



Submission to
ALBERTA FAMILY LAW REFORM 2002

**Alberta Justice Consultation on
Alberta Family Law Reform 2002
Public and Technical Workbooks**

March 28, 2002

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Foreword

Family Law Consultation Document

On behalf of the Alberta Law Reform Institute, we take this opportunity to acknowledge the important step which Alberta Justice is taking in its process of revising provincial family law. The public and technical workbooks clearly put the issues before Albertans and indicate the policy choices to be made.

We also appreciate the acknowledgement in the workbooks of the reliance placed on the prior work of the Alberta Law Reform Institute, in the various reports which it has issued in this area. The four-volume series of reports on Family Law was intended to provide an informed basis for future consultation, and we are gratified to see that taking place.

It would be tempting to merely restate the recommendations that the Institute has put forward on prior occasions, but to do so would be inappropriate for a number of reasons. First, circumstances and views change, sometimes even in a relatively short period of time, and it is always necessary to ensure that recommendations made even as little as three years ago are reviewed for their current appropriateness. Second, there may be new and emerging issues, or issues which others have raised which were not within the consideration of the Institute when it provided its previous recommendations. Finally, insight and understanding may develop over time, so that refinement of our proposals should never be precluded.

For these reasons, we present our response by way of a number of layers of information. As well as providing a choice of reading styles, these layers will allow the reader to delve at various levels into the context within which the Institute response is given.

The first layer is a direct question and answer response, following the questions that are set out in the public and technical workbooks. The second layer provides a more detailed response to the questions and adds to it comments on the issues that are raised by proposals made in the workbooks, indexing them to the previous Institute work. In particular, this document responds not only to the specific questions that are raised in the

workbooks, but deals with all of those areas in which the workbooks put forward a position or a recommendation. The third layer consists of a detailed comparative chart which reviews all of the positions set forth in the Alberta Justice consultation papers, the existing ALRI recommendations, and a commentary on the revision of those recommendations and the compatibility between the Alberta Justice and ALRI recommendations. This layer is set out in Appendices A, B, C.1 and D.1. In this level of detail, the ALRI recommendations are set out in full for the reader's benefit.

We then add, in order to complete the context of the recommendations, several further documents: first, a more comprehensive description of the responsibilities of a custodial and a non-custodial guardian (Appendix C.2); second, a complete list of the relevant factors for the court to consider in making a guardianship/custody/access decision in the child's best interests (Appendix C.3); and third, a list of our recommendations with respect to possessory orders on the matrimonial home or residence (Appendix D.2).

We add our most recent publication, namely, a Research Paper on the issue of recognition of same sex relationships, an important element in the last part of the workbook, dealing with the recognition of marriage, cohabitational relationships, and the possibility of registered partnerships.

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List of ALRI Answers to AJ Questions

April 9, 2002

ALBERTA FAMILY LAW REFORM 2002

Alberta Justice Consultation on
Alberta Family Law Reform 2002
Public and Technical Workbooks

1. SPOUSAL SUPPORT

AJ Questions:

[Technical Workbook]

1.5.a. Should the non-legal obligations of a spouse to support other people, as well as the non-legal responsibility to a new spouse to support a spouse claiming support, be considered by the courts?

1.5.b. If yes, how could a non-legal obligation be independently verified and the potential for abuse of this non-legal obligation minimized?

ALRI Responses:

Yes: ALRI RFD18.2 (Spousal Support), Rec. 8.2. In one example, a spouse may be providing financial assistance to an elderly parent or disabled sibling even though they are under no legal responsibility to do so. In a relationship that exists outside of marriage, a non-legal obligation may be owed to a person who has not yet attained the formal status of “spouse” or “partner.” To cover this example, the use of the word “spouse” in the question requires clarification. *See Appendix A, rows 21-25.*

A party who is the beneficiary of a non-legal support obligation should be under a duty to disclose to the other party and to the court the benefit being received. A party who has undertaken a non-legal support obligation and asks the court to take this into consideration in assessing that person’s legal support obligation should bear the burden of satisfying the court that the non-legal support obligation should be taken into account.

AJ Questions:

1.7.a. Should new legislation follow the *Divorce Act* approach or the *Domestic Relations Act* approach?

ALRI Responses:

The *Domestic Relations Act*: ALRI RFD18.2, Rec. 12.2. ALRI recommended that a spousal support agreement should prevail unless the applicant for support is able to bring themselves within one of the stated exceptions. Where an exception applies, the court could disregard the agreement. The government acted on our recommendation in 1999 in *DRA*, Part 3, s. 25.01. This section allows the court to disregard the spousal support provisions in an agreement if the spouse challenging the agreement lacked independent legal advice, the removal of a religious barrier to remarriage was a consideration in making the agreement, spouses living in a cohabiting relationship married each other, or a spouse is on social assistance without reasonable support from the other spouse. In contrast, the *Divorce Act* requires the court to take a spousal support agreement into account, but the agreement is not binding on the court. In our view, departure from the principle of harmonization is justified here to bring greater certainty to the contractual arrangement and thereby allow the parties to move forward with their lives on a dependable foundation. We think that the exceptions allowing the court to disregard the agreement strike a reasonable balance between two positions: that the agreement should prevail absolutely and that the court should have an unfettered discretion to override provisions in the agreement. Where (as is often the case) the provisions governing spousal support and matrimonial property distribution are closely intertwined, parties may be reluctant to conclude the agreement if there is any likelihood that the court will override the support provisions. If reform is to occur, it should be reform of the provision in the *Divorce Act* and not the *DRA*. See *Appendix A, rows 33-42*.

AJ Questions:

1.9.a. Should the court be given the power to grant a final order of spousal support?

ALRI Responses:

Yes: ALRI RFD18.2, Rec. 38.2. We can envisage cases in which final settlement would be in the interest of the parties. For example, at the conclusion of a short-term relationship, it may well be unreasonable to impose an indeterminate support obligation. As we stated in RFD18.2, at 182, a party might be prepared to go to extraordinary lengths to raise a lump sum for support if that party could be assured that it was the last demand that would be made. A lump sum might also be more beneficial to the recipient than an uncertain and possibly uncollectible claim for future periodic payments. Final settlement would allow the parties to get on with their lives free of any further relationship with each other. Additionally, where the parties have reached agreement on spousal support, the court should be able to incorporate the terms of that agreement a support order that is final, subject to the legislated exceptions. We recognize that there are arguments going the other way and that under the *Divorce Act* the spousal support obligation is open-ended: see RFD18.2, at 183. With respect to the *Divorce Act*, we see this as a situation justifying departure from the principle of harmonization with the federal law. *See Appendix A, rows 48-51.*

AJ Questions:

1.9.b. Can a spousal support order be automatically terminated if the spouse receiving support enters into a new cohabitational relationship but does not remarry, or should entry into such a relationship only form the basis of a variation application?

ALRI Responses:

Entry into a new cohabitational relationship should form the basis for variation, not termination: ALRI RFD18.2, Rec. 44.2. ALRI has revisited its position on the automatic termination of support. We now think that neither remarriage nor entry into a new cohabitational relationship should trigger the automatic termination of support. Previously, we had recommended that the remarriage of the spouse receiving support should terminate a spousal support order prospectively, except where a court orders differently. We now endorse harmonization with the *Divorce Act* under which remarriage is a relevant factor but it is not decisive of the support issue. By analogy (applying the harmonization principle to cohabitational relationships) and consistent with our previous recommendation, we take the position that although the existence of a new cohabitational relationship may provide grounds for variation of a spousal support order, it should not automatically terminate it. *See Appendix A, row 53.*

2. CHILD SUPPORT

AJ Questions:

[Public Workbook]

2.2.a. Should child support by a parent continue once a child turns 18?

ALRI Responses:

Yes, in limited circumstances.

*AJ Questions:**ALRI Responses:*

ALRI previously recommended that a distinction be drawn between the support obligation owed by parents to a child under age 18, and a child 18 years of age or more. For a child under age 18, the parental obligation would foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child, as reflected in the federal Child Support Guidelines. For a child 18 years of age or over, the parental obligation would be to assist the child in limited circumstances. With certain exceptions, children 18 years of age or more would be required to take appropriate steps leading to their financial self-sufficiency upon attaining, or within a reasonable period of time after having attained, the age of majority: RD18.3, Rec. 11.3. Undertaking further education is one example of a step an adult child would be assisted to take in order to attain financial self-sufficiency within a reasonable period of time after turning 18. The policy of promoting the concept of financial self-sufficiency would guide developments in the law for children who have reached adult age.

The AJ Workbooks do not articulate an equivalent policy of assistance (rather than full responsibility to provide the child with a reasonable standard of living) with respect to the support obligation owed to adult children. It is silent about the adult child's responsibility to become financially self-sufficient – an expectation which society ordinarily places on adult children. It is our opinion that the law should articulate these policies.

*AJ Questions:**ALRI Responses:*

Since issuing our RFDs, we have rethought the implications of allowing the exceptions we recommended previously. Those exceptions were the ones identified in the *Divorce Act*, that is, in non-intact families the parents of children who are over the age of majority but unable, by reason of illness, disability or other cause, to provide the necessities of life for themselves would continue to owe a support obligation: RD18.3, Rec. 12.3. As a general matter, we hesitate to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. *See our response to questions 2.2.b and 2.2.c.*

We do not think that the provisions of the *Divorce Act* should govern the direction of reform on these issues. Constitutionally, outside of “marriage and divorce” which is a matter for federal jurisdiction, it seems to us that the support obligations of family members is a matter for determination by the provinces under the head of “property and civil rights.” We think it questionable whether the imposition of support obligations with respect to adult children is a necessary corollary of the federal jurisdiction over “marriage and divorce.” We have not researched the matter in depth, but it does appear that these provisions may be open to constitutional challenge. In our view, the support obligations owed by parents to their adult children is an area in which the province should be setting the standard.

AJ Questions:

2.2.b. If support should continue, should there be a distinction made between intact families and families that have separated?

ALRI Responses:

Yes, but only in carefully circumscribed situations. Under ALRI's recommendations, the parental obligation to support a child exists independently of the relationship between the child's parents (married, cohabiting, living separate and apart). We have taken the position that private family law should not interfere with decision-making in intact families. We think it reasonable to assume that parents in an intact family will be able to agree on the issue of child support beyond age 18, and that their decision will reflect their shared family values. The state should not be telling parents in intact families how to bring up their children. In contrast, parents in a non-intact family are apt to disagree on the issue of child support both under and beyond age 18. It is therefore appropriate for the law to set the standard for child support in non-intact families in order to reduce the potential for conflict between the separated parents. At the same time, as stated in answer to question 2.2.a, in general we are hesitant to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. A strong reason to add to the support obligation owed by parents in non-intact families should be shown.

We note, as an aside, that in situations where the law gives a right to support over age 18, the ALRI recommendations would allow the child to bring an application against the parents: RFD18.3 (Child Support), Recs. 19.3 and 22.3.

See Appendix B, rows 7, 55 and 60.

AJ Questions:

2.2.c. If support should continue, should support be limited to:

- Children 18 years and over who have an illness or disability?

ALRI Responses:

Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. We cannot see justification for increasing the obligations of parents in non-intact families (but not intact families) in situations where the state has an obligation to undertake an active role in caring for its most vulnerable citizens, as in the case of ill or disabled adults. In our view, the question of the respective responsibilities of parents and the state toward adult children needs further attention: see, e.g. *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, File No.: 27891. Questions of the following kind need to be addressed: What is the appropriate relationship between private and public law when it comes to caring for persons who are unable to care for themselves? In what circumstances and how should the burden be shared? In what circumstances should the burden shift to become society's responsibility? The province should ensure that principled policies govern the financial responsibilities of private citizens and the state, respectively, for ill, disabled or otherwise destitute adults.

As an aside, we note that the *Maintenance Order Act*, ss. 2 and 3, places a duty on parents (first the father and secondarily the mother) to maintain their adult children who are "old, lame, mentally deficient or impotent" or otherwise destitute and unable to work. (The ordinary obligation of a parent under this Act ceases when the child turns 16.) However, this Act is antiquated and it is our understanding that the duties it imposes are rarely enforced. This being so, it would be inequitable to apply it to non-intact families only.

AJ Questions:

- Children 18 years and over who are engaged in further education (i.e., attending high school, college or university)?

- Children 18 years and over who are otherwise unable to become independent?

2.4.a. Should standard child support guidelines apply to persons acting in the place of a parent?

ALRI Responses:

The *Child Welfare Act* is an example of legislation that provides for the apportionment of financial responsibility between private citizens and the state. It empowers the court to order a person who is legally responsible for the support of a child to contribute financially to the child's maintenance while in the care of child welfare authorities: *see e.g.* s. 31(4)(c) (temporary guardianship order) and s. 34(6)(a) (permanent guardianship order). Section 41 lists "relevant circumstances" for the court to consider in requiring a person to pay maintenance for a child under the Act. Section 128 establishes the liability of the Minister to pay costs incurred for the care and maintenance of a child in public care.

Agree, subject to the reasonable limits that follow from imposing an obligation on the child to become financially self-sufficient within a reasonable time after turning 18. In most situations assistance to obtain a first degree (or equivalent credential) would be reasonable. The rule of thumb would be assistance for 4 years of further education. This answer promotes harmonization of the federal and provincial law because, in general, further education has been understood to fall within the definition of "other cause" under the provisions in the *Divorce Act*.

Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. *See our response, p. 8, to question 2.2.c: children 18 years and over who have an illness or disability?*

No. The court should have discretion to determine whether support should be paid and in what amount: *see ALRI RFD18.3 (Child Support), Rec. 18.3. See Appendix B, row 37.*

AJ Questions:

[Technical Workbook]

2.4.a. Which definition do you think best describes a parent-like relationship? Are there changes that could be made to make one of the definitions more appropriate?

2.4.b. Should normal child support laws apply to persons acting in the place of a parent or should the court be allowed to use judicial discretion?

2.4.c. Should the law recognize there are priorities among adults who are obligated to provide child support? If so, what should those priorities be?

ALRI Responses:

ALRI recommends defining “person standing in the place of a parent” to mean “a person who has demonstrated a settled intention to treat a child as a child of their family”: RFD18.3 (Child Support), Rec. 7.3(4); it may apply even where the person has withdrawn from the relationship: RFD18.3 (Child Support), Rec. 18.3. *See Appendix B, rows 37, 42 and 46.*

Judicial discretion. In cases where a person standing in the place of a parent has a duty to support a child, ALRI prefers leaving apportionment to the discretion of the court: RFD18.3 (Child Support), Rec. 18.3. As AJ observes in the Technical Workbook, allowing complete judicial discretion is the approach taken in the federal Child Support Guidelines. Under our recommendation, the court would have discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship. The court should have power to make a final determination of support (see question 2.6.a below). *See Appendix B, rows 37 and 46.*

Yes, the law should recognize priorities among adults who are obligated to provide child support. The basic obligation should be imposed on parents: ALRI RFD18.3 (Child Support), Rec. 4.3. Parents should be as defined in RFD18.3 (Child Support), Recs. 7.3 and 8.3 with the addition of sperm donors as proposed by AJ in accordance with the 1991 Uniform Law Conference of Canada legislative provisions (see heading E.2.a below). As a general matter, the obligation of a parent, so defined, should prevail over the obligation of a person standing in the place of a parent. *See Appendix B, rows 4 and 24-27.*

AJ Questions:

2.4.d. Among the options presented for apportioning child support obligations between individuals, is there one that you prefer? Are there changes that could be made to one of the options that would make it more suitable?

2.4.e Should legislation include a mechanism that allows one person to secure child support contributions from another obligated person? Should that mechanisms be the one recommended by the Alberta Law Reform Institute?

2.6.a. Should the court be able to order that a child support agreement constitutes a final settlement of a child support obligation? Should compliance with such an order discharge all future child support claims?

ALRI Responses:

We prefer judicial discretion. We have considered the AJ alternatives, some of which are discussed in the ALRI report and some of which are not, but we continue to support our original recommendation for court discretion. Choosing the alternative of discretion is consistent with the federal Child Support Guidelines and thus fosters the principle of harmonization of federal and provincial child support law.

Yes, in accordance with ALRI RFD18.3 (Child Support), Recs. 6.3 and 46.3. *See Appendix B, rows 20, 21 and 53.*

Yes: RFD18.3, Rec. 17.3(e). We think the power would be used sparingly, especially in the case of a parent, but that it should be available. We can envisage cases for use of such a power where the child is 18 years of age or over and falls into one of the exceptions justifying support during adulthood. We can also envisage circumstances in which a person standing in the place of a parent should be able to know the full extent of the obligation to which they are being held. The recommendation we made in RFD 18.3, Rec. 17.3(e) was that legislation should: a) give the court the authority to order that a child support agreement constitutes a final settlement of the child support obligation; and b) provide that compliance with the agreement discharges all future child support claims. We reiterate that recommendation. *See Appendix B, rows 69 and 73.*

3. GUARDIANSHIP, CUSTODY AND ACCESS

AJ Questions:

[Public and Technical Workbooks]

3.2.a. Should there be any special provisions to deal with testamentary guardianship in a non-intact family where the parents are no longer joint guardians?

ALRI Responses:

No. See ALRI RFD18.4 (Guardianship, Custody and Access), Rec. 14.4. By way of example, AJ suggests the law could provide that the surviving parent rather than the testamentary guardian is entitled to become the guardian, or it could provide that the surviving parent is entitled to become a joint guardian with the testamentary guardian. (Under the AJ proposals, for intact families, testamentary guardianship would not take effect until after the death of a surviving parent / guardian – a position with which we disagree.)

AJ uses the term “testamentary guardianship” to describe a guardian appointed by deed or will. For the sake of brevity, we do the same in this submission.

When we examined guardianship, we considered the ways in which guardianship could arise. We concluded that most parents should be guardians automatically as a matter of law: RFD18.4, Rec. 10.4; the court, acting in the child’s best interests, should have power to appoint or remove a guardian: RFD18.4, Recs. 11.4 and 18.4; and a guardian of the child, either parent or non-parent, should have power to name a guardian to act on the nominating guardian’s death: RFD18.4, Rec. 13.4. In the latter instance, the guardianship would take effect immediately on the nominating guardian’s death unless the nominating guardian made another stipulation: RFD18.4, Rec. 14.4. *See Appendix C.1, rows 12-13, 14, 16, 20 and 21.*

*AJ Questions:**ALRI Responses:*

We would make no distinction among guardians. That is to say, under ALRI's recommendations, any guardian would be able to appoint a guardian whose appointment would take place, in the usual case, immediately upon the death of the guardian making the appointment. The guardian so appointed would act jointly with a surviving guardian. For example, if a surviving parent is a guardian, the guardianship continues. That parent would be a guardian together with the person nominated in the appointing document. The surviving parent would have to work together with the guardian nominated by the deceased parent. If the surviving parent and the nominated guardian are unable to work out their differences, they could apply to the court for an order resolving their respective positions (as could parent guardians who live separate and apart and are unable to agree about how to share their guardianship responsibilities).

The use of the word "joint" in AJ's question is confusing. Whether or not they are living together, under ALRI's recommendations, in the usual situation, both of a child's parents would be guardians and share in the distribution of the guardianship powers. The death of a parent guardian (or other guardian) should not change the status of a surviving parent guardian (or other guardian).

Under no circumstances should a parent whose guardianship has been terminated by the court, or who never attained the status of guardian under the law, automatically become a guardian on the death of the other parent / guardian. The law should require a parent who is not a guardian but wishes to acquire the status of guardian to apply to court for an order appointing them.

AJ Questions:

3.2.b Should the responsibilities of the deceased guardian flow to the surviving guardian or to the guardian appointed by the deceased guardian?

[Public Workbook]

3.4.a. Should provincial and federal legislation regarding parenting arrangements be consistent?

3.4.b. Are the attributes for parenting arrangements appropriate? What changes if any would you suggest?

3.6.a. Is the list of persons who can apply for access appropriate? Should anyone be added or dropped from the list?

