaks for itself.

I would like to move on to 22(1)(c) and deal with the wording of "during the period of separation, there was a course of conduct through the spouses' legal counsel evidenting an attempt by the husband and wife to separate and finalize their affairs." An attempt to finalize your affairs means absolutely nothing. An attempt to finalize your affairs does not give anybody a right to any property. I could attempt, I could write letters, I could even maybe say we are prepared to agree to this and have the lawyer on the other side bind himself that he is prepared to agree as well, and then find out that the clients are not prepared to sign the final documents.

* (2320)

Unless there has been a final agreement, unless there has actually been a transfer of the property in a final settlement, what is an attempt to do something? It is a nothing, it is a legal nothing.

To have general wording like that in the Act is going to give forth to lots of litigation, make lots of money for lawyers—I should not be opposing this, but in my mind it is terrible drafting because an attempt to finalize things does not give anybody any rights.

We recently had a case in our office of exactly that. We had negotiations going back and forth with one of my partners and a law firm in Winnipeg and a deal was struck. We thought it was a final deal. The lawyer on the other side thought he was binding his client. In fact he had never discussed the final deal with his client and still had to go back to his client and his client said, no. Where do you define, attempt to finalize?

We would have, had you asked us that day, said we have now reached a final settlement. We wrote to our client and said, we have now reached a final settlement, we are drafting the papers. Only to find out the lawyer phoning back shamefaced the next week saying, no, my client is not prepared to agree to this, after he had said, yes, I have discussed it and he is prepared. An attempt is nothing, we have to get to the actual writing on the dotted line.

We have the same comments with respect to (d), before the husband's death, the husband and wife divided their property in a manner that was intended by them or appears to have been intended by them to separate and finalize their affairs. What does, appears to have been intended by them mean? Does it mean one letter between law firms? Does it mean a draft agreement? Does it mean a little agreement that they put on paper by themselves without independent legal advice? What does it mean? I do not know what it means, but I do not think that it is clear what it means, and I do not think we should be passing legislation. I would, therefore, strongly recommend that you accept CORC's and MAWL's recommendations with respect to those sections.

I also want to compliment the Government on Section 21(1)(b) which protects spouses' guaranteed share of the estate over orders under the new Dependants Relief Act, and that is a very necessary provision, and we are very pleased to see that provision here in this legislation.

I would now like to move on to The Intestate Succession and Consequential Amendments Act, Bill 48. The first thing I would like to deal with is the principle of all-to-spouse. We were very pleased to see the enactment of the principle of the all-to-spouse rule. In my practice, I see that reflects what the majority of people actually think and do when they make wills.

When you have a younger widow in where they have not made a will—and that is usually the case where wills are not made is when couples are younger—and she has three dependent children and you tell her that she gets the first $50,000.00. Thereafter, she has to share with the children, and it is held in trust for the children, she is just appalled. I know that her husband would have never intended that to happen. So the all-to-spouse rule is something that we have been asking for some time and will alleviate a lot of very difficult situations created by the existing law.

However, we have only gone halfway. We have said, just a minute now, it is all-to-spouse the principle goes, but it does not go in a situation where there are children of a previous marriage. Suddenly we have the Cinderella concept of the evil stepmom who is going to take over and not share with the children from the previous marriage. We also have this sort of connotation that children have a right to property, some sort of a moral obligation to leave to your children. It is funny, because in the same package of legislation, the Government is not being consistent. The Government has taken out the moral duty, which we are applauding in The Dependants Relief Act. Yet somehow or other it is still attempting to put it in this Act.

So I would very much like to see that the second part of the all-to-spouse rule also apply, and in every case it should be the case that the whole estate should go to the surviving spouse, if there is not a will. That way we are also encouraging people to make a will and let us get an education campaign out that tells people to make a will. Let us start with Mr. Edwards' suggestion of something on the marriage licence and let us go on to other things that will tell people and encourage people to properly plan and to make wills.

I would also like to comment that if it is the case that you are not going to change or amend that section, the amount referred to here, $50,000, is very, very inadequate. We did some checking with Stats Canada

and from the date that the $50,000 was brought in until now the difference in value would now be somewhere over $170,000 in value. Let us wake up to the real world, $50,000 does not you buy a house anywhere; $50,000 does not even buy you a house in Carman, Manitoba. So let us wake up to some realistic numbers. I am not proposing that we have numbers; I am proposing that we should have the all-to-spouse rule complete.

With respect to Section 3, I just note that the same comments I made with respect to The Dower Act would be made to this Act as well.

I would like to move on now to The Dependants Relief Act, Bill 47. There are some excellent amendments in this Act. The first one that we really support is the shifting of the test for entitlement from a moral duty to one of dependency. This will preclude the possibility of able-bodied, economically secure individuals from contesting wills, and we believe this is really good.