3.6.b. Should access applications by non-guardians be restricted to the situations where guardians or parents are not living together or where one of the guardians or parents is dead?

3.6.c. Are the proposed restrictions on access by non-guardians appropriate? Would you add or delete any of the conditions?

3.6.d. Should the same conditions for access apply to grandparents as apply to other non-guardians? If not, what conditions, if any, should apply to access for grandparents?

ALRI Responses:

The responsibilities of the deceased guardian should flow to the guardian appointed by the deceased guardian: RFD18.4 (Guardianship, Custody and Access), Rec. 14.4. *See Appendix C.1, row 21.*

Agree, in general, that provincial and federal legislation regarding parenting arrangements should be consistent.

Agree with AJ's list of attributes, subject to discussion of the implications of making parents accountable for not fulfilling their responsibilities, and attention to ALRI's lists of factors to consider in determining a child's best interests in guardianship, custody and access cases, respectively: RFD18.4 (Guardianship, Custody and Access), Recs. 12.4, 23.4 and 32.4. *See Appendix C.3.*

Yes, the list is appropriate. No additions or deletions are needed.

Yes, access applications by non-guardians should be restricted to these situations: ALRI RFD18.4 (Guardianship, Custody and Access), Rec. 31.4. *See Appendix C.1, row 83.*

Yes, the proposed restrictions are appropriate. No additions or deletions need be made to any of the conditions.

Yes, the same conditions for access should apply to grandparents.

*AJ Questions:**ALRI Responses:*

[Public Technical Workbooks]

3.7.a. Should the court have the discretion to link access and child support or should the two continue to be kept separate?

Keep separate. As we recommended in RFD18.4 (Guardianship, Custody and Access), Rec. 33.4, access and child support should continue to be kept separate. Access should be determined on the basis of the child's best interests being furthered by a continuing personal relationship with the non-custodial parent, not on whether the non-custodial parent does or does not pay support. *See Appendix C.1, row 88.*

[Technical Workbook]

3.8.a. Should legislation provide a mechanism that will assist parents to obtain access to records to which they are entitled?

Yes, but that mechanism should consist of placing an obligation on the parent who has custodial guardianship to provide the institution maintaining the record with written permission to release the information directly to the non-custodial guardian. The obligation should be spelled out in law and be enforceable: a) on application when the custodial guardian fails to accommodate the access guardian's (non-custodial parent's) reasonable request for information, or b) in accordance with the terms of an order made by the court when it determines access. Using this mechanisms will reduce the opportunities for conflict between the parents.

3.8.b. What approach would be the most workable for health authorities, school boards and other third parties?

The most workable approach for third parties would be to act on the permission provided by the custodial guardian to release information directly to the non-custodial (access) guardian, or failing this, a court order for disclosure.

4. COURT JURISDICTION AND POWERS

AJ Questions:

[Technical Workbook]

4.2.a. Should the court have the powers described in the 4.2 *Securing Payments* section regarding child and support orders?

4.3.a. Should the court be given discretion to order third party payments or in the case of child support, to order payment directly to the child?

4.3.b. Should the court's power in this regard be restricted to only certain types of cases or circumstances?

[Public Workbook]

4.3.a. [4.5.a in the Technical Workbook] Are there reasons why judicial separation should be retained as an option for married persons?

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

ALRI Responses:

Yes: ALRI RFD18.2 (Spousal Support), Rec. 20.2 and RFD18.3 (Child Support), Rec. 27.3(c). *See Appendix D.1, rows 9-16.*

Yes: ALRI RFD18.2 (Spousal Support), Rec. 47.2 and RFD18.3 (Child Support), Rec. 47.3. *See Appendix D.1, rows 18-19.*

No. Rely on the court to exercise its discretion wisely in such matters.

We have recommended that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed: Rep65, Rec. 2. The abolition would be accompanied by the enactment of a provision making it clear that married men and married women are to be treated equally as independent persons with full legal capacity (Rep65, Rec. 3). Under our recommendations, the entitlements that come with judicial separation under the existing law would be available on the breakdown of the relationship.

No, the right to sue should not be retained: ALRI Rep65, Rec. 8. Yes, if the right to sue is retained, claims should be restricted to recovering expenses.

*AJ Questions:**ALRI Responses:*

[Technical Workbook]

4.7.a. Should family law cases only be heard by a judge and never by jury trial?

Yes. Family law cases should only be heard by a judge. In cases involving children, we have concerns about the potential of jury trials to exacerbate conflict, contrary to the child's best interests. We also have concerns about the inappropriate use of jury trial by a party with a controlling personality to gain an unfair advantage by prolonging the proceeding, building up costs, and giving that party more clout in negotiations. (We did not consider this matter in our earlier work.)

4.8.a. [4.5.a in the Public Workbook] Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the *Matrimonial Property Act* when there has been a breakdown of the marriage?

Yes: ALRI Report No. 83 (May 2000).

4.9.a. Should a court be given the authority to order that a spouse or child be continued as the beneficiary of any pension, benefit or life insurance plan held by a spouse or parent?

Yes: ALRI RFD18.2 (Spousal Support), Rec. 23.2(a) and RFD18.3 (Child Support), Rec. 27.3(e). *See Appendix D.1, rows 41-44.*

4.9.b. Should a court be given the authority to revoke an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan?

Yes. ALRI RFD18.2 (Spousal Support), Rec. 24.2 and RFD18.3 (Child Support), Rec. 27.3(f). *See Appendix D.1, rows 45-46.*

5. PERSONAL RELATIONSHIPS

AJ Questions:

[Technical Workbook]

5.1. Should living together for a minimum of three years be one of the criteria for determining when an unmarried person is in a committed, conjugal relationship? If not, would one or two years be appropriate?

ALRI Responses:

Cohabiting for a minimum period of time should be one of the criteria for determining when an unmarried person is in a committed, conjugal relationship. It must be recognized that whatever period of time that is chosen is arbitrary. Thus, thorough consideration must be given to period of time which is chosen, and it must be ensured that there are logical and rational reasons underlying the decision. In this regard it may be useful to harmonize the requisite period of cohabitation with those used in other jurisdictions. As three years is the time period used in other jurisdictions such as Ontario, it would be appropriate to adopt three years as a requisite period of cohabitation which must be satisfied prior to ascribing “marriage-like” rights and obligations.

Cohabiting for any set period of time in and of itself should not result in the relationship being deemed to be conjugal, rather, the parties must be in a conjugal relationship during the period of cohabitation. The Supreme Court of Canada has judicially considered and interpreted the term “conjugal” in a broad and flexible manner:

Molodowich v. Penttinen (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, and children, as well as the societal perception of the couple.

AJ Questions:

5.2. Do you agree that two persons that live together and have a biological or adopted child are in a committed relationship that should have benefits and obligations attached?

ALRI Responses:

However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. ... In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal.” [M. v. H. (1999), 171 D.L.R (4th) 577 at 615 (S.C.C.)]

ALRI agrees with this description of a “conjugal relationship” as it encompasses a broad range of relationships for which it is appropriate to attach legal rights and obligations. Thus, any legislative provision ascribing rights and obligations on the basis of cohabitation should indicate that two persons must have “cohabited in a conjugal relationship” for the requisite period of time.

Two persons who live together in a relationship of some permanence and who

- i) together have a biological child
- ii) together have adopted a child, or
- iii) have a biological child of one partner who has been adopted by the other partner

should be a separate criteria for ascribing legal rights and obligations to an unmarried relationship without first satisfying the minimum cohabitation. Again, ALRI’s view is that the relationship must first be conjugal before rights and obligations are ascribed. While conjugality is likely if the couple has a child, the legislation should specifically require that the relationship also be conjugal.

AJ Questions:

5.3. Are there other criteria you would recommend that would indicate that two persons are in a committed, conjugal relationship?

5.4. Alberta Laws could be amended to give benefits and obligations to all persons in committed personal relationships. Should this include only those in committed, conjugal relationships or should it also include those in committed, platonic relationships?

ALRI Responses:

Any legislation which ascribes rights and obligations on the basis of a conjugal relationship should provide a list of factors which a court may use to determine if a relationship is in fact conjugal. These factors should be those which the Supreme Court of Canada listed in *M. v. H. supra*, being:

- shared shelter
- sexual and personal behaviour
- services
- social activities
- together having a biological or adopted child
- the societal perception of the couple and any other factors which may be relevant.

The legislation should also state that these factors may be present in varying degrees and not all are necessary for the relationship to be conjugal.

ALRI's position is that legislation in Alberta should be amended to give benefits to, and impose obligations on, people in committed **conjugal** relationships only. It is entirely inappropriate to extend marital benefits and obligations to persons in any type of platonic relationship

[ALRI has not had the opportunity to properly research and consult on the view expressed by the Law Commission of Canada in its report "Beyond Conjugal: Recognizing and supporting close personal adult relationships" released January 31, 2002, which seems to support having a registration system which provides different packages of rights for conjugal and non-conjugal committed relationships. At this time, ALRI's position is that any system which grants rights and obligations on the basis of personal relationships should be limited to persons in conjugal relationships.]

*AJ Questions:**ALRI Responses:*

The policy considerations for extending rights and obligations to persons in committed conjugal relationships have been thoroughly examined in both social and legal contexts. Many jurisdictions have already extended to common law couples rights and obligations which were once available only to married couples. Conversely, few, if any, studies have considered extending the rights and obligations of marriage to persons in platonic relationships, nor does there appear to be any public outcry demanding the extension of marital rights and obligations to persons in platonic relationships. If extending marital rights and obligations to persons in platonic relationships is being considered seriously, there is a need for extensive research and consultation to determine the types of rights and obligations which should be included. There must also be a thorough study of the consequences of so doing, for example, how extending rights to persons in platonic relationships may affect employee benefits plans. The consultation being conducted through the within Family Law Reform Project does not adequately address these issues.

There are significant differences between persons in committed conjugal relationships (which may be described as “marriage-like” relationships) and persons in “committed” platonic relationships. It will be difficult to define a “committed” platonic relationship; it is not even clear what constitutes a “commitment” in a platonic relationship. Trying to define a “committed” platonic relationship which gives rise to marital benefits and obligations is likely to cause confusion and create uncertainty.

AJ Questions:

5.5.a. Should a relationship that is platonic be considered an interdependent relationship simply by satisfying the criteria or should persons in this kind of relationship be required to take some active step to indicate they wish to be considered a partner in an interdependent relationship?

5.5.b. If some active step is required:

- Should the requirement be that they may opt in by registration, if they decide they wish to have benefits and obligations legally attached to their relationship?

Or

- Should they be required to enter into a contract in writing that says that they are not an interdependent relationship, if they do not want to have the benefits and obligations of the relationship?

ALRI Responses:

As discussed in question 5.4 above, ALRI takes the position that platonic relationships should be excluded from a regime of marital rights and obligations. If it is decided to extend marital rights and obligations to persons in platonic relationships, such rights should not be ascribed passively. The persons in the relationships must be required to take an active step to obtain any “partnership” status.

If persons in platonic relationships wish to obtain marital rights and benefits they must be required to opt into such a regime through registration rather than opting out through agreement. As noted above there are problems with defining a committed platonic relationship. Any definition likely will be overbroad and encompass relationships that should not be included. This will lead to confusion and likely result in litigation. This confusion is virtually guaranteed if parties are *prima facie* ascribed rights and obligations absent a written agreement to the contrary. Likely most, if not all, people in platonic relationships will not consider themselves to be in a relationship that gives rise to any legal rights or obligations and will not be aware of the need to opt out of such rights and obligations. Thus, if any rights and obligations arise by virtue of a platonic relationship, the persons in that relationship must actively seek recognition of those rights.

AJ Questions:

5.6. Is the definition of an interdependent relationship appropriate? If not, what changes would you suggest?

ALRI Responses:

The workbook suggests different criteria for “interdependent relationships” in different places. We assume the proposed definition is that found at p. 51, being “two adults living together in a long-term, committed relationship of economic and emotional interdependence”, with no requirement that the relationship be conjugal in nature. It is ALRI’s view that this definition is not appropriate. There should be no status of “interdependent relationship”; such status should be confined to persons in committed conjugal relationships as defined in questions 5.1 and 5.2 above.

If there is to be a status of “interdependent relationship”, the proposed definition is not adequate. What constitutes a “committed” relationship? What constitutes “emotional interdependence”? Likely many friends who share living accommodations are emotionally interdependent. Finally, what constitutes “economic interdependence”? Is a relationship “economically interdependent” if only one party in the relationship is economically dependent on the other? Generally legislation which imposes certain rights and obligations upon the breakdown of a relationship seeks to protect one person in the relationship who is economically dependent on the other. Requiring a relationship to be “economically interdependent” may in fact exclude relationships where one party is not in fact dependent on the other.

*AJ Questions:**ALRI Responses:*

There are many situations which could fall into the proposed definition but should not be ascribed the rights and obligations associated with committed conjugal relationships. For example, what if an adult child (bearing in mind this would include any adult child over the age of 18) lives with his or her parents for a period of time for financial, personal or cultural reasons, and contributes to groceries, utilities or a mortgage? This situation could fall within the definition of a committed “interdependent relationship” and would be subject to, or have the option of, obtaining the rights, benefits and obligations associated with marriage like relationships. Thus, it is possible that the child or the parents could claim support from the other when the child moves out. This simply is not appropriate.

The definition does not deal with cessation of the interdependent relationship and does not address when the rights and obligations associated with the interdependent relationship end. Do they end immediately upon the cessation of cohabitation? Certain marital rights and obligations survive through separation and even divorce. How would these apply to “interdependent relationships”?

There are too many issues with the proposed definition of “interdependent relationship” to discuss at this time. However, the issues mentioned herein highlight the need for further research, study and consultation before adopting any proposal which equates platonic relationships with committed conjugal relationships.

AJ Questions:

5.7. Are the factors which could be used in determining the validity of an interdependent relationship reasonable? Are there other factors you would suggest?

ALRI Responses:

As discussed previously, it is not reasonable to include platonic relationships in any definition of “interdependent relationship”. ALRI also questions whether it is even possible to define “interdependent relationship” in a meaningful way at this time, if ever. There is no information available (of which ALRI is aware) indicating the types of relationships which should be included or excluded from the proposed group and the reasons for doing so. The factors used for determining the validity of “interdependent relationships” will also vary depending on the rights or obligations that will be given to such relationships. Until this information is determined it is simply not possible to define “interdependent relationship”.



ALRI Response to AJ Questions and Other Issues¹

April 9, 2002

ALBERTA FAMILY LAW REFORM 2002

Alberta Justice Consultation on
Alberta Family Law Reform 2002
Public and Technical Workbooks

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¹ Abbreviations:

AJ = Alberta Justice

ALRI = Alberta Law Reform Institute

RFD = Report for Discussion

The Charts that comprise Document #3 in this submission compare the ALRI and AJ Positions. They are divided into columns and rows. The right-hand column numbers the rows in each section of the Chart. For example, a reference in this submission to *Appendix A, row 5* identifies row 5 on the Chart comparing the AJ and ALRI positions on Spousal Support; *Appendix C.1, row 27* identifies row 27 on the Chart comparing the AJ and ALRI positions Guardianship, Custody and Access.

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APPENDICES

Appendix A: Spousal Support: ALRI and AJ Positions Compared

Appendix B: Child Support: ALRI and AJ Positions Compared

Appendix C: Guardianship, Custody and Access

 C.1 – ALRI and AJ Positions Compared

 C.2 – Guardianship: Custodial and Non-custodial Parent

 C.3 – Child’s Best Interests – Factors for Court to Consider

Appendix D: Court Jurisdiction and Powers

 D.1 – ALRI and AJ Positions Compared

 D.2 – ALRI RFD No. 14, *The Matrimonial Home* – List of Recommendations

A. General Comment

[1] We applaud the Alberta government for taking this important step toward legislative reform that will improve Alberta’s family law. Family law reform is long overdue in Alberta. As we stated in our RFD18.1 (Overview), at present:

- many of the statutory provisions in Alberta embody outdated concepts and terms;

- Alberta family law statutes have grown in a piecemeal fashion over many years, resulting in the fragmented treatment of family law legislation, as well as overlap and inconsistencies among the provisions contained in the existing family law statutes;
- family law jurisdiction is spread among the Court of Queen’s Bench, the Provincial Court (Family Division) and, to a lesser extent, the Surrogate Court, different statutory provisions apply from one court to another and differences exist in the rights recognized, remedies available and procedures followed; and
- differences in federal and provincial family law cause awkwardness and confusion for family members who ask the courts to help sort out their rights and obligations.

[2] At the outset of our submission, we wish to emphasize two foundational principles.

[3] First, our answers to the questions in the AJ Workbooks respect the principle of greater harmonization of federal and provincial law. The discussion in the AJ Workbooks supports this principle. The principle is important because, in addition to the rights and obligations provided by provincial law, married spouses may obtain relief corollary to divorce for themselves and their children under the federal *Divorce Act*.

[4] Second, our answers to AJ’s questions are based on recognition of the distinction between public and private law and the implications of this distinction for both intact and non-intact families. (By non-intact families we mean situations where the spouses (partners) or a child’s parents are living separate and apart.) The discussion in the AJ Workbooks lacks clarity on this point. In our view, the public and private law aspects of spousal and child support, and child care, control and protection should be understood as separate legislative spheres. As a matter of principle, the state should not interfere with intact families, unless and until the difficulties in intact families raise a concern so great that it takes on a public dimension – as in the case of child welfare and domestic violence. In the private law sphere, intact families should be free to manage their own relationships without state interference. State intervention through private law should be limited to the regulation of relationships in non-intact families. In short, the scope of the new family legislation should be restricted to private law matters arising in non-intact families. Situations giving rise to state concern in intact, as well as non-intact, families should be handled in statutes dealing with public law matters. It is, of course, important for the law to show an understanding of the close relationship that exists between the spheres of private law and public law.

[5] Unless otherwise stated, our answers assume that the new family legislation will apply only to non-intact families.

B. ALRI Family Law Publications

[6] In recent years, ALRI has issued a number of publications on family law. Several of these publications form the basis for AJ’s proposals and the issues on which AJ is

consulting. We refer in particular to our boxed set of Reports for Discussion on Family Law issued in October 1998:

- Report for Discussion No. 18.1, *Family Law Project – Overview* (October 1998)
- Report for Discussion No. 18.2, *Family Law Project – Spousal Support* (October 1998)
- Report for Discussion No. 18.3, *Family Law Project – Child Support* (October 1998)
- Report for Discussion No. 18.4, *Family Law Project – Child Guardianship, Custody and Access* (October 1998)

Although these are called Reports for Discussion, in order to allow for consultation, they are drafted as final reports containing recommendations.

[7] The AJ Workbooks also draw on the following ALRI reports:

- Final Report No. 83, *Division of Matrimonial Property on Death* (May 2000)
- Final Report No. 78, *Reform of the Intestate Succession Act* (June 1999)
- Report No. 65, *The Domestic Relations Act (DRA) Phase 1 – Family Relationships: Obsolete Actions* (March 1993)
- Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (June 1989)

[8] We are pleased to see our recommendations reflected in the AJ Workbooks.

C. Approach Taken in This Submission

[9] ALRI's position is summarized in this document. Our full submission is contained in the Charts that are appended to this document. The Charts in Appendices A., B., C.1 and D.2 compare our recommendations (made in our family law publications) with AJ's proposals and include our comments. To facilitate ease of reference in this submission, the left-hand column numbers the rows. The next column reproduces the discussion in the AJ Public and Technical Workbooks. The third column reproduces ALRI's recommendations for purposes of comparison. The right-hand column contains ALRI's comments. In it, we draw attention to the similarities and differences between the previous two columns and indicate whether we agree or disagree with AJ's proposals or suggestions. ALRI's answers to the specific questions AJ asks in the Public and Technical Workbooks are set out in oblong boxes outlined in bold following the sections in the Charts to which they refer.

Sample

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS

37	Alberta Justice proposes	RFD18.3, Rec. 18.3: Alberta legislation should ...	Agree. AJ Adopts ALRI recommendation.
38			

AJ Question

2.4.a. Should standard child support guidelines apply ...

ALRI Response

No. The court should have discretion to determine ...

[10] As our answers to AJ’s specific questions indicate, for the most part we continue to support the recommendations we have made in past reports. In some instances, AJ raises issues which ALRI did not previously consider. In this submission, we give our opinion with respect to these issues. In other instances, we have revisited our earlier recommendation in light of AJ’s proposals and the current direction of developments in the law. This fact is noted in this submission and our current position stated. In a few instances, AJ’s position with respect to one of our recommendations is unclear from the Workbooks, and we note this.

D. Spousal Support

1. ALRI responses to AJ questions

[Technical Workbook]

1.5.a. Should the non-legal obligations of a spouse to support other people, as well as the non-legal responsibility of a new spouse to support a spouse claiming support, be considered by the courts?

[11] Yes: ALRI RFD18.2 (Spousal Support), Rec. 8.2. In one example, a spouse may be providing financial assistance to an elderly parent or disabled sibling even though they are under no legal responsibility to do so. In a relationship that exists outside of marriage, a non-legal obligation may be owed to a person who has not yet attained the formal status of “spouse” or “partner.” To cover this example, the use of the word “spouse” in the question requires clarification.

See Appendix A, rows 21-25.

1.5.b. If yes, how could a non-legal obligation be independently verified and the potential for abuse of this non-legal obligation minimized?

[12] A party who is the beneficiary of a non-legal support obligation should be under a duty to disclose to the other party and to the court the benefit being received. A party who has undertaken a non-legal support obligation and asks the court to take this into consideration in assessing that person’s legal support obligation should bear the burden of satisfying the court that the non-legal support obligation should be taken into account.

1.7.a. Should new legislation follow the Divorce Act approach or the Domestic Relations Act approach?

[13] The *Divorce Act* approach. ALRI has reconsidered its original recommendation for the *DRA* approach. We previously recommended (in ALRI RFD18.2, Rec. 12.2) that a spousal support agreement should prevail unless the applicant for support could bring themselves within one of the exceptions which we had specified. Where an exception applied, the court could disregard the agreement. In 1999, the government enacted ALRI's recommendation in Part 3 of the *DRA*. In contrast, the *Divorce Act* requires the court to take a spousal support agreement into account, but the agreement is not binding on the court. In the interests of harmonizing federal and provincial law, ALRI now supports the *Divorce Act* approach.

See Appendix A, rows 33-42.

1.9.a. Should the court be given the power to grant a final order of spousal support?

[14] No. ALRI has revisited its recommendation that the court be given power to grant a final order of spousal support. Although we think that the power to grant a final order of support has merit, recent developments in Canadian constitutional law regarding the position of cohabitants and the open-ended support obligation under the *Divorce Act* have persuaded us to depart from the position we held previously: ALRI RFD18.2, Rec. 38.2.

See Appendix A, rows 48-51.

1.9.b. Can a spousal support order be automatically terminated if the spouse receiving support enters into a new cohabitational relationship but does not remarry, or should entry into such a relationship only form the basis of a variation application?

[15] Entry into a new cohabitational relationship should form the basis for variation, not termination: ALRI RFD18.2, Rec. 44.2. ALRI has revisited its position on the automatic termination of support. We now think that neither remarriage nor entry into a new cohabitational relationship should trigger the automatic termination of support. Previously, we had recommended that the remarriage of the spouse receiving support should terminate a spousal support order prospectively, except where a court orders differently. We now endorse harmonization with the *Divorce Act* under which remarriage is a relevant factor but it is not decisive of the support issue. By analogy (applying the harmonization principle to cohabitational relationships) and consistent with our previous recommendation, we take the position that although the existence of a new cohabitational relationship may provide grounds for variation of a spousal support order, it should not automatically terminate it.

See Appendix A, row 53.

2. Additional ALRI comments

a. Extended family support

[16] AJ proposes to discontinue the extended family support obligation within the *Maintenance Order Act* and limit the legal support obligation to parents supporting

children and to spouses supporting each other. We agree with AJ’s proposal. Although giving financial assistance to extended family members is a laudable social conduct, the obligation to support extended family members should not be state-imposed as a matter of law. (Previously, ALRI identified the issue of support obligations owed to and by extended family members as a “future law reform topic: RFD18.1 (Overview), pp. 8-9.)

See Appendix A, row 4.

b. Refusal or neglect to provide spousal support

[17] AJ proposes that a spousal support remedy be provided in situations where the spouses (persons in the relationship) are not living separate and apart, but one person has refused or neglected to provide the other, without sufficient cause, with food and other necessities when able to do so. We disagree with this proposal on the basis that relief under the new legislation should be restricted to relationship breakdown situations. While ALRI acknowledges that, as a matter of principle, the spousal support obligation exists during an on-going marriage or cohabitational relationship, we do not think it appropriate for the state to intervene to enforce spousal support obligations while the relationship continues intact. The state should not be telling intact families how to regulate their affairs.

[18] The AJ position invites the questions: *Should the standard for assessing support vary depending on whether the relationship is on-going or broken down? What should be the basis for court jurisdiction: disputes arising from economic dependency or disputes arising from marriage breakdown?* The retention of the language of desertion and court intervention in cases of failure to provide necessities during an on-going marriage (relationship) appears to reintroduce the idea of support based on one spouse’s (partner’s) ability to pay and the other spouse’s (partner’s) need for financial support instead of criteria analogous to those set out in the *Divorce Act*. In other words, it appears that there would be two different tests for assessing support, one for situations arising while the parties continue to live as partners and another for situations where the relationship has broken down.

[19] *What purpose would para. c serve?* From a practical perspective, it is not clear from the Workbooks what AJ would achieve by including this provision. The reference to necessities invites interpretation based on the complexities of a long body of out-dated case law. New criteria for determining “necessities” would be needed. It is difficult to envisage the harmonious continuation of a marriage (relationship) in which one party takes court action in order to prove that the other has refused or neglected without sufficient cause to provide necessities.

See Appendix A, rows 11-14.

c. Void, voidable and polygamous marriages

[20] ALRI RFD18.2 (Spousal Support), Rec. 3.2, provides that the legislated spousal support obligation should extend to the parties to a void, voidable or polygamous

marriage. AJ's plan may be to deal with these in connection with the provision it makes for personal relationships under either its conjugal relationships or interdependent relationships model, but the Workbooks are silent in this regard. Void, voidable and polygamous marriages need attention.

Appendix A, row 7.

d. Prenatal, birth and postnatal expenses

[21] The *Parentage and Maintenance Act* gives the court power to award prenatal, birth and postnatal expenses to unmarried mothers. AJ proposes to extend this by giving the court power to award such expenses to mothers regardless of their marital status. ALRI recommended such an extension as an element of spousal support in cases where the parents are living separate and apart, that is, in marriage breakdown situations. Under ALRI's recommendations the jurisdiction being proposed would be conferred on the Provincial Court as well as the Court of Queen's Bench. The new legislation should reflect these details.

Appendix A, rows 26-31.

e. Application by a minor spouse

[22] ALRI recommended that a minor spouse should be able to bring or defend a support claim without the intervention of a next friend or guardian *ad litem*. AJ does not comment on the ability of a minor to apply for support independently. We endorse our previous recommendation.

Appendix A, row 54.

E. Child Support

1. ALRI responses to AJ questions

[Public Workbook]

2.2.a. Should child support by a parent continue once a child turns 18?

[23] Yes, in limited circumstances.

[24] ALRI previously recommended that a distinction be drawn between the support obligation owed by parents to a child under age 18, and a child 18 years of age or more. For a child under age 18, the parental obligation would foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child, as reflected in the federal Child Support Guidelines. For a child 18 years of age or over, the parental obligation would be to assist the child in limited circumstances. With certain exceptions, children 18 years of age or more would be required to take appropriate steps leading to their financial self-sufficiency upon attaining, or within a reasonable period of time after having attained, the age of majority: RD18.3, Rec. 11.3. Undertaking further education is one example of a step an adult child would be assisted to take in order to attain financial self-sufficiency within a reasonable period of time after turning 18. The policy of

promoting the concept of financial self-sufficiency would guide developments in the law for children who have reached adult age.

[25] The AJ Workbooks do not articulate an equivalent policy of assistance (rather than full responsibility to provide the child with a reasonable standard of living) with respect to the support obligation owed to adult children. It is silent about the adult child's responsibility to become financially self-sufficient – an expectation which society ordinarily places on adult children. It is our opinion that the law should articulate these policies.

[26] Since issuing our RFDs, we have rethought the implications of allowing the exceptions we recommended previously. Those exceptions were the ones identified in the *Divorce Act*, that is, in non-intact families the parents of children who are over the age of majority but unable, by reason of illness, disability or other cause, to provide the necessities of life for themselves would continue to owe a support obligation: RD18.3, Rec. 12.3. As a general matter, we hesitate to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. *See our response to questions 2.2.b and 2.2.c.*

[27] We do not think that the provisions of the *Divorce Act* should govern the direction of reform on these issues. Constitutionally, outside of “marriage and divorce” which is a matter for federal jurisdiction, it seems to us that the support obligations of family members is a matter for determination by the provinces under the head of “property and civil rights.” We think it questionable whether the imposition of support obligations with respect to adult children is a necessary corollary of the federal jurisdiction over “marriage and divorce.” We have not researched the matter in depth, but it does appear that these provisions may be open to constitutional challenge. In our view, the support obligations owed by parents to their adult children is an area in which the province should be setting the standard.

See Appendix B, rows 18 and 19.

2.2.b. If support should continue, should there be a distinction made between intact families and families that have separated?

[28] Yes, but only in carefully circumscribed situations. Under ALRI's recommendations, the parental obligation to support a child exists independently of the relationship between the child's parents (married, cohabiting, living separate and apart). We have taken the position that private family law should not interfere with decision-making in intact families. We think it reasonable to assume that parents in an intact family will be able to agree on the issue of child support beyond age 18, and that their decision will reflect their shared family values. The state should not be telling parents in intact families how to bring up their children. In contrast, parents in a non-intact family are apt to disagree on the issue of child support both under and beyond age 18. It is therefore appropriate for the law to set the standard for child support in non-intact families in order to reduce the potential for conflict between the separated parents. At the same time, as

stated in answer to question 2.2.a, in general we are hesitant to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. A strong reason to add to the support obligation owed by parents in non-intact families should be shown.

[29] We note, as an aside, that in situations where the law gives a right to support over age 18, the ALRI recommendations would allow the child to bring an application against the parents: RFD18.3 (Child Support), Recs. 19.3 and 22.3.

See Appendix B, rows 7, 55 and 60.

2.2.c. If support should continue, should support be limited to:

• Children 18 years and over who have an illness or disability?

[30] Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. We cannot see justification for increasing the obligations of parents in non-intact families (but not intact families) in situations where the state has an obligation to undertake an active role in caring for its most vulnerable citizens, as in the case of ill or disabled adults. In our view, the question of the respective responsibilities of parents and the state toward adult children needs further attention: see, e.g. *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, File No.: 27891. Questions of the following kind need to be addressed: What is the appropriate relationship between private and public law when it comes to caring for persons who are unable to care for themselves? In what circumstances and how should the burden be shared? In what circumstances should the burden shift to become society's responsibility? The province should ensure that principled policies govern the financial responsibilities of private citizens and the state, respectively, for ill, disabled or otherwise destitute adults.

[31] As an aside, we note that the *Maintenance Order Act*, ss. 2 and 3, places a duty on parents (first the father and secondarily the mother) to maintain their adult children who are "old, lame, mentally deficient or impotent" or otherwise destitute and unable to work. (The ordinary obligation of a parent under this Act ceases when the child turns 16.) However, this Act is antiquated and it is our understanding that the duties it imposes are rarely enforced. This being so, it would be inequitable to apply it to non-intact families only.

[32] The *Child Welfare Act* is an example of legislation that provides for the apportionment of financial responsibility between private citizens and the state. It empowers the court to order a person who is legally responsible for the support of a child to contribute financially to the child's maintenance while in the care of child welfare authorities: see e.g. s. 31(4)(c) (temporary guardianship order) and s. 34(6)(a) (permanent guardianship order). Section 41 lists "relevant circumstances" for the court to consider in requiring a person to pay maintenance for a child under the Act. Section 128 establishes the liability of the Minister to pay costs incurred for the care and maintenance of a child in public care.

• ***Children 18 years and over who are engaged in further education (i.e., attending high school , college or university)?***

[33] Agree, subject to the reasonable limits that follow from imposing an obligation on the child to become financially self-sufficient within a reasonable time after turning 18. In most situations assistance to obtain a first degree (or equivalent credential) would be reasonable. The rule of thumb would be assistance for 4 years of further education. This answer promotes harmonization of the federal and provincial law because, in general, further education has been understood to fall within the definition of “other cause” under the provisions in the *Divorce Act*.

• ***Children 18 years and over who are otherwise unable to become independent?***

[34] Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. *See our response to question 2.2.c in para. [30] above.*

2.4.a. Should standard child support guidelines apply to persons acting in the place of a parent?

[35] No. The court should have discretion to determine whether support should be paid and in what amount: see ALRI RFD18.3 (Child Support), Rec. 18.3.

See Appendix B, row 37.

[Technical Workbook]

2.4.a. Which definition do you think best describes a parent-like relationship? Are there changes that could be made to make one of the definitions more appropriate?

[36] ALRI recommends defining “person standing in the place of a parent” to mean “a person who has demonstrated a settled intention to treat a child as a child of their family”: RFD18.3 (Child Support), Rec. 7.3(4); it may apply even where the person has withdrawn from the relationship: RFD18.3 (Child Support), Rec. 18.3.

See Appendix B, rows 37, 42 and 46.

2.4.b. Should normal child support laws apply to persons acting in the place of a parent or should the court be allowed to use judicial discretion?

[37] Judicial discretion. In cases where a person standing in the place of a parent has a duty to support a child, ALRI prefers leaving apportionment to the discretion of the court: RFD18.3 (Child Support), Rec. 18.3. As AJ observes in the Technical Workbook, allowing complete judicial discretion is the approach taken in the federal Child Support Guidelines. Under our recommendation, the court would have discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship.

See Appendix B, rows 37 and 46.

2.4.c. Should the law recognize there are priorities among adults who are obligated to provide child support? If so, what should those priorities be?

[38] Yes, the law should recognize priorities among adults who are obligated to provide child support. The basic obligation should be imposed on parents: ALRI RFD18.3 (Child Support), Rec. 4.3. Parents should be as defined in RFD18.3 (Child Support), Recs. 7.3 and 8.3 with the addition of sperm donors as proposed by AJ in accordance with the 1991 Uniform Law Conference of Canada legislative provisions (see heading E.2.a below). As a general matter, the obligation of a parent, so defined, should prevail over the obligation of a person standing in the place of a parent.

See Appendix B, rows 4 and 24-27.

2.4.d. Among the options presented for apportioning child support obligations between individuals, is there one that you prefer? Are there changes that could be made to one of the options that would make it more suitable?

[39] We prefer judicial discretion. We have considered the AJ alternatives, some of which are discussed in the ALRI report and some of which are not, but we continue to support our original recommendation for court discretion. Choosing the alternative of discretion is consistent with the federal Child Support Guidelines and thus fosters the principle of harmonization of federal and provincial child support law.

2.4.e Should legislation include a mechanism that allows one person to secure child support contributions from another obligated person? Should that mechanism be the one recommended by the Alberta Law Reform Institute?

[40] Yes, in accordance with ALRI RFD18.3 (Child Support), Recs. 6.3 and 46.3.

See Appendix B, rows 20, 21 and 53.

2.6.a. Should the court be able to order that a child support agreement constitutes a final settlement of a child support obligation? Should compliance with such an order discharge all future child support claims?

[41] No. As it did for spousal support, ALRI has revisited its recommendation that the court should be able to order the final settlement of child support: RFD18.3, Rec. 17.3(e). We are now of the view that the court should be able to exercise its discretion with respect to child support at any time an issue is raised. This position fosters harmonization with the *Divorce Act* and the common law under which, as AJ points out, the courts have never been bound by agreements between parents governing support because children are not parties to those agreements and the courts have an obligation to protect children's rights.

See Appendix B, rows 69 and 73.

2. Additional ALRI comments

a. Definition of parent where conception assisted by new reproductive technologies

[42] ALRI identified the question of the parentage of children conceived with the assistance of new reproductive technologies as a "future law reform topic": RFD18.1

(Overview), at 7. AJ recommends the adoption of the 1991 Uniform Law Conference legislative provisions with respect to the child support obligations of a man who provides his own genetic material in order to artificially inseminate the woman to whom he is married or with whom he cohabits, or consents to artificial insemination using semen provided by another or others, or subsequently agrees to assume the full responsibilities of fatherhood, or treats the child as his own with the full knowledge of the circumstances of the conception. We agree with this addition to the law.

See Appendix B, rows 31-34.

b. Validity of child support agreement

[43] We agree with AJ's proposal that a contract should be enforceable if it is made in compliance *with Alberta law*.

[44] We do not agree with AJ's proposal that a contract should be automatically enforceable if it is made in compliance *with the law where the agreement was formed*. It is important distinguish between the validity of an agreement and its enforceability. An agreement may be valid under the law where it is made but contain terms that offend Alberta law. In Rep53, we recommended that to be valid in Alberta, an agreement dealing with child support or guardianship, custody or access, must be in the best interests of the child and that the court should be able to disregard any provision that does not meet this standard. Further, we recommended that this requirement should apply to contracts presented in Alberta for enforcement but for which the proper law is the law where the agreement was formed.

[45] We further recommended that an agreement with respect to child support should only be valid and enforceable in Alberta if the agreement was entered into by a couple whose relationship has broken down (we called this a separation contract). It should not be valid and enforceable if it was entered into before or during the continuation of an intact marriage or cohabitation relationship (we called these marriage or cohabitation contracts).

[46] Our recommendation refers only to child support provisions in contracts and not to the enforcement of court orders made elsewhere. Although we did not deal with the subject of enforcement in our boxed set of RFDs, we believe that the recommendations we made in Rep53 are compatible with the provisions of legislation governing the enforcement of custody and support orders made outside Alberta. Such legislation allows an Alberta court to vary, in whole or in part, a foreign order presented in Alberta for purposes of enforcement: see e.g. *Reciprocal Enforcement of Maintenance Orders Act*. In addition to being able to disregard any provision in a foreign contract that does not meet the child's best interests, the court should have power to vary a foreign order to bring it into compliance with the Alberta law for purposes of our recommendations in Rep53.

[47] AJ does not mention such refinements. We think they should form part of the Alberta law. As an aside, we note that the distinction between the validity of an

agreement made elsewhere and its enforceability in Alberta is equally relevant to the enforcement of spousal support agreements.

See Appendix B, row 34.

c. Guardian's obligation

[48] Instead of or in addition to the support obligation of a parent or person standing in the place of a parent in relation to a child, AJ proposes that a guardian who is not the child's parent should have a support obligation. We disagree with AJ's proposal. ALRI recommended that a non-parent guardian should have the same powers, responsibilities, rights and duties as a parent guardian, except the duties to give the child love and affection and to support the child from the guardian's personal resources: RFD18.4 (Guardianship, Custody and Access), Rec. 9.4.

[49] Historically, unlike a parent, a guardian who is not a parent does not have a duty to support the child from personal resources or a duty to give the child love and affection. ALRI takes the common law position that these duties should not be imposed on non-parent guardians.

[50] In ALRI's view, in the case of non-parents, guardianship and support should be separate considerations. It would be contrary to a child's best interests to deny the appointment of the person best suited for guardianship by reason of their relationship with the child because that person is not in a position, in addition, to take on the financial burden associated with raising a child.