If only you could establish that same principle in The Intestate Succession Act with respect to the all-to-spouse rule, because I find the two really inconsistent. In the one Act you are saying there should not be a moral duty to leave to your adult children, and yet you are imposing that moral duty on people in the other Act. I do not see the consistency of it, but I really support the move in this Act for that.

Secondly, it recognizes the need of dependent common-law spouses and that is really excellent, because in today's society we have so many people who are choosing for whatever reason not to marry and we have to look at dependency being set up in those cases. As well, it protects the surviving spouse's share of the estate under The Dower Act, and I think that is critical that the one-half—again we come back to the first principle I enunciated, the spouse should never get less by staying married to the spouse than she would have, or he would have, had they separated just prior to the death. Taking that principle into account, we must protect under The Dower Act, and we are very pleased to see these amendments.

The final one is the amendment providing for the possibility of interim orders, and that again is very necessary and we would hate to see someone who truly was dependent going lacking in the interim because they are not being provided for, so we definitely support all those amendments.

There are some concerns that the Manitoba Association of Women and the Law, and I personally, have with respect to The Dependants Relief Act. The first one comes with the fact that you are extending the categories of dependants. It is probably the case that hard cases make bad law. If we can say that point, where we could always think of an example where someone should be included, the grandmother in your example, Mr. Edwards—but I could also think of examples where there are fairly small estates and the surviving spouse is going to need everything, even though a grandmother might need something too. I am not convinced and I am not prepared in today's society to rely on judicial discretion to make a fair and equitable judgment there.

Our association put forward a report last year on gender equality in the courts, which suggests the courts do not often abide by the same principles as what half or more than half of the population think or see the world. I have to say that for you to say to me, or for people to say to me, well, it does not give them an automatic right, it only gives them a right to make an application, but I am not prepared to rely on the judicial discretion to the same extent as some other parties are.

* (2330)

Secondly, any time someone makes an application to court, it is going to cost the estate money to fight that application. If someone comes in to me and says someone is making an application for a $10,000 claim, I will say let us settle it out of court. It will cost you more than $10,000 to go to court. In huge estates, yes, you can fight to go to court, but in small estates you do not go to court. You do not have the money to go to court. They do not want to spend the money to go to court.

I have some real concerns about that, particularly in the examples of siblings. It is interesting because I gave a talk out in Carman a couple of weeks ago on this Act, and I raised this point of The Dependants Relief Act. A couple of people in the audience I could see were really squirming, and they called up later and sort of said to me, you know, my brother went bankrupt a couple of years ago and he has really been in need, so I have been helping him out.

I helped him buy a house, and I loaned him some extra money. I have given some money to him when he needed money because he could not make the payments. She says, is that going to mean now that he is going to get part of my estate? I said, well, I do not know, dependency is not defined under this Act. We do not know what dependency is. Is this sibling going to be considered a dependant? I do not know.

My own personal view is, I do not believe my siblings—if I want to help out my brothers and sisters, fine, I will help them out, but I do not believe that they should ever be entitled to make a claim against my estate that my surviving spouse or my surviving children might take, unless I choose to leave them that in their will.

In that line, I would also like to comment that in drafting wills and in teaching the Bar admission course I found that we attempt to tell people how they can get around statutes. For instance, people will come to me and we teach in the Bar admission course how to draft a will with the applicable trusts set up so that if you have a mentally disabled child the party will be able to protect them, but they will still be able to claim social allowance. I have clients come in and ask me to do this all the time. Lawyers have devised trusts that will get around the statute in that way.

On the same token, I do not believe that people are not going to be concerned. These clients of mine who approached me, with respect to their brother, they are going to think about giving this brother another red cent. They are concerned. They were very concerned about the Act.

I do not believe that Mr. King suggested that there was no evidence to say that people were not going to be as benevolent to their relations as they have been in the past, but we do see people adjust their course of conduct to take sort of maximum advantage of Government programs and Government assistance.

I have seen many people who are elderly divest their whole estate while they are alive so they can claim pension benefits, low-income earning benefits and things like that. I am not saying that is a good course of conduct, but I am saying that people in reality do adjust their conduct accordingly. I think you have to keep that in mind.

I would see for instance if this Act came into effect as it is now that we would caution in our Bar admission class, we would have people caution their clients, the students teach them to caution their clients, that if they leave or allow a dependent relationship to establish, then they may be forced to leave something in their will to that party or else risk an application under The Dependants Relief Act.

It is my own view that if you want to provide for someone other than your sort of immediate family, you should do so in your own will, and we should be making every effort to encourage people and to educate people to do that. If we by legislation provide everything so that they do not have to make a will anyway, there will not be that incentive to make a will.

We need to now be saying that it is going to be all to the spouse unless you make a will, and it is going to be only to your immediate family unless you make a will. Let us get people making a will and addressing their own minds to what they wish to do and how they wish to leave and set up their assets. I do not do this from an economic advantage standpoint because I can tell you that most lawyers would say that we would much rather be doing other things than drafting wills because we do not make any money drafting wills.-(interjection)- It is a loss leader, that is right.

Finally, with respect to The Marital Property Act, we certainly support the Government's amendments allowing for interim orders. This is a really necessary thing. I spoke earlier about the problems involved when you are acting for a spouse who has no money and no assets. I think it is really necessary to have this. We would have liked to see changes to Section 9, re joint assets, because they are so much a part of what we are going to have, joint assets included, because they are so much a part of what you need to bargain for in that set-up and of course, we would always like to see community of property.

It is interesting that Mr. King made the point of view that community of property would be such a radical thing. Community of property was introduced in Manitoba in 1977-78, and community of property has been introduced in 28 states in the United States and in many countries all over the balance of the world. It has not really completely revolutionized those countries, so I am not sure it would have the drastic effect that Mr. King suggests it might have -(interjection)- It might be in some circles.

In The Family Maintenance Act, the clarification of the non-custodial rights is excellent, the target case certainly created problems and a good clarification legally was really required. Child support to be charged against the estate is absolutely essential and the imprisonment—it is unfortunate that we have to have such provisions in our laws—but unfortunately, I think if we are going to have a maintenance enforcement system that is working we need to have these in our laws. We badly need to do something very soon about setting some very strong guidelines for maintenance award and child support awards, because we are experiencing in Manitoba today the feminization of poverty. It is really a sorry state when you see the very, very low awards that are being awarded and the poverty that women and children are living in after separation and divorce. I really would urge the Government to move in that area as quickly as they can.

I have been very long-winded when I said I would be short, and it is so late, so I thank you for your time.

Mr. Chairman: Any questions to Ms. Brown? Mr. Edwards.

Mr. Edwards: Ms. Brown—I think I can call you Mona—thank you so much for presenting here tonight, and we certainly do not mind you being long-winded. It was very educational and it was certainly a learning experience for me. I am particularly pleased that you were here to listen to Mr. King's comments and had some reflections on them. I found them particularly useful.

Let me take you back, and I do not intend to be long-winded in my questioning, because the hour is late, but it seems to me we have a resource in front of us. I do want to ask you specifically the concern about children who are perhaps minors from a prior marriage. We have talked about adult children, and I think you can have much less sympathy perhaps for the adult children scenario, but children who are minors from a prior marriage, is it your experience, as Mr. King indicated, that invariably people would want to leave money to those children?

I simply ask you that in the context of the principle for The Intestate Succession Act which is articulated to be, we want to do what most people would do. What comments do you have about that statement by him as a statement of fact?

Ms. Brown: I would very much disagree with that statement, particularly with respect to minor children. It is my experience they almost always—I mean assuming they have custody, if they do not, there will be an order under The Dependants Relief Act, and we are not worried about that, but if they had custody, they would want to leave the assets to the surviving spouse to be able to have the ability to care for those children.

* (2340)

Mr. Edwards: When you say, if the children are with the other spouse, if we think through that, obviously at the time of the divorce there must have been a marital property settlement; there may in fact be child

support payments which are still flowing, and there is on top of that the opportunity to apply under The Dependants Relief Act. I guess my question is, in that situation though, does the testator normally leave money, in addition, to those children? Is that something we have to worry about or think about as something which would normally be done by most average Manitobans?

Ms. Brown: In the situation where they are living with, say, their mother, and the father dies, and we can clarify the situation, and then father is making a will, possibly—it really depends a lot on whether he is remarried, if he is remarried if he has children of that second marriage as well, and how old the children are—but assuming they are dependent children, it would not be unusual for the father to make a will leaving part of the assets to the children who are living with their mom. It also depends on how the separation took place and some of those factors that play into it.

Mr. Edwards: I think it may also depend on how the custody access relationship is working out at the particular time. We went through this a year and a half ago, the Access Assistance Program. That can stir some pretty high emotions. Another question about the definitions in Sub (a) and Sub (c), which appear in both The Dower Act and The Intestate Succession Act, you have indicated one year is simply too short, and I know from the brief presented that you would just have that removed, as well Sub (c).

Mr. King's comments, and I think you have gone over this, were that we would in some way be encouraging people to speed up a separation, in other words to give short shrift to the reconciliation potential, which of course the lawyers are obliged to assist if it is at all apparent. Do you see that potential in Sub (c), where the wording as you have indicated is quite loose but—go ahead.