[51] In many instances, non-parent guardianship will be granted to a member of the child's extended family (either by appointment by an existing guardian in deed or will, or by court order). In this situation, imposing a support obligation on an extended family member who is willing to assume the responsibilities of guardianship is inconsistent with the AJ proposals that the extended family support obligation within the *Maintenance Order Act* be discontinued and that the new legislation will limit the legal support obligation to parents supporting children, and to spouses.

See Appendix B, row 8.

d. Application for variation order

[52] ALRI would allow the personal representative of a deceased child support payor to apply for a variation order. This would be in addition to application by the child, or a person acting on behalf, or in the place, of the child (AJ specifies a person who has care and control of a child, or the government where it is entitled). The AJ Workbooks do not mention the ALRI addition of the personal representative of a deceased child support payor. We recommend the inclusion of our recommendation in the new family law legislation.

See Appendix B, rows 59 and 60.

e. Reasons for upholding agreement that departs from child support guidelines

[53] ALRI would require the court to record its reasons where it upholds an agreement that provides for child support in an amount that is different from the amount that would be determined in accordance with the applicable child support guidelines: RFD18.3 (Child Support), Rec. 17.3(d). AJ has no equivalent provision. We continue to hold the view that stating reasons would assist the development of the law in this area.

See *Appendix B, row 75*.

F. Guardianship, Custody and Access

1. Preliminary note

[54] It is our opinion that the law should define the powers of a guardian. It is important for non-intact families to understand what guardianship involves when a child's parents do not live together. The issue is: how are the responsibilities of guardians to be shared in non-intact families? As the AJ Workbooks emphasize, the more desirable arrangements are those agreed to by the parents (guardians) themselves. We agree that the law should encourage and facilitate parental agreement. The problems arise in cases where the parents are unable to agree. ALRI developed a model, which we call the Sole Custody Model, for such cases. This Model distributes the guardianship responsibilities between the parent with whom the child lives (the custodial guardian) and the other parent (the non-custodial guardian): see Appendix C.2. The AJ Workbooks do not mention ALRI's Model. Under AJ's approach, a court order appears to be a necessary alternative to parent / guardian agreement. In our view, legislating the default position would assist parent negotiations in conflicted cases and reduce the number of court applications. Under ALRI's Model, either party could bring an application to the court for a different distribution; however, a court order would not be necessary if legislation specifies the responsibilities where conflict exists and no agreement is reached.

2. ALRI responses to AJ questions

[Public and Technical Workbooks]

3.2.a. Should there be any special provisions to deal with testamentary guardianship in a non-intact family where the parents are no longer joint guardians?

[55] No. See ALRI RFD18.4 (Guardianship, Custody and Access), Rec. 14.4. By way of example, AJ suggests the law could provide that the surviving parent rather than the testamentary guardian is entitled to become the guardian, or it could provide that the surviving parent is entitled to become a joint guardian with the testamentary guardian. (Under the AJ proposals, for intact families, testamentary guardianship would not take effect until after the death of a surviving parent / guardian – a position with which we disagree: see *infra*, p. 19.)

[56] AJ uses the term “testamentary guardianship” to describe a guardian appointed by deed or will. For the sake of brevity, we do the same in this submission.

[57] When we examined guardianship, we considered the ways in which guardianship could arise. We concluded that most parents should be guardians automatically as a matter of law: RFD18.4, Rec. 10.4; the court, acting in the child's best interests, should have power to appoint or remove a guardian: RFD18.4, Recs. 11.4 and 18.4; and a guardian of the child, either parent or non-parent, should have power to name a guardian to act on the nominating guardian's death: RFD18.4, Rec. 13.4. In the latter instance, the guardianship would take effect immediately on the nominating guardian's death unless the nominating guardian made another stipulation: RFD18.4, Rec. 14.4.

See Appendix C.1, rows 12-13, 14, 16, 20 and 21.

[58] We would make no distinction among guardians. That is to say, under ALRI's recommendations, any guardian would be able to appoint a guardian whose appointment would take place, in the usual case, immediately upon the death of the guardian making the appointment. The guardian so appointed would act jointly with a surviving guardian. For example, if a surviving parent is a guardian, the guardianship continues. That parent would be a guardian together with the person nominated in the appointing document. The surviving parent would have to work together with the guardian nominated by the deceased parent. If the surviving parent and the nominated guardian are unable to work out their differences, they could apply to the court for an order resolving their respective positions (as could parent guardians who live separate and apart and are unable to agree about how to share their guardianship responsibilities).

[59] The use of the word "joint" in AJ's question is confusing. Whether or not they are living together, under ALRI's recommendations, in the usual situation, both of a child's parents would be guardians and share in the distribution of the guardianship powers. The death of a parent guardian (or other guardian) should not change the status of a surviving parent guardian (or other guardian). Under no circumstances should a parent whose guardianship has been terminated by the court, or who never attained the status of guardian under the law, automatically become a guardian on the death of the other parent / guardian. The law should require a parent who is not a guardian but wishes to acquire the status of guardian to apply to court for an order appointing them.

3.2.b Should the responsibilities of the deceased guardian flow to the surviving guardian or to the guardian appointed by the deceased guardian?

[60] The responsibilities of the deceased guardian should flow to the guardian appointed by the deceased guardian: RFD18.4 (Guardianship, Custody and Access), Rec. 14.4.

See Appendix C.1, row 21.

[Public Workbook]

3.4.a. Should provincial and federal legislation regarding parenting arrangements be consistent?

[61] Agree, in general, that provincial and federal legislation regarding parenting arrangements should be consistent.

3.4.b. Are the attributes for parenting arrangements appropriate? What changes if any would you suggest?

[62] Agree with AJ's list of attributes, subject to discussion of the implications of making parents accountable for not fulfilling their responsibilities, and attention to ALRI's lists of factors to consider in determining a child's best interests in guardianship, custody and access cases, respectively: RFD18.4 (Guardianship, Custody and Access), Recs. 12.4, 23.4 and 32.4.

See Appendix C.3.

3.6.a. Is the list of persons who can apply for access appropriate? Should anyone be added or dropped from the list?

[63] Yes, the list is appropriate. No additions or deletions are needed.

3.6.b. Should access applications by non-guardians be restricted to the situations where guardians or parents are not living together or where one of the guardians or parents is dead?

[64] Yes, access applications by non-guardians should be restricted to these situations: ALRI RFD18.4 (Guardianship, Custody and Access), Rec. 31.4.

See Appendix C.1, row 83.

3.6.c. Are the proposed restrictions on access by non-guardians appropriate? Would you add or delete any of the conditions?

[65] Yes, the proposed restrictions are appropriate. No additions or deletions need be made to any of the conditions.

3.6.d. Should the same conditions for access apply to grandparents as apply to other non-guardians? If not, what conditions, if any, should apply to access for grandparents?

[66] Yes, the same conditions for access should apply to grandparents.

[Public and Technical Workbooks]

3.7.a. Should the court have the discretion to link access and child support or should the two continue to be kept separate?

[67] Keep separate. As we recommended in RFD18.4 (Guardianship, Custody and Access), Rec. 33.4, access and child support should continue to be kept separate. Access should be determined on the basis of the child's best interests being furthered by a continuing personal relationship with the non-custodial parent, not on whether the non-custodial parent does or does not pay support.

See Appendix C.1, row 88.

*[Technical Workbook]***3.8.a. Should legislation provide a mechanism that will assist parents to obtain access to records to which they are entitled?**

[68] Yes, but that mechanism should consist of placing an obligation on the parent who has custodial guardianship to provide the institution maintaining the record with written permission to release the information directly to the non-custodial guardian. The obligation should be spelled out in law and be enforceable: a) on application when the custodial guardian fails to accommodate the access guardian's (non-custodial parent's) reasonable request for information, or b) in accordance with the terms of an order made by the court when it determines access. Using this mechanisms will reduce the opportunities for conflict between the parents.

3.8.b. What approach would be the most workable for health authorities, school boards and other third parties?

[69] The most workable approach for third parties would be to act on the permission provided by the custodial guardian to release information directly to the non-custodial (access) guardian, or failing this, a court order for disclosure.

3. Additional ALRI comments**a. Restrictions on non-guardian access**

[70] AJ makes the point that it would be possible to place restrictions on non-guardian access (that is, access by persons other than parent guardians) that go beyond the usual "in the best interests of the child" test. (Examples of non-guardians who may seek access include persons standing in the place of parents and grandparents.) The restrictions could require that:

- There has been frequent and positive contact in the past and that continuing contact would be in the best interests of the child.
- Where a guardian is opposed to access by a person who is not a guardian, the court could not allow access unless it can be shown that it is so clearly in the best interests of the child as to make the guardian's opposition unreasonable.

ALRI did not consider this possibility. However, ALRI's list of factors for the court to consider in determining whether access is in the child's best interests includes: the nature and quality of the child's relationship with the person seeking access (RD18.4 (Guardianship, Custody and Access), Rec. 32.4(3) and the wishes of the person with custody of the child (RD18.4 (Guardianship, Custody and Access), Rec. 32.4(8).

[71] Having considered the possibility raised by AJ, we have concluded that the legislation should not specify restrictions that go beyond the "best interests" test. The child's "best interests" should continue to be the paramount consideration. Where a parent (guardian) refuses to permit access to a non-guardian, we hold the view that the

issue should be decided through the exercise of judicial discretion combined with legislated factors to assist the court in making its determination.

See Appendix C.1, rows 82-85, and Appendix C.3.

b. When testamentary guardianship takes effect

[72] AJ proposes that, although the new law gives a parent the power to appoint a testamentary guardian, such guardianship would only take effect if both parents die or if the surviving parent has a disability that prevents the parent from acting as a guardian. We disagree with AJ's proposal. We recommended that, unless the nominating guardian stipulates otherwise, the guardianship should take effect immediately on the nominating guardian's death and the person nominated as guardian should act jointly with any other guardian of the child: RFD18.4 (Guardianship, Custody and Access), Rec. 14.4. This recommendation, which accords with the existing law, maximizes the chance that there will be proper guardianship for the child. Under ALRI's recommendations, the effect would be that where the person named as guardian by the deceased parent / guardian does not live with the child, that person would have the powers, responsibilities and rights of a non-custodial guardian under ALRI's default provisions. Of course, a court could order otherwise.

[73] We continue to support our recommendation. One situation we envisage is that of a child who lives with and enjoys a positive relationship with a parent and a stepparent, and a less satisfactory relationship with the other parent. The custodial / residential parent may wish to name the stepparent as guardian in the event of the parent's death in order to ensure continuity in the child's living arrangement and the continuation of the positive relationship that exists between the child and the stepparent. If the surviving parent is a guardian of the child at the time of the other parent's death, the surviving parent will continue to be a guardian after the other parent's death.

See Appendix C.1, rows 21.

c. Restricting custody to guardians

[74] Ordinarily, custody is restricted to guardians, and this is how we think it should be in most situations. We expressly so recommended in RFD18.4 (Guardianship, Custody and Access), Rec. 25.4. However, as the law evolves, we can see circumstances in which a child may benefit from a grant of standing to apply for custody or access, without the need for guardianship. Some courts have granted such standing to a person who stands in the place of a parent in relation to a child. The debate that exists about the jurisdiction of the Provincial Court to grant interim guardianship gives rise to one example: by granting interim custody to a non-guardian, the court may be able to act in the child's best interests to preserve an existing living arrangement pending the full determination of the rights and responsibilities involved. Awarding interim custody to a person standing in the place of a

parent is consistent with the notion of sharing of parental responsibilities until an application for guardianship including custody or access is heard.

See Appendix C.1, row 50.

d. Whose “right” is access?

[75] AJ proposes that Alberta’s family law legislation continue to treat access as one of the rights of guardianship. We are in fundamental disagreement with this proposal and firmly reject any provision that does not define access as the right of the child to have access to persons of significance to the child, as we recommended in RFD18.4 (Guardianship, Custody and Access), Rec. 30.4. We strongly reiterate our recommendation that access should be conceptualized as the right of the child. What is at stake is the child’s right to enjoy a continued relationship with persons of significance to the child and not the right of an adult to impose themselves on the child. Treating access as a parent’s right allows a parent to maintain that the child should in effect be carved up even where that is disadvantageous to the child, and giving that weapon tends to escalate the argument.

[76] In our report, after recommending that access should be defined as the right of the child, we distinguished the access position of a non-custodial guardian and a person who is not a guardian (that is, a non-guardian). Under our recommendations, subject to court order otherwise, a non-custodial guardian would have reasonable access to the child: RFD18.4 (Guardianship, Custody and Access), Rec. 34.4; in contrast, a non-guardian seeking access would have to obtain the custodial parent’s (guardian’s) consent or a court order which would be granted where access is found to be in the child’s best interests: RFD18.4 (Guardianship, Custody and Access), Rec. 35.4. ALRI’s recommendations proceed from the assumption that, except where the court orders otherwise, access to both parent guardians is in the child’s best interests whereas access to other persons is a matter for decision by the child’s parents or the court acting in the child’s best interests.

See Appendix C.1, rows 78-79.

e. Notice of change of child’s residence

[77] AJ does not discuss the inclusion of a requirement to give notice of an intended change in the child’s residence. ALRI recommended that the custodial guardian should have a duty to notify any other guardian, in writing, of an intended change in the child’s place of residence: RFD18.4 (Guardianship, Custody and Access), Rec. 29.4. That notice would have to be given in writing, be given at least thirty days before the change takes place and include when the change will be made and the child’s new place of residence. This requirement could be altered by court order or agreement by the parties.

[78] The *Divorce Act*, s. 16(7) allows a court making a custody or access order to include a notice requirement, as does Alberta’s *Provincial Court Act*, s. 32(1.1) and (1.2). These provisions allow the court to order that notice be given to any person who is entitled to access. The inclusion of a notice requirement along similar lines would promote

harmonization with federal law and be consistent with one of Alberta's existing statutory provisions. We think the new legislation should address this matter.

See Appendix C.1, row 95.

f. Supervision of custody or access

[79] AJ does not discuss the court's power to make a supervisory order as part of its jurisdiction over custody and access. ALRI strongly holds the view that the jurisdiction of the court to make a supervisory order and the requirement for the supervisor's consent should be legislated. We so recommended in RFD18.4 (Guardianship, Custody and Access), Rec. 46.4. Under our recommendation, the court would be able to give such directions as it considers appropriate for the supervision of the custody of, or access to, a child by another person or other body, provided that person or body has consented to act as supervisor.

See Appendix C.1, row 96.

G. Court Jurisdiction and Powers

1. Preliminary note

[80] By and large, ALRI's reports exclude from consideration constitutional and other issues relating to court structure, the assignment of court jurisdiction and court procedures: RFD18.1 (Overview), pp. 10-11. This being said, the ALRI recommendations are designed with the idea that a single body of substantive law would apply no matter in what court a proceeding is brought and, further, that within the existing court structure the Provincial Court would have the broadest jurisdiction over family law that is constitutionally allowable. ALRI also made recommendations with respect to procedural powers that are necessary for the effective exercise by the courts of family law jurisdiction.

2. ALRI responses to AJ questions

[Technical Workbook]

4.2.a. Should the court have the powers described in the 4.2 Securing Payments section regarding child and support orders?

[81] Yes: ALRI RFD18.2 (Spousal Support), Rec. 20.2 and RFD18.3 (Child Support), Rec. 27.3(c).

See Appendix D.1, rows 9-16.

4.3.a. Should the court be given discretion to order third party payments or in the case of child support, to order payment directly to the child?

[82] Yes: ALRI RFD18.2 (Spousal Support), Rec. 47.2 and RFD18.3 (Child Support), Rec. 47.3.

See Appendix D.1, rows 18-19.

4.3.b. Should the court's power in this regard be restricted to only certain types of cases or circumstances?

[83] No. Rely on the court to exercise its discretion wisely in such matters.

[Public Workbook]

4.3.a. [4.5.a in the Technical Workbook] Are there reasons why judicial separation should be retained as an option for married persons?

[84] We have recommended that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed: Rep65, Rec. 2. The abolition would be accompanied by the enactment of a provision making it clear that married men and married women are to be treated equally as independent persons with full legal capacity (Rep65, Rec. 3). Under our recommendations, the entitlements that come with judicial separation under the existing law would be available on the breakdown of the relationship.

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

[85] No, the right to sue should not be retained: ALRI Rep65, Rec. 8. Yes, if the right to sue is retained, claims should be restricted to recovering expenses.

[Technical Workbook]

4.7.a. Should family law cases only be heard by a judge and never by jury trial?

[86] Yes. Family law cases should only be heard by a judge. In cases involving children, we have concerns about the potential of jury trials to exacerbate conflict, contrary to the child's best interests. We also have concerns about the inappropriate use of jury trial by a party with a controlling personality to gain an unfair advantage by prolonging the proceeding, building up costs, and giving that party more clout in negotiations. (We did not consider this matter in our earlier work.)

4.8.a. [4.5.a in the Public Workbook] Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the Matrimonial Property Act when there has been a breakdown of the marriage?

[87] Yes: ALRI Report No. 83 (May 2000).

4.9.a. Should a court be given the authority to order that a spouse or child be continued as the beneficiary of any pension, benefit or life insurance plan held by a spouse or parent?

[88] Yes: ALRI RFD18.2 (Spousal Support), Rec. 23.2(a) and RFD18.3 (Child Support), Rec. 27.3(e).

See Appendix D.1, rows 41-44.

4.9.b. Should a court be given the authority to revoke an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan?

[89] Yes. ALRI RFD18.2 (Spousal Support), Rec. 24.2 and RFD18.3 (Child Support), Rec. 27.3(f).

See Appendix D.1, rows 45-46.

3. Additional ALRI comments

a. Jurisdiction of Provincial Court

[90] AJ proposes that the Provincial Court's jurisdiction expand to include persons in conjugal and other interdependent relationships that do not involve marriage and all children of such interdependent relationships. We agree that the jurisdiction of the Provincial Court over spousal support should include persons in conjugal relationships of a marriage-like nature. In RFD18.2 (Spousal Support), we recommended extending the spousal support obligation to persons of the opposite sex living in marriage-like relationships and flagged the issue with respect to persons of the same sex. However, we disagree with AJ's proposal, as worded, insofar as it limits jurisdiction over children to the children of persons in conjugal and other interdependent relationships. Under our recommendations, the child support obligation would be based on the relationship between parent (or other adult) and the child. This relationship would be considered independently of questions having to do with the relationship between (or among) the adults having the child support obligation. Issues relating to guardianship, custody and access would be determined on the basis of the child's best interests.

See Appendix D.1, rows 1-3.

b. Binding the Crown

[91] ALRI recommended that the Crown should be bound by the provisions requiring third parties to disclose financial information relevant to the dispute between the parties to a spousal or child support application and by the provisions requiring the disclosure of information about the location of a respondent or child. ALRI further recommended that the duty to disclose should prevail over the *Alberta Freedom of Information and Privacy Act*: RFD18.2 (Spousal Support), Rec. 52.2 and RFD18.3 (Child Support), Rec. 52.3. We would now modify our position to require the Crown to provide information about the location of a respondent or child where the court so orders. The requirement of a court order would allow the court to consider arguments relating to concerns about domestic violence or anything else before deciding whether to grant or refuse the order. The provisions regarding the disclosure of financial information would bind the Crown, as would a court order for disclosure of the location of a respondent or child.

See Appendix D.1, rows 100-103.

c. Exclusive possession of family home

[92] ALRI recommended that the *Matrimonial Property Act*, s. 23, and the *Personal Property Security Act*, ss. 23 and 26, as modified by the recommendations in ALRI RFD

No. 14 on *The Matrimonial Home*, should apply where an application for exclusive possession of the family home is brought in a spousal or child support proceeding: RFD18.2 (Spousal Support), Recs. 22.2 and 28.2; RFD18.3 (Child Support), Rec. 27.3; and RFD18.4 (Guardianship, Custody and Access), Rec. 48.4.

[93] AJ proposes that the court should be able to grant an order for exclusive use for all or part of the family home and exclusive use of any or all household goods in conjunction with proceedings for spousal or child support, or for child guardianship, custody or access. The order would be available on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application. However AJ does not give further details. These details should be provided.