Ms. Brown: I believe what Mr. King was referring to is, he was suggesting that if our suggested amendments were put forward, i.e., deleting 22(1)(a) making slight, clerical cleanup amendments to (b) and deleting (c) and making some cleanup amendments to (d), he was suggesting that people—because there would be no time limit on when the spouse's rights under The Dower Act would cease, he was suggesting that every lawyer would advise their clients to immediately make an application under The Marital Property Act. Then there would be a pending application under The Marital Property Act, and they would then not have to deal with The Dower Act provisions because there would be a pending application, and I say to that, excellent. That is exactly is what most women who do not own property and who need to get the ball moving would like to have happen. They then have to be served, they then have good grounds to go to legal aid, if they do not have funds for their own lawyer and say, I need a lawyer, because I have been served with this application, and I have to respond within 60 days.

What happens usually is, after that application has been filed, that does not mean they have to immediately be in court. After the application is filed, we can just leave the document filed. I could write to the other side and say, before I file and answer, let us try to negotiate settlement. I might never even file an answer on behalf of my clients, and that does not mean in any way that it is going to be protracted into court any more so than it would be the other way. You also get the contrary happening whereby, if you are acting for the wife who has or the spouse who has very little assets, you are trying to get financial disclosure, you are trying to get them to file exactly what they have to tell you when they file The Marital Property Act application, and they were hiding assets and they were delaying for six months and not doing anything.

So the way the Act is drafted right now, I have real concerns this would only encourage lawyers to delay and delay and not have anything done until after the year is up. I mean, if a husband came in to see me and had lots of property, and what is proposed here were the law, I would say to him, do absolutely nothing for a year, and then your wife will have no dower rights. Okay, so all she can get is what is under The Marital Property Act.

Let us not encourage that kind of a situation where those who can afford counsel can take advantage of those who cannot afford counsel or who may be under the misapprehension that they may be able to reconcile with their spouse. Let us force the party who can best afford it to have to hire the lawyers and pay for the first application. I think what Mr. King was suggesting was going to happen would be the best scenario for women in Manitoba.

Mr. Edwards: It is an interesting perspective. It is too bad Mr. King is not here. Sub (c), I expressed a concern or raised a question, given the wording of Sub (c) that that may in fact detract from efforts toward reconciliation in the sense that it speaks so vaguely about a course of conduct through spouses' independent legal counsel evidencing an attempt, whatever that means.

Do you see any of that danger in fact that Mr. King says he wants to prevent that if two people go to counsel, they run the risk at that point, or very shortly thereafter, that they have lost dower rights, whereas we are told, at least I recall from the Bar admission course I attended, that we are told lawyers are to assist if they see any potential for reconciliation, to attempt to facilitate that. I am very concerned about the vagueness of course of conduct in that context and the specifically linking it to the factual determination of two legal counsel who happen to be in the picture.

Ms. Brown: I agree with your comments. I am concerned as well with those same points. I personally do not think that this provision is in any way going to assist in getting people to reconcile or getting people to work out their differences any more so than I think it is going to lead to more litigation because it is so vague as to what an attempt means to finalize their affairs.

I mean, what is an attempt to finalize their affairs? I do not know. I would say to my clients, well, let us try it, let us see what the court has to say, so we are

protracting litigation by that kind of a clause, and the reality is that it is giving the party who could lose rights is getting nothing because it is just an attempt. It is not a finalization. When there is a finalization then the rights should be lost and I clearly agree with that.

When there is a finalization, a court order, or a finalization of their affairs, but an attempt to finalize is a nothing. It is like they teach in contract law, an agreement to agree is no agreement at all. An attempt to finalize is no finalization.

Mr. Edwards: With respect to when the money is going to be divided between children, where there are children from a prior marriage under this proposal here, when those trust monies go to the children and the children are minors, can the mother in this case, let us say, get at those trust monies? I am not clear on how tied up those monies are in normal circumstances.

Ms. Brown: The monies are held by the Public Trustee for the infant children and the only way that the parent, the surviving parent can access those funds is if they make an application to the court and the court allows them access to the funds, unless there is a will and the will gives specific powers to the executors to do that.

Here we are talking about a situation where there is no will so that the only way you can do this is by hiring lawyers and making an expensive court application which either can be opposed or agreed to by the Public Trustee's office. That is the mannerism by which infants—and it poses a real problem. I have attended in court a number of times for widows who have had young children and we have had to go to the court and ask that we use some of the children's money, because $50,000 is not much money these days. It hurts you to bill somebody in that instance because you are taking money from these kids. It is so inequitable.

Mr. Edwards: Going to The Dependants Relief Act, with respect to the definition of dependant, at Sub (c) it says, "a person of the opposite sex", and then it goes through a number of substatements about cohabitation for five years, one year if there is a child or children. What do you see as being a possible justification for opposite sex being in there? Is there one?

Ms. Brown: No, I think that section is probably contrary to our Human Rights Act and definitely contrary to our Charter. We have in our report recommended that be repealed. We are very pleased to see common-law spouses in, but in my view it should be common-law spouses of either sex.