See Appendix D.1, rows 113-116 and Appendix D.2 (reproducing the recommendations in ALRI RFD No. 14).

d. Joint application for guardianship, custody and access

[94] ALRI recommended that the Rules of Court and Forms should facilitate joint applications for guardianship, custody and access: RFD18.4 (Guardianship, Custody and Access), Rec. 58.4. AJ does not mention the possibility of joint applications. We continue to think it would be desirable to provide for joint applications as a means of reducing conflict for children.

See Appendix D.1, row 154.

e. Withholding or removal of child

[95] ALRI recommended the enactment of provisions to prevent the withholding or removal of a child by either parent or any third party: RFD18.4 (Guardianship, Custody and Access), Rec. 26.4. We recommend the inclusion of these provisions.

See Appendix D.1, rows 180-181.

H. Personal Relationships

1. ALRI responses to AJ questions

[96] In responding to all of the questions in section 5 of the Technical Workbook, “Personal Relationships” ALRI takes the position that there should be no distinction between persons in opposite sex and same sex relationships.

[Technical Workbook]

5.1. Should living together for a minimum of three years be one of the criteria for determining when an unmarried person is in a committed, conjugal relationship? If not, would one or two years be appropriate?

[97] Cohabiting for a minimum period of time should be one of the criteria for determining when an unmarried person is in a committed, conjugal relationship. It must be recognized that whatever period of time that is chosen is arbitrary. Thus, thorough consideration must be given to period of time which is chosen, and it must be ensured that

there are logical and rational reasons underlying the decision. In this regard it may be useful to harmonize the requisite period of cohabitation with those used in other jurisdictions. As three years is the time period used in other jurisdictions such as Ontario, it would be appropriate to adopt three years as a requisite period of cohabitation which must be satisfied prior to ascribing “marriage-like” rights and obligations.

[98] Cohabiting for any set period of time in and of itself should not result in the relationship being deemed to be conjugal, rather, the parties must be in a conjugal relationship during the period of cohabitation. The Supreme Court of Canada has judicially considered and interpreted the term “conjugal” in a broad and flexible manner:

Molodowich v. Penttinen (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. ... In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal.” [M. v. H. (1999), 171 D.L.R. (4th) 577 at 615 (S.C.C.)]

ALRI agrees with this description of a “conjugal relationship” as it encompasses a broad range of relationships for which it is appropriate to attach legal rights and obligations. Thus, any legislative provision ascribing rights and obligations on the basis of cohabitation should indicate that two persons must have “cohabited in a conjugal relationship” for the requisite period of time.

5.2. Do you agree that two persons that live together and have a biological or adopted child are in a committed relationship that should have benefits and obligations attached?

[99] Two persons who live together in a relationship of some permanence and who

- i) together have a biological child
- ii) together have adopted a child, or
- iii) have a biological child of one partner who has been adopted by the other partner

should be a separate criteria for ascribing legal rights and obligations to an unmarried relationship without first satisfying the minimum cohabitation. Again, ALRI’s view is that the relationship must first be conjugal before rights and obligations are ascribed. While conjugality is likely if the couple has a child, the legislation should specifically require that the relationship also be conjugal.

5.3. Are there other criteria you would recommend that would indicate that two persons are in a committed, conjugal relationship?

[100] Any legislation which ascribes rights and obligations on the basis of a conjugal relationship should provide a list of factors which a court may use to determine if a relationship is in fact conjugal. These factors should be those which the Supreme Court of Canada listed in *M. v. H. supra*, being:

- shared shelter
- sexual and personal behaviour
- services
- social activities
- together having a biological or adopted child
- the societal perception of the couple and
- any other factors which may be relevant.

The legislation should also state that these factors may be present in varying degrees and not all are necessary for the relationship to be conjugal.

5.4. Alberta Laws could be amended to give benefits and obligations to all persons in committed personal relationships. Should this include only those in committed, conjugal relationships or should it also include those in committed, platonic relationships?

[101] ALRI's position is that legislation in Alberta should be amended to give benefits to, and impose obligations on, people in committed **conjugal** relationships only. It is entirely inappropriate to extend marital benefits and obligations to persons in any type of platonic relationship.

[ALRI has not had the opportunity to properly research and consult on the view expressed by the Law Commission of Canada in its report "Beyond Conjuality: Recognizing and supporting close personal adult relationships" released January 31, 2002, which seems to support having a registration system which provides different packages of rights for conjugal and non-conjugal committed relationships. At this time, ALRI's position is that any system which grants rights and obligations on the basis of personal relationships should be limited to persons in conjugal relationships.]

[102] The policy considerations for extending rights and obligations to persons in committed conjugal relationships have been thoroughly examined in both social and legal contexts. Many jurisdictions have already extended to common law couples rights and obligations which were once available only to married couples. Conversely, few, if any, studies have considered extending the rights and obligations of marriage to persons in platonic relationships, nor does there appear to be any public outcry demanding the extension of marital rights and obligations to persons in platonic relationships. If extending marital rights and obligations to persons in platonic relationships is being considered seriously, there is a need for extensive research and consultation to determine

the types of rights and obligations which should be included. There must also be a thorough study of the consequences of so doing, for example, how extending rights to persons in platonic relationships may affect employee benefits plans. The consultation being conducted through the within Family Law Reform Project does not adequately address these issues.

[103] There are significant differences between persons in committed conjugal relationships (which may be described as “marriage-like” relationships) and persons in “committed” platonic relationships. It will be difficult to define a “committed” platonic relationship; it is not even clear what constitutes a “commitment” in a platonic relationship. Trying to define a “committed” platonic relationship which gives rise to marital benefits and obligations is likely to cause confusion and create uncertainty.

5.5.a. Should a relationship that is platonic be considered an interdependent relationship simply by satisfying the criteria or should persons in this kind of relationship be required to take some active step to indicate they wish to be considered a partner in an interdependent relationship?

[104] As discussed in question 5.4 above, ALRI takes the position that platonic relationships should be excluded from a regime of marital rights and obligations. If it is decided to extend marital rights and obligations to persons in platonic relationships, such rights should not be ascribed passively. The persons in the relationships must be required to take an active step to obtain any “partnership” status.

5.5.b. If some active step is required:

• ***Should the requirement be that they may opt in by registration, if they decide they wish to have benefits and obligations legally attached to their relationship?***

Or

• ***Should they be required to enter into a contract in writing that says that they are not an interdependent relationship, if they do not want to have the benefits and obligations of the relationship?***

[105] If persons in platonic relationships wish to obtain marital rights and benefits they must be required to opt into such a regime through registration rather than opting out through agreement. As noted above there are problems with defining a committed platonic relationship. Any definition likely will be overbroad and encompass relationships that should not be included. This will lead to confusion and likely result in litigation. This confusion is virtually guaranteed if parties are *prima facie* ascribed rights and obligations absent a written agreement to the contrary. Likely most, if not all, people in platonic relationships will not consider themselves to be in a relationship that gives rise to any legal rights or obligations and will not be aware of the need to opt out of such rights and obligations. Thus, if any rights and obligations arise by virtue of a platonic relationship, the persons in that relationship must actively seek recognition of those rights.

5.6. Is the definition of an interdependent relationship appropriate? If not, what changes would you suggest?

[106] The workbook suggests different criteria for “interdependent relationships” in different places. We assume the proposed definition is that found at p. 51, being “two adults living together in a long-term, committed relationship of economic and emotional interdependence”, with no requirement that the relationship be conjugal in nature. It is ALRI’s view that this definition is not appropriate. There should be no status of “interdependent relationship”; such status should be confined to persons in committed conjugal relationships as defined in questions 5.1 and 5.2 above.

[107] If there is to be a status of “interdependent relationship”, the proposed definition is not adequate. What constitutes a “committed” relationship? What constitutes “emotional interdependence”? Likely many friends who share living accommodations are emotionally interdependent. Finally, what constitutes “economic interdependence”? Is a relationship “economically interdependent” if only one party in the relationship is economically dependent on the other? Generally legislation which imposes certain rights and obligations upon the breakdown of a relationship seeks to protect one person in the relationship who is economically dependent on the other. Requiring a relationship to be “economically interdependent” may in fact exclude relationships where one party is not in fact dependent on the other.

[108] There are many situations which could fall into the proposed definition but should not be ascribed the rights and obligations associated with committed conjugal relationships. For example, what if an adult child (bearing in mind this would include any adult child over the age of 18) lives with his or her parents for a period of time for financial, personal or cultural reasons, and contributes to groceries, utilities or a mortgage? This situation could fall within the definition of a committed “interdependent relationship” and would be subject to, or have the option of, obtaining the rights, benefits and obligations associated with marriage like relationships. Thus, it is possible that the child or the parents could claim support from the other when the child moves out. This simply is not appropriate.

[109] The definition does not deal with cessation of the interdependent relationship and does not address when the rights and obligations associated with the interdependent relationship end. Do they end immediately upon the cessation of cohabitation? Certain marital rights and obligations survive through separation and even divorce. How would these apply to “interdependent relationships”?

[110] There are too many issues with the proposed definition of “interdependent relationship” to discuss at this time. However, the issues mentioned herein highlight the need for further research, study and consultation before adopting any proposal which equates platonic relationships with committed conjugal relationships.

5.7. Are the factors which could be used in determining the validity of an interdependent relationship reasonable? Are there other factors you would suggest?

[111] As discussed previously, it is not reasonable to include platonic relationships in any definition of “interdependent relationship”. ALRI also questions whether it is even possible to define “interdependent relationship” in a meaningful way at this time, if ever. There is no information available (of which ALRI is aware) indicating the types of relationships which should be included or excluded from the proposed group and the reasons for doing so. The factors used for determining the validity of “interdependent relationships” will also vary depending on the rights or obligations that will be given to such relationships. Until this information is determined it is simply not possible to define “interdependent relationship”.

2. Additional issues to address

[112] The Alberta Family Law Reform Workbook does not clearly address certain issues regarding personal relationships. ALRI suggests that the following issues need also be addressed:

1. What rights and obligations may be obtained through cohabitation or satisfying criteria of a committed conjugal relationship?

[113] ALRI’s position is that the rights and obligations of people in committed, conjugal relationships should not differ on the basis of sexual orientation. Any rights and obligations which are imposed by law on opposite sex couples in committed conjugal relationships should also apply to same sex couples in committed conjugal relationships.

[114] While many of these rights and obligations concern economic and financial issues as between the individuals in these relationships, there are other legal rights or obligations to which married couples are entitled which at present are not ascribed to “common law” couples. A thorough review of all legislation should be undertaken to determine whether the exclusion of common law couples, regardless of sexual orientation, is constitutionally valid. If there is no valid and constitutionally acceptable reason for excluding persons in common law relationships from rights or obligations given to married persons, the legislation should be amended to include all persons in common law relationships regardless of sexual orientation.

2. What rights and obligations may be obtained through registration of a personal partnership?

[115] The province does not have the jurisdiction to permit same sex couples to marry. It is ALRI’s position that in light of this restriction, a form of personal partnership registry is necessary to allow same sex couples to obtain the rights and obligations of marriage at a time of their choosing, without having to wait for the expiry of the requisite cohabitation period.

[116] The rights and obligations which are obtained through registration in a personal partnership registry of either an opposite sex or same sex conjugal relationship should mirror those which arise upon marriage as closely as possible. Any legislated marital

rights which are excluded from the registry will inevitably be the subject of future *Charter* challenges and will likely be declared invalid in any event. Providing a comprehensive package of rights and obligations upon registration will minimize the potential for future litigation and will fulfill the province's established constitutional obligation to eliminate a discriminatory legislative regime.

[117] Careful thought must be given to the issue of termination of a registered personal partnership. Many of the legislated rights and obligations of marriage arise upon the termination of the marriage. Thus, the rights and obligations which arise upon termination of a registered personal partnership must be specified, and should, as far as possible, mirror those rights and obligations which arise upon the cessation of a marriage.

[118] It should be noted that there may be jurisdictional issues concerning the creation of a personal partnership registry. As previously noted, marriage is within the exclusive jurisdiction of the federal government. If the creation of a personal registry is seen in pith and substance as redefining "marriage", it may be that it is *ultra vires* the provincial government. This issue has been canvassed in the 1998 British Columbia Law Institute report on relationships, wherein it was opined that such a registry likely would fall within the province's jurisdiction as an exercise of its property and civil rights power. This view is supported by the fact that some provincial legislation already extends rights to people based on a marriage-like status (being common law), and the Supreme Court has held that in fact provincial legislation must do so. A personal registry may be seen as merely a mechanism by which rights which must be extended to people in marriage like relationships may be conveniently accessed. In any event, constitutional limits on establishing a personal partnership registry should be considered thoroughly prior to its implementation.

[119] The Institute has not had time to engage in a proper consultation of those affected by the establishment of a personal registry. It is likely that a portion of the same sex community may not support such a registry on the ground that registering grants only "equivalent to marriage" status. Doing so may be seen as giving same sex couples a second class standing in society by limiting the way their relationships are recognized to a status other than marriage, which may be seen as suggesting that their relationships are not worthy of the same recognition as opposite sex couples. However, the province cannot redefine marriage to include same sex couples because marriage is within the federal jurisdiction. A registry is the likely the best available mechanism within the province's jurisdiction to legally recognize same sex relationships by granting certain rights and responsibilities to same sex couples. However, legal rights and obligations are merely a consequence of marriage. Likely most people do not marry because of the legal consequences; they do so for the status of being married as between themselves and to be perceived as such by society. Registering as partners does not give the same societal status that marriage does. If in the future same sex couples are given the right to marry federally (through either constitutional challenges or a federal legislative action) the province must make the necessary legislative amendments to permit such marriages in

Alberta. The personal partnership registry must not act as an impediment to same sex marriages in the future.

3. What effect would the registry have on the rights and obligations which arise at common law through cohabitation?

[120] ALRI's position is that the availability of a personal partnership registry simply functions to provide a method by which people may obtain rights and obligations without cohabiting for the statutorily set minimum period of time. Any two adult persons in a committed conjugal relationship who have not chosen to either marry or register would remain subject to the legislated rights and obligations which arise through cohabitation, subject to written agreements to the contrary.

4. Should the implementation of a registry or the redefinition of common law relationship be postponed until the issue of non-conjugal interdependent relationships is settled?

[121] The need to amend Alberta's legislation to eliminate discrimination against persons in unmarried conjugal relationships is not in doubt. In particular, there is clear authority from the Supreme Court of Canada in *M. v. H.* that legislation which discriminates against same sex couples is unconstitutional. A comprehensive response to eliminate the obvious discrimination against all unmarried conjugal couples which exists currently should be completed as soon as possible.

[122] As noted above there are significantly different policy considerations and consequences in extending marital-type rights and obligations on persons in platonic relationships. These policy considerations have nothing to do with the need to amend legislation to include same sex couples. Therefore, amending legislation to include same sex couples is not dependent upon, nor need not be combined with, any amendments to include platonic relationships.

3. Policy questions relating to the termination of relationships and co-ordination of rights and obligations under relationships

a. General discussion

[123] The Technical Workbook at p. 48 suggests that parties to common law and same sex relationships should be treated by law the same as parties to a marriage relationship. The specific mechanism by which the equal treatment will be achieved is not specified. This part of ALRI's submission is based on the assumption that the result of the Alberta Family Law Project will be a movement towards giving qualified conjugal cohabitants rights and obligations under many Alberta statutes.

[124] With only a few exceptions, the present law is that an individual can be involved in only one relationship having legal consequences, that is, one marriage. Unless the process is carefully thought through, moving to a legal situation in which an individual might be involved simultaneously in two or more relationships having legal consequences could lead to many conflicts between the interests of the various legal relationships.

[125] Given the time constraints, ALRI is not able to suggest solutions to questions as to when a qualified conjugal cohabitational or registered relationship will be terminated or questions arising from serial relationships. ALRI suggests strongly that at least the following questions should be dealt with before legislation is enacted:

1. What circumstances will terminate a cohabitational or registered relationship for legal purposes?
2. Will it be possible for an individual to be simultaneously in two or more legally-recognized conjugal relationships?
3. If it will be possible for an individual to be simultaneously in two or more legally-recognized conjugal relationships, how will conflicts among the rights and obligations of the individual and the other parties to the two or more relationships be avoided?

b. Specific issues

1. What circumstances will terminate a conjugal cohabitational or registered relationship for legal purposes?

[126] Suppose that it is decided that a conjugal relationship will be legally recognized when certain conditions relating to the length of cohabitation or to registration have been met. As rights and obligations will flow from that recognition, it should always be possible to determine whether the law continues to recognize the relationship.

[127] The law could treat a conjugal cohabitational or registered relationship as enduring in law even though it has terminated in fact, as it now treats marriages, pending divorce. It could treat a conjugal relationship as revocable in law only by consent. It could treat a conjugal relationship as revocable in law by joint or unilateral conduct, including one party discontinuing the cohabitation. Or it could require some form of judicial intervention to bring the relationship to an end for legal purposes. If the guiding principle is that the parties to the conjugal cohabitational and registered relationships are to be treated by law the same as parties to a marriage, the law would have to require judicial intervention for termination, though such a provision might not be considered suitable by couples who enter into informal relationships.

[128] The legislation should be clear as to when the law will cease to recognize a conjugal cohabitational or registered relationship. The law should also be clear as to whether any of the rights and obligations that have arisen under a legally-recognized relationship will survive the termination of the relationship.

2. Will it be possible for an individual to be simultaneously in two or more legally-recognized conjugal relationships?

[129] At present, it is not legally possible for one individual simultaneously to be a party to two or more valid marriages. Should it be possible for one individual to be a party to a marriage and also to a legally-recognized conjugal cohabitational or registered

relationship, or to two or more conjugal cohabitational or registered relationships? For example, if one party to a marriage leaves the other party and enters into a conjugal cohabitational relationship with another partner that satisfies the conditions for recognition, will that conjugal cohabitational relationship be recognized even though the marriage continues to subsist in law? Or if a party to a legally-recognized conjugal cohabitational relationship leaves the other party and contracts a new conjugal cohabitational relationship that meets the prescribed conditions, will both the first and second relationships be legally recognized? We think that the legislation should answer these questions.

[130] If contracting a second relationship would automatically terminate the first, this question would not need to be specifically answered. However, a second relationship cannot terminate the first legally-recognized relationship if the latter is a marriage, and if it could, the result would be inconsistent with a provision, if such a provision is adopted, that judicial intervention is necessary to terminate the legal recognition of a relationship.

3. If it will be possible for an individual to be simultaneously in two or more legally-recognized conjugal relationships, how will conflicts among the rights and obligations of the individual and the other parties to the two or more relationships be avoided?

(a) General discussion of difficulties that may arise from competing “spousal” claims

[131] The situation is relatively simple where only two individuals are involved. However, when more than two individuals are affected by similar rights and obligations, conflicts may arise.

[132] The Workbook does not specify the mechanism by which equal treatment would be given to the parties to conjugal cohabitational and registered relationships.

[133] If equal treatment is achieved by specific legislation covering each different aspect of the legal treatment of specific relationships, any necessary adjustments of legal rights and obligations under relationships could be made on a case by case basis.

[134] Equal treatment might instead be achieved by some device such as expanding the definition of “spouse” or declaring by one statute that the parties to a conjugal cohabitational or registered relationship are to have all the rights and obligations that they would have if they were married. It is suggested here that such a general device should not be applied to any area of the law until that area has been considered in order either to ensure that unwanted consequences will not flow from the use of the device or to take corrective steps. It is also suggested that one size will not fit all legal aspects of serial relationships.

[135] It may be instructive to look at a few examples from those mentioned in the Workbook. In each case, suppose that an individual, A, can be party to legally-recognized

relationships successively with three partners, P1, P2 and P3, in that order, each of the legally-recognized relationships being either marriage, a qualified conjugal cohabitational relationship, or a conjugal registered relationship.