Mr. Edwards: My last question, on to The Dower Act. You have indicated clearly that you think we should just simply delete Section 16. You think that there would not be adverse consequences as Mr. King has suggested. You have also indicated that you think we would not need to look further in the Act to do other things, that it could simply be deleted.

* (2350)

If in fact this committee were to move that Section 16 be deleted, and if in fact a controversy arose and the proposal was put to us by the Minister that if this move persisted, The Dower Amendment Act, as it stands here, would be pulled and not introduced for third reading, what would your advice be? Assuming that we wanted to support you in deleting Section 16, how far do we take it in that scenario? I am not saying that is necessarily what is going to happen. I am simply seeking your advice knowing the consequences of Section 16 be there, but also knowing perhaps the benefits of having this amendment Act in place.

Ms. Brown: Well I would like to think that Mr. McCrae would be egalitarian enough that he would not take that position. I am sure that Section 16 can easily be repealed without a problem. I would really like to hope that our Government, and trust in our Government, that would not be the case. I would hope that the Opposition Parties would stand firm on this particular section because we have to say something to the people of Manitoba. We have to say something to the women of Manitoba about whether we truly believe in equality or not. To let this Bill go through without repealing Section 16 tells me that you do not believe in equality. I would have to urge you to let the Bill go rather than to put it in without an amendment to Section 16.

Mr. Chairman: Thank you. Ms. Wasylycia-Leis.

Ms. Wasylycia-Leis: Thank you very much, Mona Brown, for your presentation. I will not be asking many questions at all. I cannot think at this hour very well, let alone say Intestate Succession Consequential Amendments Act, but that was it, right?

Following up on the previous questions around The Dower Act, first on Section 16, can you tell us how it would be unfair to those who have finalized their affairs to move now to delete Section 16?

Ms. Brown: No. As far as I can see, I do not see any problem with parties who have already made their wills in contemplation of Section 16. They have one of a number of options. They can make new wills to contemplate the new provisions, or their spouse will simply be able to elect to take one-half under The Dower Act instead of taking under their will. I really do not see that is a problem to them. If they wish they can go in and make new wills. If they do not choose to do that, then their spouse will get what they would have been entitled to had they left them or whatever. I have no problem with that whatsoever. I see no dangers in doing that.

Ms. Wasylycia-Leis: It would be accurate to say that in effect deletion of Section 16 would simply put a check in place in terms of anyone who had included in his or her will an attempt to leave a very paltry sum to the surviving spouse.

On the same issue in terms of Section 16, would it be fair to say that—or can I ask you, would the failure to delete Section 16 at this time, and to delay it for some future unspecified date, leave Manitoba wide open for a case against the Charter of Rights and Freedoms?

Ms. Brown: In my view, yes.

Ms. Wasylycia-Leis: Thank you and no doubt of considerable cost to the Province of Manitoba as well as leading to the possible inevitable conclusion that our laws must be changed at any rate to bring them in line with the Charter of Rights and Freedoms.

Could I ask—since I had raised this earlier and I was told that you would be the one to answer this—your opinion in terms of the different proposals that have been presented in response to Section 15 and the fixed share scheme under The Dower Act, the difference between the Law Reform Commission proposal, the CORC and MAWL proposal, and the benefits or the downside of those two proposals?

Ms. Brown: Yes, basically the substantial difference, the Law Reform Commission put out a report about three years ago. In that report they recommended that whatever you would have been entitled to under The Marital Property Act, had you made an application on the date of death of your spouse, is what you should get under The Dower Act, so that you would get exactly the same as what you would get under The Marital Property Act had you separated from your spouse.

What CORC and MAWL recommend is that you would get 50 percent of the net estate. So it is possible under CORC and MAWL's example that you could get more under staying married to your spouse under The Dower Act than what you would get if you separated from your spouse. Let us give a rationale for that. I have no problem with that if someone gets more. I have a problem with someone staying married and getting less, but I do not have a problem if somebody gets more if they stayed married and were married and living with the party at the date of death.

The problem happens the other way in the Law Reform Commission's example. Let us take the situation of a farming couple who were farming together—but something that is exempt from sharing under The Marital Property Act is gifts and inheritance. Just at the time of marriage or shortly after the son inherits a farm from his parents or father. They would work on this farm, live on this farm and build it up over the next number of years, 30 years, 40 years, whatever. It is not a sharable asset under The Marital Property Act.

Now that to me seems to be inequitable in a situation where the parties have remained married and are still living together, you know, because it is a gift through inheritance. The same with assets acquired prior to marriage, they are not sharable. They are not sharable assets.

So I think there are circumstances which would justify allowing more than The Marital Property Act amount when the parties remain married to each other at the time of death. I do not have a problem at all with a flat 50 percent. You are entitled to one-half of the estate period.

Ms. Wasylycia-Leis: Yes, just a couple of other quick questions. You would support, I gather, fairly strongly any efforts to amend the Intestate Succession et cetera Act to move for full application of the all-to-spouse principle.