(b) Examples

[136] **Matrimonial Property Act.** The MPA gives the Court power to make a distribution between the spouses of all the property owned by both spouses and by each of them, with special provisions for property owned at the time of marriage or received by gift or inheritance. The basic purpose is to divide between the spouses the gains made during the marriage.

[137] First, under the proposed reforms, will each of the three partners, P1, P2 and P3, have a right to a spouse's share of the gains made by A during any period during which their legally-recognized relationships overlap? If yes, some specific scheme will have to be worked out to sort out the competing claims. Second, will A, the common partner, have a right to the spouse's share of gains made by each of P1, P2 and P3 during their respective overlapping relationships? Third, if P1, P2 or P3 is also a party to another legally recognized relationship, how will the claims of their other partners, which may affect the amount of A's matrimonial property, be dealt with? The adoption of a general overriding provision equating married and cohabitational partners, without more, would in some situations lead to competing MPA claims of equal priority with no provision for either priority or sharing.

[138] **Intestate Succession Act.** The ISA provides that if an intestate dies leaving a surviving spouse but no issue, the intestate's estate goes to the spouse. If A dies without issue, it is not possible for "the intestate's estate" to go to each of P1, P2 and P3. It would be possible to establish criteria that will give one partner priority. It would be possible to provide that P1, P2 and P3 will share equally. Any of these solutions would take a specific decision and specific legislation. The adoption of a general overriding provision equating married and cohabitational partners, without more, would in some situations lead to competing ISA claims of equal priority with no provision for either priority or sharing.

[139] In our Report 78, *Reform of the Intestate Succession Act*, ALRI recommended, in effect, that a surviving cohabitational spouse would take the spouse's under the Act if in cohabitation at the date of the intestate's death. Otherwise a married spouse would take the spouse's share. Given the need to revise the Act immediately, this solution could be adopted for the short term pending a complete review of the whole subject of serial relationships.

[140] **Pensions.** The Employment Pension Plans Act applies to private-sector pension plans. The definition of "spouse" in the Act gives primacy to a married spouse who has not been separated from a plan member for three years or more. Only if there is no such spouse does the Act recognize a person of the opposite sex who has lived with the plan member in a marriage-like relationship for the 3-year period immediately preceding the

relevant time. Such a definition has the advantage of ensuring that only one “spouse” at a time can receive the benefits due to a “spouse”. It does not, however, give an unmarried “spouse” the three-year window after separation, and a later spouse could take immediate priority over a cohabitational spouse, so that the rights of a cohabitational spouse would not be the same as the rights of a married spouse. The definition would also deprive a long-term spouse of any claim on pension rights that accrued during the relationship if a new relationship has arisen, and something would have to be done to co-ordinate the effect of matrimonial property orders with a cohabitational spouse’s claim to share in a pension. The adoption of a general overriding provision equating married and cohabitational partners, without more, would in some pension situations lead to competing claims of equal priority with no provision for either priority or sharing.

[141] ***Fatal Accidents Act: spousal damages.*** The Fatal Accidents Act provides for the payment of \$43,000 in damages to a “spouse or cohabitant”. “Spouse” means husband or wife. “Cohabitant” means a person of the opposite sex to the deceased who lived with the deceased for the 3-year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as the deceased's consort. The damages are not to be awarded to a spouse if the spouse was living separate and apart from the deceased person at the time of death, and the damages are to be awarded to a cohabitant if there is no spouse who was not living separate and apart from the deceased person. This ensures that only one claim can be made (unless it is possible for the deceased to have “lived with” the cohabitant during the relevant period without living “separate and apart” from the married spouse).

[142] The FAA thus gives some preference to a married spouse. No period of cohabitation is required for a married spouse, so that a married P2 who succeeds a cohabitant P1 will prevail if A’s death occurs at any time after the termination of P1’s cohabitation and the commencement of P2’s cohabitation, while a cohabitant P2 who succeeds a married P1 cannot claim until the qualifying conditions for the legal recognition of a conjugal cohabitation relationship have been satisfied. If cohabitation has terminated under both relationships, P1 will prevail. The adoption of a general overriding provision equating married and cohabitational partners, without more, would in some situations lead to competing FAA claims of equal priority with no provision for either priority or sharing.

(c) Conclusion with respect to the questions relating to termination and co-ordination of relationships

[143] The fact that difficult policy questions about the termination of relationships and the co-ordination or other reconciliation of competing claims arising from a series of relationships require answers is not a reason for not proceeding with the Alberta Family Law Reform Project. It is, however, in our submission a reason why legislation should not be enacted until these policy questions have been answered and appropriate legislation drafted to give effect to the answers. If the legislation does not provide satisfactory answers, those involved in marriage and in other legally recognized conjugal

cohabitational relationships will not know what their legal rights and obligations are, many of them will suffer injustice, and much litigation is likely to occur.

FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared
[April 9, 2002]

[Topic headings follow Alberta Justice Technical Workbook]

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FAMILY LAW REFORM

ALRI and Alberta Justice Positions Compared

[April 9, 2002]

*Topic headings follow Alberta Justice Technical Workbook

**The abbreviation "DRA1999" refers to the *Domestic Relations Amendment Act, 1999*, c. 20 which amended the spousal support provisions to comply with the constitutional requirements respecting cohabitants called for by the Alberta C.A. judgment in *Taylor v. Rossu*.

*** "AJ" refers to Alberta Justice Technical Workbook

1. SPOUSAL SUPPORT

Overview

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
1	Under Canada's Constitution, the federal government has responsibility for issues involving divorce, including spousal support when applied for at the time of divorce. Provincial legislation governs all other relationships.		
2	In Alberta, the <i>Maintenance Order Act</i> and the <i>Domestic Relations Act</i> address spousal support matters. Many aspects of these Acts, and other legislation governing marriage and interdependent relationships, have become out-dated over time.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
3	For example, until recently the <i>Domestic Relations Act</i> permitted only married spouses to apply for spousal support. This changed in 1998 following a Court of Appeal decision that said it was unconstitutional, for the purposes of spousal support, to distinguish between persons who are married and persons who are in common law relationships. Spousal support legislation was changed in 1999 to include married persons and persons in common law relationships.		The 1999 changes to spousal support legislation applied only to the jurisdiction of the Court of Queen’s Bench under Part 3 of the DRA. The jurisdiction of the Provincial Court Part 4 continues to be grounded in the out-dated concept of marital desertion.

1.1 Extended Family Support

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
4	Currently, children have a legal obligation to support their parents. Similarly, parents and grandparents have a legal obligation to support their children and grandchildren. Alberta Justice proposes that the extended family support obligation within the <i>Maintenance Order Act</i> be discontinued. New legislation will limit the legal support obligation to parents supporting children, and to spouses supporting each other.		AGREE. Identified in RFD 18.1, pp. 8-9, as a “future law reform topic.” Although giving financial assistance to extended family members is a laudable social conduct, the obligation to support extended family members should not be state-imposed as a matter of law.

1.2 Basic Support

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
5	It is proposed that new legislation contain a general statement about basic spousal support obligations.	RFD18.2, Rec. 1.2: Alberta legislation should contain a general statement of the basic spousal support obligation.	AGREE that legislation should contain a general statement of the basic spousal support obligation: ALRI RFD18.2, Rec. 1.2.
6	Persons in relationships where support obligations apply, such as marriage and common law relationships, will be obligated to support each other during and after the breakdown of the relationship until such time as the court terminates the obligation.	RFD18.2, Rec. 2.2: The legislated obligation should: (1) flow from marriage or a marriage-like relationship; (2) be mutual as between the spouses; (3) not be tied to matrimonial fault; (4) exist during marriage (unless and until terminated by court order); and (5) survive marriage breakdown (in appropriate circumstances).	AJ proposals generally follow ALRI RFD18.2, Rec. 2.2. For purposes of spousal support, ALRI’s definitions of "spouse" and “cohabitant” enacted previously, in DRA 1999. ALRI took the position, in principle, that the spousal support obligation should exist throughout marriage. However, ALRI would confer jurisdiction on the court to award support only in cases of marriage (relationship) breakdown. It is difficult to imagine a situation in which spouses (partners) who are unable to resolve their financial obligations toward each other and seek court resolution and enforcement of the obligation would thereafter continue to live together in a harmonious relationship. In ALRI’s view, state intervention to enforce support obligations during an on-going marriage is not appropriate. (See RFD18.2 at 27-28).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
7		<p>RFD18.2, Rec. 3.2:</p> <p>(1) The legislated spousal support obligation should extend to the parties to</p> <ul style="list-style-type: none"> (a) a void marriage, (b) a voidable marriage, (c) a polygamous marriage that is valid according to the law of the place where the marriage was celebrated, or (d) a cohabitational relationship [i.e. a relationship between "cohabitants" as defined in Recommendation No. 13.2]. <p>(2) "Spouse" should be defined to include a party to such a marriage or marriage-like relationship.</p>	<p>AJ does not comment on void, voidable and polygamous marriages: RFD18.2, Rec. 3.2. AJ's plan may be to deal with these in connection with the provision it makes for personal relationships under either its conjugal relationships or interdependent relationships model, but the Workbooks are silent in this regard.</p> <p>Insofar as it applies to Rec. 3.2(1)(d), Rec. 3.2(2) (with minor changes) was enacted in DRA 1999.</p>
8		<p>RFD18.2, Rec. 13.2: "Cohabitant" should be defined [for the purposes of Recommendation No. 3] to mean either of a man and woman who are not married to each other and who, immediately preceding the breakdown of the relationship, continuously cohabited</p> <ul style="list-style-type: none"> (a) in a conjugal relationship with each other for at least three years, or (b) in a relationship of some permanence if there is a child of the relationship.] 	<p>As just stated, for purposes of spousal support, ALRI Rec. 13.2 was enacted with minor changes in DRA 1999.</p> <p>AJ deals with the issue of definition in 5. Personal Relationships.</p>
9		<p>RFD18.2, Rec. 4.2: Alberta spousal support law should foster the equitable sharing of the economic consequences of marriage or marriage breakdown.</p>	<p>AJ does not pick this up specifically, but it follows in any event from AJ's acceptance of an analogy to <i>Divorce Act</i>: see 1.3 Assessment of Support.</p>

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
10	New Alberta legislation will allow a support obligation to be made: a. Where the persons are living separate and apart. b. Where the persons are not living separate and apart but are experiencing discord of such a degree that they cannot reasonably be expected to live together.	RFD 18.2, Rec. 5.2: The court should have the power to make an order of spousal support where (a) the spouses are living separate and apart, or (b) although the parties are not living separate and apart, they are, in the opinion of the court, experiencing marital discord of such a degree that they cannot reasonably be expected to live together as spouses.	AGREE with AJ paras. a. and b. These incorporate ALRI RFD 18.2, Rec. 5.2 which were enacted in DRA 1999.
11	c. Where the persons are not living separate and apart, but one person has refused or neglected to provide the other, without sufficient cause, with food and other necessities when able to do so.		DISAGREE with addition of AJ para. c. The inclusion of this provision contrasts with ALRI's view that state intervention to enforce support obligations during an on-going marriage / relationship is not appropriate. The state should not be telling intact families how to regulate their affairs.
12			The AJ position invites the questions: <i>Should the standard for assessing support vary depending on whether the relationship is on-going or broken down? What should be the basis for court jurisdiction: disputes arising from economic dependency or disputes arising from marriage breakdown?</i>

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
13			The retention of the language of desertion and court intervention in cases of failure to provide necessities during an on-going marriage (relationship) appears to reintroduce the idea of support based on one spouse’s (partner’s) ability to pay and the other spouse’s (partner’s) need for financial support instead of criteria analogous to those set out in the <i>Divorce Act</i> . In other words, it appears that there would be two different tests for assessing support, one for situations arising while the parties continue to live as partners and another for situations where the relationship has broken down.
14			<i>What purpose would para. c serve?</i> From a practical perspective, it is not clear from the Workbooks what AJ would achieve by including this provision. The reference to necessities invites interpretation based on the complexities of a long body of out-dated case law. New criteria for determining “necessities” would be needed. It is difficult to envisage the harmonious continuation of a marriage (relationship) in which one party takes court action in order to prove that the other has refused or neglected without sufficient cause to provide necessities.

1.3 Assessment of Support

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
15	Alberta Justice proposes that Alberta's legislation concerning support obligations use the language, rationale and criteria of the federal <i>Divorce Act</i> . This move would make Alberta's law consistent with federal legislation.	RFD18.2, Rec. 6.2: (1) Alberta should retain the approach of judicial discretion to spousal support but enact objectives for spousal support combined with factors for the court to consider in making a spousal support order.	AGREE. AJ position reflects RFD18.2, Rec. 6.2, recommending that Alberta enact the <i>Divorce Act</i> objectives for spousal support combined with the <i>Divorce Act</i> factors for the court to consider.
16		(2) Spousal support orders made under Alberta legislation should <ul style="list-style-type: none"> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to an order for child support, (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage, and (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. 	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
17		(3) Alberta legislation should direct the court, in an application for spousal support, to take into consideration the condition, means, needs and other circumstances of each spouse, including (a) the length of time the spouses cohabited, (b) the functions performed by the spouse during cohabitation, and (c) any order, agreement or arrangement relating to support of the spouse.	ALRI RFD18.2, Rec. 6.2(3), borrowed from the <i>Divorce Act</i> , was enacted in DRA 1999.

1.4 Marital Misconduct

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
18	It is proposed that, as with the <i>Divorce Act</i> , evidence of marital misconduct (i.e., adultery, cruelty) no longer be required to give the court jurisdiction to make a support order. Generally, marital misconduct would no longer be considered in the assessment of support. Only economic implications - either regarding the need for support or regarding the ability to pay - would be considered.	RFD18.2, Rec. 7.2: Alberta legislation should provide that, in determining the amount of spousal support, the court (1) shall consider only conduct that (a) arbitrarily or unreasonably precipitates, prolongs or aggravates the need for support, (b) arbitrarily or unreasonably prolongs the period of time required by the person being supported to prepare themselves to assume responsibility for their own support, or (c) unreasonably affects the ability to pay support, and (2) shall not consider any other conduct.	AGREE. AJ position reflects ALRI RFD18.2, Rec. 7.2

1.5 Second Families

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
19	Issue for discussion: Obligations to a second family of a spouse paying support.		
20	Background: It is proposed that new legislation provide that child support should take priority over spousal support if the paying spouse has limited resources. This is consistent with provisions under the federal <i>Divorce Act</i> .	RFD18.2, Rec. 9.2: Child support should take priority over spousal support. RFD18.3, Rec. 2.3: Alberta legislation should expressly require the court, where it is considering applications for child support and spousal support, to give priority to child support in determining the applications.	AGREE. AJ position reflects ALRI Recs.
21	The new law will also allow judicial discretion to be used in determining the degree to which a paying spouse's legal obligations to a second family and any other person impacts his or her ability to pay spousal support. It is suggested that the legislation provide the court with a number of factors to consider as part of the assessment. These factors include:	RFD18.2, Rec. 8.2: Alberta legislation should direct the court to have regard to	AGREE.
22	• The legal obligation of the paying spouse to provide support for any other person.	(a) the legal obligation of the spouse having the support obligation to provide support for any other person,	AGREE.
23	• The legal or non-legal responsibilities of the paying spouse towards any dependent member of his or her household.	(b) the responsibilities of the spouse having the support obligation towards any dependent member of their household, whether or not the responsibility is a legal obligation,	AGREE.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
24	<ul style="list-style-type: none"> The extent to which a second spouse contributes towards household expenses and thereby increases the ability of the paying spouse to support prior family dependents. 	(c) the extent to which a second spouse contributes towards household expenses and thereby increases the ability of the spouse having the support obligation to support prior family dependants, and	AGREE.
25	<ul style="list-style-type: none"> The legal or non-legal responsibility of a new partner to support the spouse claiming support. 	(d) the responsibility of a new partner to support the spouse claiming support, whether or not the responsibility is a legal one.	AGREE.

AJ Questions:

1.5.a. Should the non-legal obligations of a spouse to support other people, as well as the non-legal responsibility to a new spouse to support a spouse claiming support, be considered by the courts?

ALRI Responses:

Yes: ALRI RFD18.2, Rec. 8.2. In one example, a spouse may be providing financial assistance to an elderly parent or disabled sibling even though they are under no legal responsibility to do so. In a relationship that exists outside of marriage, a non-legal obligation may be owed to a person who has not yet attained the formal status of “spouse” or “partner.” To cover this example, the use of the word “spouse” in the question requires clarification.

AJ Questions:

1.5.b. If yes, how could a non-legal obligation be independently verified and the potential for abuse of this non-legal obligation minimized?

ALRI Responses:

A party who is the beneficiary of a non-legal support obligation should be under a duty to disclose to the other party and to the court the benefit being received. A party who has undertaken a non-legal support obligation and asks the court to take this into consideration in assessing that person's legal support obligation should bear the burden of satisfying the court that the non-legal support obligation should be taken into account.

1.6 Natal Expenses and Pledging of Credit

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
26	It is proposed that the court be given the power to order prenatal, birth and postnatal expenses for the mother, whether or not the child survives.	RFD18.2, Rec. 10.2: Alberta legislation should empower the court to include prenatal, birth and postnatal support for the mother in a spousal support order, whether or not the child survives the birth.	AGREE. AJ position is consistent with RFD18.2, Rec. 10.2; RFD18.3, Rec. 15.3; and RFD18.3, Rec. 16.3.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
27	This would extend a power available to the court now in the case of unmarried mothers under the <i>Parentage and Maintenance Act</i> .		RECOMMEND: The court jurisdiction under the <i>Parentage and Maintenance Act</i> lies with the Court of Queen’s Bench. The jurisdiction being proposed should be conferred on the Provincial Court as well as the Court of Queen’s Bench.
28		RFD18.3, Rec. 15.3: Where no spousal support order has been made in connection with this expense, Alberta legislation should empower the court to order a parent to pay	
29		(a) reasonable expenses for the support of the mother (i) during a period not exceeding 3 months preceding the birth of the child, (ii) at the birth of the child, and (iii) during a period after the birth of the child that, in the opinion of the Court, is necessary as a consequence of the birth of the child;	
30		(b) costs of any or all Court proceedings taken under this Act.	
31		RFD18.3, Rec. 16.3: Alberta legislation should empower the court to order a parent to pay (a) burial expenses for the child; (b) burial expenses for the mother if she should die as a consequence of the pregnancy or birth.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
32	Before married women had independent legal status, a married woman did not have a separate legal existence from her husband. If her husband abandoned her, she was legally entitled to obtain the necessities of life in her husband's name. The need for this law is now outdated. It is proposed, therefore, that the common law right of a wife to pledge her husband's credit after separation be abolished. It is also proposed that the common law presumption that a deserted wife may act as an agent of her husband to render him liable for necessities, be abolished.	RFD18.2, Rec. 11.2: Alberta should abolish (a) the wife's common law right to pledge her husband's credit for necessities after separation, and (b) the common law presumption of the implied agency of a wife to render her husband liable for necessities supplied by a third party.	AGREE. AJ proposal reflects ALRI RFD18.2, Rec. 11.2.