Ms. Brown: That is right.

Ms. Wasylycia-Leis: Finally, just to put it on record. Once more, you would support any efforts to amend The Dependants Relief Act to delete this new amendment which extends the categories of the dependant?

Ms. Brown: That is correct.

Ms. Wasylycia-Leis: Finally, thank you very much for your contribution and for a very enlightening and, I believe, convincing set of arguments in terms of moving this family law legislative package more in line with the Charter of Rights and Freedoms and the principles as enunciated by you and many others. Thank you.

Mr. Chairman: Thank you for your presentation, Ms. Brown.

We will go to the next presenter, and that is Mrs. Berenice Sisler. Do you have a written presentation? No? You may start immediately.

Mrs. Berenice Sisler (Private Citizen): I will as soon as I get a drink of water. It is very dry in this room.

Ladies and gentlemen, the hour being late, you will be pleased to learn that my presentation is very short and only concerns Bill 48. With your indulgence I will read it and it will be finished even faster.

It is customary to thank the committee for the opportunity afforded citizens like myself to make presentations. I have mixed emotions in doing so, because I regret that I am here once again to criticize proposed succession legislation.

We started doing so in 1976 continued in 1977 and 1978. It seems to me as if we have been responding to reports and White Papers on this issue ever since. Perhaps it is fitting to be here once again on International Women's Day.

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I am disappointed, because I thought that finally we had a Government that would listen to and hear the logic inherent in an all-to-spouse rule. I had thought that finally we would have legislation based on principles rather than on exceptions. Sad to relate, this is not the case.

I have spent a considerable portion of my 65 years working to eradicate the discrimination and injustices toward women in our laws. One instance of this is the paternalistic, discriminatory, unfair and unjust legislation regarding the estates of those who die without wills. Unfortunately, Bill 48 perpetuates this paternalism, discrimination and injustice.

Previous legislation was framed before the age of enlightenment, before the perception of marriage as a partnership of equals, a perception now set out in the preamble to our Marital Property Act. At the time,

women were seen as property of their husbands who had received them from their fathers in exchange for their support and protection. The laws reflected this.

The former Succession Duty Act, for one, treated wives in the same way it treated children. The suppositions of much of our family law had been that the assets were his, not theirs, that women were incapable of coping with financial affairs, in any event, that they were fickle and would succumb to the first fortune hunter who crossed their paths and neglect their children when this took place.

Bill 48 adds another supposition about women. It presumes that second wives are mean-spirited, self-centered and greedy. Bill 48 purports to a spouse the all-to-spouse rule. Indeed, the family law package, at page 16, makes this claim: An examination of the proposed legislation, however, reveals a different truth.

What we have here is a very bizarre situation. Should a spouse die intestate with no surviving children, the surviving spouse would inherit absolutely. Should a spouse with surviving children of the union die intestate, the surviving spouse would inherit absolutely. So far, so good. Should a spouse with surviving children of a previous marriage, whether they are children of the union or not, die intestate, the surviving spouse would not inherit absolutely.

Here we enter the numbers game, and that magical 50,000 figure so beloved by drafters of legislation appears, a figure that in our inflationary times becomes out of date almost as soon as it is suggested. What we have as a result of this proposal are adult children who have no moral right to their parents' assets, receiving some of those assets, not because they are children but because they are children of a former marriage—all this at the expense of the surviving spouse.

Adult children who are not dependent ought not to inherit what rightly belongs to the surviving spouse. Dependent children from a previous marriage can seek relief through The Dependants Relief Act. I would point out here that in regard to adult children inheriting, I was interested in Mr. King's comments. I have to say to you that I have had an English father and that was the situation in Britain. I think what he is doing is transposing his perception that parents usually pass it on through the male line in the British system. I think that his perception of parents always willing to children is a hangover from his upbringing.

What is behind the inconsistent and illogical thinking in this section of the Bill? Part of what is behind it is the old gold digger syndrome of which we heard a great deal in former discussions about family law in the 70s. The rhetoric goes like this: What about the man who remarries late in life, usually the wife is described as young, and who dies shortly after? Should his wife of a few months receive all his estate? The answer, if he has not made a will stipulating that his children of a previous marriage receive a portion of his estate is, yes.

Another scenario concerns the man with children who divorces his wife after he has run off with his secretary. Should his second wife inherit absolutely to the detriment of the children? If those children are adult, they have no right to the assets. If they are dependent, they can seek relief through The Dependants Relief Act. Provision can be made and should be made in a will for those children if the father so chooses. I would endorse Mr. Edward's suggestion about informing people to make wills.

The law does not require those who make wills to leave a portion of their estates to surviving children. A spouse who is remarried is not obligated by law to leave anything to children of a former marriage in a will. If the law is not concerned about these children, why is it necessary to intrude where there is no will? It is not inconceivable that a second wife would provide financial assistance to her deceased husband's children from a previous marriage? This may seem naive, particularly from someone my age, but it is no less likely to my mind than the assumption that she would necessarily be mean-spirited and refuse to do so.