1.7 Domestic Contracts

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
33	<i>Issue for discussion:</i> Impact of spousal support agreements on the court.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
34	Background: The federal <i>Divorce Act</i> and the provincial <i>Domestic Relations Act</i> treat an agreement between spouses dealing with spousal support differently. Under the <i>Divorce Act</i> , the court is required to take such an agreement into account, but the agreement is not binding upon it. Under the <i>Domestic Relations Act</i> , the agreement is binding unless there is an exception made. The most common exception is probably a claim that one spouse entered into the agreement without receiving independent legal advice.	RFD18.2, Rec. 12.2: (1) Alberta should enact those provisions set out in Part II, sections 17(2) and (3), 21 and 22 (1) and (2) of the draft legislation proposed in Part IV of ALRI Report No. 53, but modified (a) to specify that either spouse may apply for relief from the spousal support provisions in the domestic contract, and (b) to empower the court to make an order to vary, discharge or temporarily suspend and again revive the spousal support provisions in the contract.	DRA 1999 enacted ALRI Rep53, ss. 21, 22(1)(b), (c) and (d), and (2) with respect to an agreement containing spousal support provisions. [RSA 2000, c. D-14, s. 27.] The effect is that under the Alberta legislation an agreement prevails unless the applicant for support can satisfy the court of one of the specified exceptions, in which case the court may disregard the disagreement.
35		ALRI Rep 53 recommended: 17(2) [Dum casta clauses] A provision in a separation agreement or a provision in a marriage contract to take effect on separation whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.	
36		(3) [Idem] A provision in a separation agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.	
37		21 [Terms of domestic contract prevail.] Subject to section 17 and section 22 where there is a conflict between a provision of this Act and a domestic contract the domestic contract prevails.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
38		<p>22(1) [Discretionary powers of court.] A court may disregard any provision of a domestic contract,</p> <p>(a) if the domestic contract was made before the coming into force of this Act and was not made in contemplation of the coming into force of this Act; or</p>	
39		<p>(b) if the spouse or cohabitant who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse or cohabitant; or</p>	
40		<p>(c) if the court is satisfied that the removal by one party of barriers that would prevent the other party's remarriage within that party's faith was a consideration in the making of all or part of the agreement or settlement; or</p>	
41		<p>(d) if cohabitants who have entered into a cohabitation agreement subsequently intermarry, where the court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case.</p>	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
42		(2) The court may disregard any provision in a marriage contract or a cohabitation agreement (but not a separation agreement) where, in the opinion of the court, the circumstances [of] the parties have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were to be enforced.	

AJ Question:

1.7.a. Should new legislation follow the *Divorce Act* approach or the *Domestic Relations Act* approach?

ALRI Response:

The *Divorce Act* approach. ALRI has reconsidered its original recommendation for the *DRA* approach. We previously recommended (in ALRI RFD18.2, Rec. 12.2) that a spousal support agreement should prevail unless the applicant for support could bring themselves within one of the exceptions which we had specified. Where an exception applied, the court could disregard the agreement. In 1999, the government enacted ALRI's recommendation in Part 3 of the *DRA*. In contrast, the *Divorce Act* requires the court to take a spousal support agreement into account, but the agreement is not binding on the court. In the interests of harmonizing federal and provincial law, ALRI now supports the *Divorce Act* approach.

1.8 Unmarried Cohabitants

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
43	Legislation that deals with unmarried cohabitants is further covered in this workbook under the section Personal Relationships.		

1.9 Spousal Support Orders

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
44	<i>Issue for discussion:</i> Variations to spousal support orders.		
45	Background: The government will continue to be able to apply for support on behalf of a person and assume the role of creditor through subrogation, as well as continuing to have the ability to assist a person to apply for support on their own behalf.	RFD18.2, Rec. 14.2: The following persons should be eligible to apply for spousal support: (a) the spouse, or (b) any other person acting on behalf of, or in the place of, the spouse.	AGREE. ALRI RFD18.2, Rec. 14.2(a) was enacted in DRA 1999. Rec. 14.2(b) was intended to accommodate subrogated claims by government.
46		RFD18.2, Rec. 16.2: The following persons should be eligible to apply for a spousal support variation order: (a) the spouse, (b) any other person acting on behalf, or in the place of, the spouse, or (c) where the spouse against whom the support order was made is deceased, that spouse's personal representative.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
47		RFD18.2, Rec. 17.2: The same persons who are eligible to apply for a spousal support order should be eligible to apply for an interim support order.	
48	It has been suggested that new legislation provide the court with the power to make a final order for spousal support that would not be subject to variation. This power would not apply to married persons, since such an order would not be binding upon a <i>Divorce Act</i> court.	RFD18.2, Rec. 38.2: Alberta legislation should provide that: (1) This section applies if an application for a spousal support order is made in proceedings in which a declaration of nullity or decree absolute of nullity is granted or a marriage-like relationship has terminated.	ALRI’s recommendation may no longer be constitutionally supportable because it recommends that marriage partners be treated differently from persons in a marriage-like relationship.
49		(2) In addition to its other powers, the court may (a) in allowing the application, order that spousal support is final and not capable of variation, and (b) in dismissing the application, order that the liability of the parties to support each other is terminated.	
		(3) Where the spouse against whom a spousal support order is made does not comply strictly with it, the order is subject to variation notwithstanding that the court has made an order under subsection (2)(a).	
50		(4) When (a) an order is made under subsection (2)(a) and the spousal support order is fully complied with, or (b) an order is made under subsection (2)(b), the liability of the parties to support each other under this Act is terminated.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
51		(5) This section does not affect the power of the court to vary provisions to secure payment of a spousal support order.	
52	It is further suggested that, while the remarriage of a person receiving support would automatically terminate a support order, this should not be the case if the person receiving support enters into a relationship that involves cohabitation. However, if this were to occur, a variation application could be made.	RFD18.2, Rec. 43.2: The remarriage of the spouse receiving support should terminate a spousal support order prospectively, except when the court issues a direction to the contrary at the time of making the order.	ALRI RFD18.2, Rec. 43.2 would allow the court to direct that remarriage will not terminate a spousal support order. AJ does not mention the possibility of conferring this power.
53		RFD18.2, Rec. 44.2: The cohabitational relationship of the spouse receiving support should not automatically terminate a spousal support order.	

AJ Questions:

1.9.a. Should the court be given the power to grant a final order of spousal support?

ALRI Responses:

No. ALRI has revisited its recommendation that the court be given power to grant a final order of spousal support. Although we think that the power to grant a final order of support has merit, recent developments in Canadian constitutional law regarding the position of cohabitants and the open-ended support obligation under the *Divorce Act* have persuaded us to depart from the position we held previously: ALRI RFD18.2, Rec. 38.2.

AJ Question:

1.9.b. Can a spousal support order be automatically terminated if the spouse receiving support enters into a new cohabitational relationship but does not remarry, or should entry into such a relationship only form the basis of a variation application?

ALRI Response:

Entry into a new cohabitational relationship should form the basis for variation, not termination: ALRI RFD18.2, Rec. 44.2. ALRI has revisited its position on the automatic termination of support. We now think that neither remarriage nor entry into a new cohabitational relationship should trigger the automatic termination of support.

Previously, we had recommended that the remarriage of the spouse receiving support should terminate a spousal support order prospectively, except where a court orders differently. We now endorse harmonization with the *Divorce Act* under which remarriage is a relevant factor but it is not decisive of the support issue. By analogy (applying the harmonization principle to cohabitational relationships) and consistent with our previous recommendation, we take the position that although the existence of a new cohabitational relationship may provide grounds for variation of a spousal support order, it should not automatically terminate it.

[Application by a Minor Spouse]

53		RFD18.2, Rec. 15.2: Alberta legislation should enable a minor who is a spouse to commence, conduct or defend a support claim without the intervention of a next friend or guardian <i>ad</i>	AJ does not comment on the ability of a minor to apply for support independently.
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FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

[Topic headings follow Alberta Justice Technical Workbook]

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FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

2. CHILD SUPPORT

Overview

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
1	The federal government has responsibility for child support matters at the time of divorce. Provincial legislation deals with the support of children in all other cases, including after a divorce if no federal order for support has been made.		
2	In Alberta, several pieces of legislation deal with child support. These include the <i>Maintenance Order Act</i> , <i>Domestic Relations Act</i> , <i>Parentage and Maintenance Act</i> , and <i>Maintenance Enforcement Act</i> . Currently, there are a number of inconsistencies between these Acts or between these Acts and the federal <i>Divorce Act</i> . Family Law Reform is attempting to eliminate these inconsistencies.		

2.1 Child Support

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
3	Use of federal child support guidelines is mandatory when the courts determine child support under the <i>Divorce Act</i> . And while this is not the case under current Alberta law, courts considering child support matters under provincial legislation also use the federal guidelines. To formalize this practice, it is proposed that Alberta adopt legislation that makes the use of the federal child support guidelines mandatory. It is further proposed the law recognize the following principles:	Rfd18.3, Rec. 14.3: Rather than create its own child support guidelines, Alberta should apply the Federal Child Support Guidelines, including the Schedules, to cases decided under Alberta law.	AGREE. AJ proposal follows ALRI Rec. 14.3.
4	<ul style="list-style-type: none"> • That a parent has a basic obligation to support a child. 	Rfd18.3, Rec. 4.3: Alberta legislation should set out the basic obligation of a parent to support their child.	AGREE. AJ position is consistent with ALRI Rfd18.3, Rec. 4.3.
5		Rfd18.3, Rec. 5.3: The legislated obligation to the child should: (1) be based on the parent-child relationship; (2) be owed by each of the mother and father; (3) commence on the child's birth [see below]; (4) continue until the child reaches maturity (as defined in Rec. No. 4) [SEE BELOW]; and (5) exist independently of parental custody, access or other living arrangements. [SEE BELOW]	
6		Rfd18.3, Rec. 13.3: The court should have power to make an order of child support against each parent of a child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
7	<ul style="list-style-type: none"> • That children should be treated equally. This includes children of marriages and other relationships; children of first and subsequent relationships. 	Rfd18.3, Rec. 3.3: Under Alberta legislation, children’s support rights should be the same no matter what the relationship between the child’s parents, be it marital or non-marital, cohabitational or non-cohabitational.	AGREE. AJ wording modifies the wording of Rfd18.3, Rec. 3.3 but the meaning is the same.
8	<ul style="list-style-type: none"> • That the obligation to support a child rests only with a child's parents (or a child's guardians if they are not the same as the parents). 	Rfd18.4, Rec. 9.4: A non-parent guardian should have the same powers, responsibilities, rights and duties as a parent guardian, except the duties to give the child love and affection and to support the child from the guardian’s personal resources.	<p>AGREE with respect to parents.</p> <p>DISAGREE with respect to non-parent guardians. Historically, unlike a parent, a guardian who is not a parent does not have a duty to support the child from personal resources or a duty to give the child love and affection. ALRI takes the common position that these duties should not be imposed on non-parent guardians.</p>
9			In ALRI’s view, in the case of non-parents, guardianship and support should be separate considerations. It would be contrary to a child’s best interests to deny the appointment of the person best suited for guardianship by reason of their relationship with the child because that person is not in a position, in addition, to take on the financial burden associated with raising a child.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
10			In many instances, non-parent guardianship will be granted to a member of the child's extended family (either by appointment by an existing guardian in deed or will, or by court order). In this situation, imposing a support obligation on an extended family member who is willing to assume the responsibilities of guardianship is inconsistent with the AJ proposals that the extended family support obligation within the <i>Maintenance Order Act</i> be discontinued and that the new legislation will limit the legal support obligation to parents supporting children, and to spouses. [See 1.1 under Spousal Support.]
11	• That the support obligation of a child's parents begins at the child's birth.	Rfd18.3, Rec. 5.3: The legislated obligation to the child should: (3) commence on the child's birth;	AGREE. Adopts Rfd18.3, Rec. 5.3.
12	• That child support is given priority over spousal support.	Rfd18.3, Rec. 1.3: Child support should be determined separately from spousal support.	AGREE. Adopts Rfd18.2, Rec. 9.2 and Rfd18.3, Recs. 1.3 and 2.3.
13		Rfd18.2, Rec. 9.2: Child support should take priority over spousal support.	
14		Rfd18.3, Rec. 2.3: Alberta legislation should expressly require the court, where it is considering applications for child support and spousal support, to give priority to child support in determining the applications.	

2.2 Age of Maturity

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
15	<i>Issue for discussion:</i> The age at which child support should end.		
16	<i>Background:</i> Under the federal <i>Divorce Act</i> , there is an obligation to support a child of the marriage. A child of the marriage is defined as someone under the age of majority. In Alberta, that is 18 years of age. Current Alberta legislation concerning child support varies between 16 and 18, depending on the Act. It is proposed that provincial legislation be changed to make a child's 18th birthday the consistent cut-off point for support.		
17	It is recognized in federal law and in society that some children may be independent before age 18 or require parental support after they turn 18. Two exemptions to Alberta's new age of maturity legislation are being contemplated:	Rfd18.3, Rec. 5.3: The legislated obligation to the child should: (4) continue until the child reaches maturity.	
18		Rfd18.3, Rec. 11.3: Alberta law should, in so far as practicable, promote the economic self-sufficiency of a child upon attaining, or within a reasonable period of time after the child has attained, the age of majority.	AJ Workbooks contain no statement equivalent to the principle set out in ALRI Rfd18.3, Rec. 11.3.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
19		Rfd18.3, Rec. 12.3: Alberta child support law should foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child who is under the age of majority and assistance to their child who is over the age of majority but unable, by reason of illness, disability or other cause, to provide the necessities of life for themselves.	AJ does not carry forward ALRI's distinction between the basis for the assessment of support owed by a parent to a child until, compared with after the child reaches the age of majority.
20	<ul style="list-style-type: none"> The child support obligation would end if a child has voluntarily left home before age 18 to pursue an independent lifestyle. Parents would be required to provide child support again if the child returned to his or her parents' care before the age of 18. 	Rfd18.3, Rec. 6.3: Alberta legislation should confer power on the court to order a parent to pay support for a child who (a) is under the age of majority and who has not withdrawn from their charge, or	AGREE, providing that the child's withdrawal was not caused by the parent's wrongful conduct.
21	<ul style="list-style-type: none"> The child support obligation could continue if a child 18 years of age or older cannot become independent because of illness, disability or some other cause. 	(b) is the age of majority or over and under their charge but unable, by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessities of life.	AGREE. This position promotes harmony with the <i>Divorce Act</i> .
22	There is also some debate about who should be legally liable under Alberta law to support a dependent child over the age of majority. Under the federal <i>Divorce Act</i> , separated or divorced parents have a legal obligation to support dependent children over the age of 18 if they cannot become independent because of illness, disability or some other cause. The provincial <i>Domestic Relations Act</i> uses a similar test for children over the age of 16 where the parents are separated. The <i>Alberta Maintenance Order Act</i> requires parents to support children over 16 who are handicapped or unable to work.		The Alberta provision requiring parents to support children over 16 who are handicapped or unable to work is located in Part 4 of the <i>Domestic Relations Act</i> – the Part that confers jurisdiction on the Provincial Court. Part 7 of the Act – the Part that applies to cases brought in the Court of Queen's Bench – does not contain this provision.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
23	Under the Divorce Act, courts have interpreted “other cause” to include a child who is a student pursuing further education. Some people have suggested a legal obligation to support a child 18 years of age or older attending school should be restricted to the completion of high school.		

AJ Questions:

2.2.a. Should child support by a parent continue once a child turns 18?

ALRI Responses:

Yes, in limited circumstances.

ALRI previously recommended that a distinction be drawn between the support obligation owed by parents to a child under age 18, and a child 18 years of age or more. For a child under age 18, the parental obligation would foster the equitable sharing by both parents of the provision of a reasonable standard of living to their child, as reflected in the federal Child Support Guidelines. For a child 18 years of age or over, the parental obligation would be to assist the child in limited circumstances.

AJ Questions:

ALRI Responses:

With certain exceptions, children 18 years of age or more would be required to take appropriate steps leading to their financial self-sufficiency upon attaining, or within a reasonable period of time after having attained, the age of majority: RD18.3, Rec. 11.3. Undertaking further education is one example of a step an adult child would be assisted to take in order to attain financial self-sufficiency within a reasonable period of time after turning 18. The policy of promoting the concept of financial self-sufficiency would guide developments in the law for children who have reached adult age.

The AJ Workbooks do not articulate an equivalent policy of assistance (rather than full responsibility to provide the child with a reasonable standard of living) with respect to the support obligation owed to adult children. It is silent about the adult child's responsibility to become financially self-sufficient – an expectation which society ordinarily places on adult children. It is our opinion that the law should articulate these policies.

AJ Questions:

ALRI Responses:

Since issuing our RFDs, we have rethought the implications of allowing the exceptions we recommended previously. Those exceptions were the ones identified in the *Divorce Act*, that is, in non-intact families the parents of children who are over the age of majority but unable, by reason of illness, disability or other cause, to provide the necessities of life for themselves would continue to owe a support obligation: RD18.3, Rec. 12.3. As a general matter, we hesitate to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. *See our response to questions 2.2.b and 2.2.c.*

AJ Questions:

ALRI Responses:

We do not think that the provisions of the *Divorce Act* should govern the direction of reform on these issues. Constitutionally, outside of “marriage and divorce” which is a matter for federal jurisdiction, it seems to us that the support obligations of family members is a matter for determination by the provinces under the head of “property and civil rights.” We think it questionable whether the imposition of support obligations with respect to adult children is a necessary corollary of the federal jurisdiction over “marriage and divorce.” We have not researched the matter in depth, but it does appear that these provisions may be open to constitutional challenge. In our view, the support obligations owed by parents to their adult children is an area in which the province should be setting the standard.

AJ Questions:

2.2.b. If support should continue, should there be a distinction made between intact families and families that have separated?

ALRI Responses:

Yes, but only in carefully circumscribed situations. Under ALRI's recommendations, the parental obligation to support a child exists independently of the relationship between the child's parents (married, cohabiting, living separate and apart). We have taken the position that private family law should not interfere with decision-making in intact families. We think it reasonable to assume that parents in an intact family will be able to agree on the issue of child support beyond age 18, and that their decision will reflect their shared family values. The state should not be telling parents in intact families how to bring up their children.

AJ Questions:

ALRI Responses:

In contrast, parents in a non-intact family are apt to disagree on the issue of child support both under and beyond age 18. It is therefore appropriate for the law to set the standard for child support in non-intact families in order to reduce the potential for conflict between the separated parents. At the same time, as stated in answer to question 2.2.a, in general we are hesitant to impose a greater legal burden on the parents of children in non-intact families than the law now imposes on the parents of children in intact families. A strong reason to add to the support obligation owed by parents in non-intact families should be shown.

We note, as an aside, that in situations where the law gives a right to support over age 18, the ALRI recommendations would allow the child to bring an application against the parents: RFD18.3 (Child Support), Recs. 19.3 and 22.3.

AJ Questions:

2.2.c. If support should continue, should support be limited to:

- **Children 18 years and over who have an illness or disability?**

ALRI Responses:

Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. We cannot see justification for increasing the obligations of parents in non-intact families (but not intact families) in situations where the state has an obligation to undertake an active role in caring for its most vulnerable citizens, as in the case of ill or disabled adults. In our view, the question of the respective responsibilities of parents and the state toward adult children needs further attention: see, e.g. *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, File No.: 27891. Questions of the following kind need to be addressed: What is the appropriate relationship between private and public law when it comes to caring for persons who are unable to care for themselves? In what circumstances and how should the burden be shared? In what circumstances should the burden shift to become society's responsibility?

AJ Questions:

ALRI Responses:

The province should ensure that principled policies govern the financial responsibilities of private citizens and the state, respectively, for ill, disabled or otherwise destitute adults.

As an aside, we note that the *Maintenance Order Act*, ss. 2 and 3, places a duty on parents (first the father and secondarily the mother) to maintain their adult children who are “old, lame, mentally deficient or impotent” or otherwise destitute and unable to work. (The ordinary obligation of a parent under this Act ceases when the child turns 16.) However, this Act is antiquated and it is our understanding that the duties it imposes are rarely enforced. This being so, it would be inequitable to apply it to non-intact families only.

AJ Questions:

ALRI Responses:

The *Child Welfare Act* is an example of legislation that provides for the apportionment of financial responsibility between private citizens and the state. It empowers the court to order a person who is legally responsible for the support of a child to contribute financially to the child's maintenance while in the care of child welfare authorities: see e.g. s. 31(4)(c) (temporary guardianship order) and s. 34(6)(a) (permanent guardianship order). Section 41 lists "relevant circumstances" for the court to consider in requiring a person to pay maintenance for a child under the Act. Section 128 establishes the liability of the Minister to pay costs incurred for the care and maintenance of a child in public care.