What this legislation amounts to is second-guessing the deceased intentions. What about the child whom for all intents and purposes the parent has repudiated, the child who has lived in a way of which the deceased did not approve? Has this child a right to inherit? Why does the legislation assume that children of a first marriage are worthy of an inheritance, that children of a second marriage are worthy only if there are surviving children of a first marriage or that a surviving spouse is only worthy of inheriting absolutely if there are not children of a spouse's former marriage?

If we had true recognition of marriage as a partnership of equals, if we had community of property from the beginning of marriage, most of the inequities and difficulties in the laws would be eradicated and there would be no need for the ongoing confrontation that results from imperfect legislation. I would point out, as Mona Brown has pointed out, that there are lots of jurisdictions in the United States where this works. Back in the '70s when we were looking into this, this was considered as radical an idea as communism almost. People just threw up their hands at contemplation of community of property during the course of the marriage. We had research at that time that showed there were states in the United States where this was working, and you know people were surviving in spite of it.

Most estates of married women are either small or nonexistent. Consequently, the impact of this legislation will be of little significance for married men. Therefore, the legislation can be viewed as an example of systemic discrimination. Given our Charter of Rights and Freedoms, this is surely a step backward in framing legislation.

Throughout the time that I have been involved in changes family law, I have observed that amendments are often made on the basis of what has gone before or what other jurisdictions have done. As a result, so much of what is presented as new is simply a patch-up job on the old. It seems to me that a more productive approach would be to look at the problems that exist. For example, the poverty of women when they are widowed, and to frame laws that would address the

problems. This should always be done on the basis of articulated principles such as the equality of partners to a marriage and not on instances that are exceptions. As has been pointed out time and time again, exceptions make bad law. Nor should legal precedent be viewed as the end-all in framing laws. Sometimes legal precedent is valid. Often it is not.

We need a fresh approach for the 1990s, not a hanging on to the past unless it is valid for today and for the future. The section of the proposed Intestate Succession Act which denotes that surviving spouses do not inherit absolutely when their spouses die intestate is a hangover from the past and no longer relevant.

Thank you very much.

Mr. Chairman: Thank you. Any questions? Thank you. No questions? Mr. Edwards.

* (0010)

Mr. Edwards: Mr. Chairperson, I know you hang on every word, so you must have been being facetious. I want to start by thanking you—I think I can call you Bernice—for your presentation. I want to start by saying that you started by recounting your own history of involvement in these issues through various Governments now, and you have obviously participated for a long time. While you express your disappointment, I think we should put on the record our appreciation for that length of service. I was not personally present through most of it in the Legislature, but I certainly can see the results of some of your work and efforts.

While you tell us about that history, do you not have some disappointment as we do, as I do, that we are here dealing with a package which we have been waiting for so long, that does not deal with, probably in my view, the most critical piece of legislation in this whole group in any substantive way, and that is The Dower Act?

I appreciate your comments are not about that Act. I simply want your comments as to why we do not have that in front of us after a Law Reform Commission report, after studies, after consultations. Why do we not have some decisions about The Dower Act in front of us?

Mrs. Sisler: Mr. Chairman, through you to Mr. Edwards, I would first say, thank you for your comments about my—perseverance I guess is the word. I do not think there is anybody left in the Legislature from the time that I first started out. I do not know what that proves.

With regard to The Dower Act, I simply cannot understand why that was not the very first thing that was tackled by the department. I find it absolutely incredible that we are sitting here in 1990 and that there is nothing substantial being brought forward with regard to The Dower Act.

Mr. Edwards: With respect to the—just call it Bill 48, Section 3 has the (a), (b), (c) and (d), and it deals with separated spouses. I do not know that your comments concentrated in particular on that area. I am assuming, perhaps you can inform me if I am correct, that you support the position which states that both (a) and (c), in that definition of the section, be deleted. Maybe you could comment on whether or not you support Ms. Brown's comments that (d) also needs some tightening up.

Mrs. Sisler: Excuse me, Mr. Chairman, I do not have the legislation with me at the moment, but I support the position of the Charter of Rights coalition.

Mr. Edwards: As well, one other point that you brought up—and I wanted to touch on with respect to the anomalous situation here where if there are children from a prior marriage, then all of the children share. Mr. King talked about this legislation needing to reflect what most people will do, and I think that is a principle enunciated in the brief from CORC and others and one that we should no doubt take strong consideration of.

How do you think that principle affects the situation where there are children from a prior marriage who are, let us say, not adults, smaller children, perhaps in the custody of the former spouse? Do you think that in most situations the spouse who has died would leave some money to those children? Do you think we need to be concerned about that? Is that something that you have thought about?

Mrs. Sisler: My contention is that if that spouse wants to leave money to those children, that spouse makes a will to do so, and that if there is not a will, they should seek relief through The Dependants Relief Act. I think the problem is with regard to the wills, and I think that people have to be made aware of it in that one of the ways you have suggested would be a way to do this.

I think my concern is for the economic security of the surviving spouse. I am of an age group where I know that elderly women are poor. I know what happens to them when they are widowed. I think that is the concern. I think that there are mechanisms in the law to protect dependent children.

If you are asking me as well about adult children, I think that adult children do not have any right to think that they inherit from their parents. I certainly never felt at any point that what my parents had belonged to me in any way, shape or form. After they had raised me, that was the end. I did not think they were obligated to do anything further for me.

Mr. Edwards: Just one final comment with respect to your analogizing the feelings about communism to that about the communal property theory. I would simply comment that the Berlin Wall is coming down as we speak, and things are happening.

Manitoba has led in this area in the past, and I certainly hope that we continue to lead and lead again. There is no reason why we should be afraid to move into areas that we think are correct. I think it is something that you have brought to this committee tonight, that sense that if there are not reasons not to do it, let us do it.

Mrs. Sisler: I would say that Manitoba was the first province to get the vote. I believe that we have the

best family law in the country. I believe we have a maintenance enforcement system unequaled in the country. I think we could make great improvements. I think community of property is one area. Of course, cleaning up The Dower Act is another. I think we have to look at equity, guidelines for equity after divorce so that the partners have an equal lifestyle after divorce and not the way it is now. I think there are lots of areas to be improved. I think much has been done, but I think a great deal is left to be done.

Ms. Wasylycia-Leis: Mr. Chairperson, I am not going to ask any questions at this late hour. I do want to thank you, Berenice, for coming here this evening and presenting at this late hour and to also thank you for your work over the years, over many, many years in the struggle for equality in family law in the Province of Manitoba.

I believe you have made very strong evidence and convincing arguments for this committee to seriously consider major amendments to this legislative package, and in particular to work very hard to make the necessary amendments to Bill 48 to ensure the full application to the principle of all-to-spouse and the equality principles enunciated so well by you and many others.

On that note, I thank you, and thank you especially for hanging in there all these years to keep us moving in the right direction. Hopefully everyone around this table will have heard your arguments and been convinced that we should move forward, not move backwards, or at best stay in the same position. Thank you.

* (0020)

Mr. McCrae: Mrs. Sisler, I have one question. Are you aware of any jurisdiction on this continent that provides benefit to a surviving spouse to the level of that provided in the legislation before us tonight?

Mrs. Sisler: With due respect, Mr. McCrae, I do not know the relevance of this question, so I really am finding it hard to respond to it. I think you know that I am not a lawyer, although I read as much as I can in this area, not from a legal point of view, but from a general point of view. I am not, as I am sure you suspect, qualified enough to respond to that. If you wanted to elaborate, I would do my best to answer, but I am afraid that I cannot make a response to that.

Mr. McCrae: Well, I am not a lawyer either, Mrs. Sisler. I do not want to put you on the spot either.

Mrs. Sisler: Oh, it does not matter if you do that.

Mr. McCrae: The only point I make is that I will tell you that I am advised the minimum 75 percent of an estate, regardless of the size of the estate, is something that is in our legislation for a surviving spouse. You will not find that anywhere else on this continent.

Mrs. Sisler: I—

Mr. Chairman: Mrs. Sisler.

Mrs. Sisler: Excuse me, Mr. Chairman, I have never been at a session where the Chairman makes you wait like this, so will you pardon me? What I would say to that is, that is interesting. I think that is good, but I do not think that is relevant to what we are discussing here. I think it is great if that is true, but I find that kind of argument very discouraging to me at my age. Just because we have something good does not mean we cannot make it better. I am all for making everything better, and I am all for looking to the economic security of the surviving spouse. This is my life cause. As I think I said to you in a meeting, I never thought we would get this close, and I was hoping we would make it.

Mr. McCrae: I appreciate that you have spent so many years of your life striving for an important goal. I also would like you to understand the position of a Government in a province that has responsibility to respond to the needs and aspirations of all of the people. I do indeed recognize you for your contribution and thank you for that on behalf of all Manitobans. Maybe it is because of you that I can claim, as Minister of Justice, that we have the best system of family justice in the country. Maybe it is not perfect, and we know it is not perfect, but thanks to people like you we have that kind of system in our province, and I appreciate your comments tonight.

Mrs. Sisler: There were lots of women in it with me, lots and lots of women.

Mr. McCrae: I know.

Mr. Chairman: Thank you, Mrs. Sisler, for your presentation. No more questions? I want to thank you. What is the will of the committee?

Committee rise.

COMMITTEE ROSE AT: 12:23 a.m.