AJ Questions:

- **Children 18 years and over who are engaged in further education (i.e., attending high school, college or university)?**

- **Children 18 years and over who are otherwise unable to become independent?**

ALRI Responses:

Agree, subject to the reasonable limits that follow from imposing an obligation on the child to become financially self-sufficient within a reasonable time after turning 18. In most situations assistance to obtain a first degree (or equivalent credential) would be reasonable. The rule of thumb would be assistance for 4 years of further education. This answer promotes harmonization of the federal and provincial law because, in general, further education has been understood to fall within the definition of “other cause” under the provisions in the *Divorce Act*.

Agree, to the extent that the law imposes a support obligation on the parents of children in intact families. *See our response, p. ?, to question 2.2.c: children 18 years and over who have an illness or disability?*

2.3 Definition of Parents

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
24	Alberta Justice proposes that parents be defined as biological parents, adoptive parents or persons found by the courts to be parents.	Rfd18.3, Rec. 7.3: For purposes of child support law, Alberta should adopt the following definitions: (1) “parent” means the mother or father of a child; (2) “mother” means (a) the biological mother of the child, (b) in the case of adoption, the adoptive mother of the child, or (c) a woman who has been found by a court to be the mother of the child;	AGREE. Adopts Rfd18.3, Rec. 7.3(1), (2) and (3).
25		(3) “father” means (a) the biological father of the child, (b) in the case of adoption, the adoptive father of the child, or (c) a man who has been found by a court to be the father of the child.	
26		Rfd18.3, Rec. 8.3: For the purposes of Recommendation 7.3, (a) a woman is presumed to be the biological mother of the child where she gave birth to the child,	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
27	It is further proposed that the current presumption of parentage in the <i>Domestic Relations Act</i> be expanded to include a situation where the person cohabited with the mother of the child for at least 12 consecutive months immediately before, during or after the birth of the child and where that person has acknowledged that he is the father of the child. An acknowledgement of paternity alone would be sufficient to establish parental obligations, but not to establish parental rights.	(b) a man is presumed to be the biological father of the child where (i) he satisfies one of the criteria set out in section 63(1) of the <i>DRA</i> , but repealing section 63(1)(d) and substituting “the person cohabited with the mother of the child for at least 12 consecutive months immediately before, during or after the time of birth of the child and has acknowledged that he is the father of the child”, or (ii) he has otherwise acknowledged that he is the father of the child.	AGREE. Adopts ALRI Rfd1 8.3, Rec. 8.3(b).
28		Rfd18.3, Rec. 9.3: Where circumstances exist that give rise to a presumption under Recommendation 8.3(b) that more than one person might be the father of a child, no presumption as to paternity should be made.	
29		Rfd1 8.3, Rec. 10.3: For the purposes of child support, (a) where the court is satisfied that any one of two or more persons may be the father of a child and is unable to determine which one of them is the father, the court should be able to make an order declaring each person who, in the opinion of the court, might be a father to be a father, and	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
30		(b) where the court is satisfied that any one of two or more persons may be the mother of a child and is unable to determine which one of them is the mother, the court should be able to make an order declaring each person who, in the opinion of the court, might be a mother to be a mother.	
31	Sperm donors would have no parental obligations or rights under the proposed new legislation unless there was an agreement to the contrary. This is consistent with 1991 Uniform Law Conference of Canada legislative provisions that have been adopted by Newfoundland and the Yukon. These provisions include:		AGREE. ALRI identified the question of the parentage of children conceived with the assistance of new reproductive technologies as a “future law reform topic” in Rfd18.1 at 7.
32	<ul style="list-style-type: none"> • A man whose own genetic material was used to artificially inseminate the woman with whom he is married or cohabiting is deemed to be the biological father of a child, even if his genetic material was mixed with other genetic material. 		
33	<ul style="list-style-type: none"> • Where his own semen was not used to artificially inseminate the woman with whom he is married or cohabiting, a man is deemed to be the biological father if he consented in advance to the insemination, or if he did not consent in advance, subsequently agreed to assume the responsibilities of fatherhood, or treated the child as his own, with the full knowledge of the circumstances of conception. 		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
34	<ul style="list-style-type: none"> Unless there is a written agreement to the contrary, a man who donates semen but who is neither married to or cohabiting with the woman who receives it, is not the biological father of the child for any purpose, including any obligation to pay child support, or any entitlement to custody, access, or any other incident of guardianship. 		

2.4 Persons Standing in the Place of a Parent

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
35	<p>Issue for discussion: Child support obligations of persons standing in the place of parents.</p>		
36	<p>Background: The break-up of a marriage or other interdependent relationship is often followed by the formation of new family groups. Another adult partner often takes on the role of mother or father to children of the previous relationship. The legal obligation of such a person is not clear in provincial legislation. The federal <i>Divorce Act</i> and legislation in many other provinces dictates that a person acting in the place of a parent is legally responsible to provide child support.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
37	Alberta Justice proposes that the court have the discretion to order a person who stands in the place of a parent to pay child support. It is further proposed that a person may not unilaterally withdraw from a legal, parent-like relationship. This is consistent with Supreme Court of Canada decisions involving <i>Divorce Act</i> cases.	Rfd18.3, Rec. 18.3: Alberta legislation should give the court discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship.	AGREE. Adopts Rfd18.3, Rec. 18.3.
38	Although persons standing in the place of parents may have a legal obligation to support a child, it has been suggested that they should not fall under the same child support guidelines as a child's natural parents. Instead, the court should have discretion to make a child support order that is appropriate for the circumstances.		

AJ Question [Public Workbook]:

2.4.a. Should standard child support guidelines apply to persons acting in the place of a parent?

ALRI Response:

No. The court should have discretion to determine whether support should be paid and in what amount: see ALRI Rfd18.3, Rec. 18.3.

	[Technical Workbook]		
39	Issue for discussion: Child support obligations of persons standing in the place of parents.		
40	Background: [CONTINUATION OF BACKGROUND IN PUBLIC WORKBOOK] Determining what constitutes a parent-like relationship is not defined in Alberta law. Alberta is considering three definitions:		
41	<ul style="list-style-type: none"> A person who has lived in an interdependent relationship with the parent of a child for at least two years and has contributed to the child's maintenance for at least one year. British Columbia currently uses this standard. 		
42	<ul style="list-style-type: none"> The courts be given the discretion to decide based on the nature of the relationship. This is consistent with a Supreme Court of Canada decision regarding a recent case. 	Rfd18.3, Rec. 7.3: For purposes of child support law, Alberta should adopt the following definitions: (4) "person standing in the place of a parent" means a person who has demonstrated a settled intention to treat a child as a child of their family.	This is ALRI's position: Rfd 18.3, Rec. 7.3.
43	<ul style="list-style-type: none"> Allow the courts to use its discretion but provide some guidance by giving the court a non-exhaustive list of factors to consider. 		This could be helpful.

44	Federal child support guidelines imply that the child support obligation of the parent is greater than that of someone standing in the place of the parent. Legislation in some provinces agreed with this approach. Manitoba's legislation lists the order of priority, beginning with the natural or adoptive parents and ending with a person standing in the place of a parent who is not married or cohabitating with the child's natural or adoptive parent.		Manitoba and other examples are set out in Rfd18.3 at 109-110.
45	If more than one adult is obligated to pay child support, legislation needs to provide a method of apportioning such obligations between individuals. The following options have been suggested:		
46	<ul style="list-style-type: none"> • Allow complete judicial discretion as is found in existing federal child support guidelines. 	Rfd18.3, Rec. 18.3: Alberta legislation should give the court discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship. [REPEATED FROM ABOVE.]	AGREE. This is ALRI's recommendation: Rfd18.3, Rec. 18.3.
47	<ul style="list-style-type: none"> • Begin with the amounts owed by each payer as outlined in the federal guidelines but allow judicial discretion to change amounts based on the means, needs and circumstances of the parties involved, the nature and length of the relationship each payer has had with the child and whether such a relationship continues to exist. 		DISAGREE.
48	<ul style="list-style-type: none"> • Add the incomes of all the payers, determine the federal guideline amounts based on the total and apportion the amount pro rata based on the payers' income. 		DISAGREE.

49	<ul style="list-style-type: none"> • Apply the federal guidelines to each payer individually. 		DISAGREE.
50	<ul style="list-style-type: none"> • Reduce the previous payer's child support by the amount to be paid by the current payer. 		DISAGREE.
51	<ul style="list-style-type: none"> • Apportion child support based on each payer's ability to pay. This imposes a budget-based formula on top of federal guidelines. 		DISAGREE.
52	In a recent court decision, the Supreme Court of Canada suggested that a parent who has paid the entire amount of a child support order might be entitled to seek contributions from a parent who has failed to pay his or her share.	Rfd18.3, Rec. 36.3: Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings.	AGREE. Reflects ALRI Rfd18.3, Rec. 26.3. In this case, the words "a parent who has paid ..." should include "a person standing in the place of a parent who has paid ..." The reference to "entire amount" should be altered to refer to a "disproportionate amount."
53	To enable this to occur, the Alberta Law Reform Institute has suggested the court be given the power to add another person to a support order application that may have a support obligation to the same dependent child.	Rfd18.3, Rec. 46.3: Alberta legislation should expressly empower the court to add as a party another person who may have an obligation to provide support to the same dependent child.	AGREE. ALRI Rfd18.3, Rec. 46.3 operates prospectively as well as (potentially) retrospectively.

AJ Questions [Technical Workbook]:

2.4.a. Which definition do you think best describes a parent-like relationship? Are there changes that could be made to make one of the definitions more appropriate?

2.4.b. Should normal child support laws apply to persons acting in the place of a parent or should the court be allowed to use judicial discretion?

ALRI Responses:

ALRI recommends defining “person standing in the place of a parent” to mean “a person who has demonstrated a settled intention to treat a child as a child of their family”: RFD18.3 (Child Support), Rec. 7.3(4); it may apply even where the person has withdrawn from the relationship: RFD18.3 (Child Support), Rec. 18.3.

Judicial discretion. In cases where a person standing in the place of a parent has a duty to support a child, ALRI prefers leaving apportionment to the discretion of the court: RFD18.3 (Child Support), Rec. 18.3. As AJ observes in the Technical Workbook, allowing complete judicial discretion is the approach taken in the federal Child Support Guidelines. Under our recommendation, the court would have discretion to order that child support be paid by a person who stands or has stood in the place of a parent, even where that person has withdrawn from the relationship.

AJ Questions [Technical Workbook]:

2.4.c. Should the law recognize there are priorities among adults who are obligated to provide child support? If so, what should those priorities be?

2.4.d. Among the options presented for apportioning child support obligations between individuals, is there one that you prefer? Are there changes that could be made to one of the options that would make it more suitable?

ALRI Responses:

Yes, the law should recognize priorities among adults who are obligated to provide child support. The basic obligation should be imposed on parents: ALRI RFD18.3 (Child Support), Rec. 4.3. Parents should be as defined in RFD18.3 (Child Support), Recs. 7.3 and 8.3 with the addition of sperm donors as proposed by AJ in accordance with the 1991 Uniform Law Conference of Canada legislative provisions (see heading E.2.a below). As a general matter, the obligation of a parent, so defined, should prevail over the obligation of a person standing in the place of a parent.

We prefer judicial discretion. We have considered the AJ alternatives, some of which are discussed in the ALRI report and some of which are not, but we continue to support our original recommendation for court discretion. Choosing the alternative of discretion is consistent with the federal Child Support Guidelines and thus fosters the principle of harmonization of federal and provincial child support law.

AJ Questions [Technical Workbook]:

2.4.e Should legislation include a mechanism that allows one person to secure child support contributions from another obligated person? Should that mechanism be the one recommended by the Alberta Law Reform Institute?

ALRI Responses:

Yes, in accordance with ALRI Rfd18.3, Recs. 6.3 and 46.3.

2.5 Child Support Applications

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
54	The government will continue to be able to apply for support on behalf of a person and assume the role of creditor, as well as continuing to have the ability to assist a person to apply for support on his or her own behalf. In addition, it is proposed the following be set into law:		
55	• That a child, a parent, a person who has care and control of a child, or the government (where it is entitled) may make a child support application.	Rfd18.3, Rec. 19.3: The following persons should be eligible to apply for child support: (a) the child, or (b) any person acting on behalf, or in the place, of the child.	AGREE. Consistent with Rfd18.3, Recs. 19.3 and 26.3. Rec. 19.3(b) would come into play where the child is under age 18 and does not have capacity to bring an application on his or her own behalf.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
56		Rfd18.3, Rec. 26.3: The Alberta government should continue to assist (a) a parent or other person having the care and control of a child, ...	Where parents do not provide adequate support to a child under the age of 18 years, child welfare may become involved. That is to say, an application by government in its subrogated capacity may be more appropriate than private application on behalf of the child.
57	• That the court can, if necessary, make a child support order part of making a spousal support order.	Rfd18.3, Rec. 20.3: Where a court is satisfied that, in an application for relief made to it by or on behalf of a parent, application for support should also have been made on behalf of a child, the court may make an order for child support.	AGREE. Reflects Rfd18.3, Rec. 20.3, implying that the court may act on its own motion.
58	• That a support application can be made before a child is born but can't be heard or disposed of until after the child's birth.	Rfd18.3, Rec. 21.3: Alberta legislation should allow an application for child support to be made prior to the child's birth, but no such action should be heard or disposed of prior to the birth of the child.	AGREE. Adopts Rfd18.3, Rec. 21.3.
59	• That the same persons who can apply for child support may apply for interim support or to vary a support order.	Rfd18.3, Rec. 23.3: The same persons who are eligible to apply for a child support order should be eligible to apply for an interim support order.	AGREE. Adopts Rfd 18.3, Recs. 23.3 and 22.3(a) and (b).
60		Rfd18.3, Rec. 22.3: The following persons should be eligible to apply for a child support variation order: (a) the child, (b) any person acting on behalf, or in the place, of the child; or (c) where the person against whom the child support order was made is deceased, that person's personal representative.	In addition, ALRI would allow application for variation by the personal representative of a deceased payor parent: Rec. 22.3(c).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
61	<ul style="list-style-type: none"> That the mother or any person acting on behalf of or in place of the mother may make a child support application to cover expenses related to pregnancy. 	<p>Rfd18.3, Rec. 24.3: Where no spousal support order has been made in connection with such expenses, the following persons should be able to apply for the reasonable expenses described in Recommendation 15.3 related to the pregnancy for the support of the mother before, at and after the child's birth:</p> <ul style="list-style-type: none"> (a) the mother, or (b) any person acting on behalf, or in the place, of the mother. 	AGREE. Adopts Rfd18.3, Rec. 24.3. Also see Rfd18.2, Rec. 10.2.
62		<p>Rfd18.3, Rec. 26.3: The Alberta government should continue to assist</p> <ul style="list-style-type: none"> (b) a person who is supporting a mother or child to apply for child support or the recovery of the mother's expenses where that parent or other person is receiving, or has received, public financial assistance in order to support the child or mother, whether or not that assistance was provided directly (as in the case of social assistance) or indirectly (as in the case of a day care subsidy). 	
63	<ul style="list-style-type: none"> That any person who incurred burial expenses for a child may make a child support application to offset burial costs. 	<p>Rfd18.3, Rec. 16.3: Alberta legislation should empower the court to order a parent to pay</p> <ul style="list-style-type: none"> (a) burial expenses for the child; (b) burial expenses for the mother if she should die as a consequence of the pregnancy or birth. 	AGREE. Adopts Rfd18.3, Rec. 25.3. Also see Rfd18.3, Rec. 16.3.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
64		Rfd18.3, Rec. 25.3: Any person who has incurred burial expenses for (a) the child, or (b) the mother if her death is a consequence of the pregnancy or birth should be eligible to apply to court for reimbursement of those expenses by a parent or parents.	
65	• That a child support order be terminated upon the adoption of the child.	Rfd18.3, Rec. 40.3: Alberta legislation should provide that a child support order terminates on the adoption of the child receiving support.	AGREE. Adopts Rfd18.3, Rec. 40.3.

2.6 Child Support Agreements

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
66	Issue for discussion: Impact of child support agreements on the court.		
67	Background: Courts have never been bound by agreements between parents governing support because children are not parties to those agreements and the courts have an obligation to protect children's rights. It is suggested, however, that new legislation provide for the following:		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
68	<ul style="list-style-type: none"> The court may use its discretion regarding acceptance of a child support agreement. 	Rep53, Part IV–Draft Legislation, s. 27(1): In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.	AGREE that court should have discretion to override the provisions of a child support agreement. AJ position is consistent with ALRI Rep53, Rep53, Part IV–Draft Legislation, s. 27(1). and Rfd18.3, Rec. 17.3(a), (b) and (c).
69		Rfd18.3, Rec. 17.3: Alberta should enact those provisions set out in Part II of the draft legislation proposed in Part IV of ALRI Report No. 53 that relate to domestic contracts providing for child support, but modified (a) to extend to any child support agreement,	
70		(b) to specify that either parent or the child may apply for relief from the provisions in a child support agreement,	Rfd18.3, Rec. 17.3(b) is consistent with the ALRI recommendations on who may apply for a child support order.
71		(c) to empower the court to vary, discharge or temporarily suspend and again revive the provisions in a child support agreement,	Rfd18.3, Rec. 17.3(c) is consistent with the ALRI recommendations on the power of the court to vary a child support order.
72	<ul style="list-style-type: none"> The court may depart from child support guidelines where adequate provision has been made for a child. 		This AJ statement is consistent with the view that the court should have discretion to depart from the child support guidelines in extraordinary circumstances.
73	<ul style="list-style-type: none"> The court may order that a child support agreement constitutes a final settlement of the child support obligation and that compliance discharges all future child support claims. 	(e) to empower the court to make an order confirming whether or not the child support agreement constitutes a final settlement of the child support obligation and that compliance discharges all future child support claims.	REVISITED. [SEE ANSWER TO AJ QUESTION 2.6.A SET OUT BELOW.]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
74	<ul style="list-style-type: none"> Provisions establishing that a contract is enforceable if made in compliance with the law where the agreement was formed or with Alberta law. 	<p>ALRI Rep53, Part IV–Draft Legislation, s. 19: The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,</p> <p>(a) a contract for which the proper law is that of a jurisdiction other than Alberta is also valid and enforceable in Alberta if entered into in accordance with the internal law of Alberta;</p> <p>(b) section 17 [contracts subject to best interests of child] and section 22 [discretionary powers of court] apply in Alberta to contracts for which the proper law is that of a jurisdiction other than Alberta; and</p> <p>(c) a provision in a marriage contract or cohabitation agreement respecting the right to custody of or access to children is not valid or enforceable in Alberta.</p>	REVISITED. Varies ALRI Rep53, Part IV–Draft Legislation, s. 19.
75		<p>RFD18.3, Rec. 17.3: Alberta should enact those provisions set out in Part II of the draft legislation proposed in Part IV of ALRI Report No. 53 that relate to domestic contracts providing for child support but modified</p> <p>(d) to require the court to record its reasons where it upholds an agreement that provides for child support in an amount that is different from the amount that would be determined in accordance with the applicable child support guidelines,</p>	AJ has no equivalent provision.

AJ Question:

2.6.a Should the court be able to order that a child support agreement constitutes a final settlement of a child support obligation? Should compliance with such an order discharge all future child support claims?

ALRI Response:

No. As it did for spousal support, ALRI has revisited its recommendation that the court should be able to order the final settlement of child support: RFD18.3, Rec. 17.3(e). We are now of the view that the court should be able to exercise its discretion with respect to child support at any time an issue is raised. This position fosters harmonization with the *Divorce Act* and the common law under which, as AJ points out, the courts have never been bound by agreements between parents governing support because children are not parties to those agreements and the courts have an obligation to protect children's rights.

FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

[Topic headings follow Alberta Justice Technical Workbook]

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FAMILY LAW REFORM

ALRI and Alberta Justice Positions Compared

[April 9, 2002]

*Topic headings follow Alberta Justice Technical Workbook

**The abbreviation "DRA1999" refers to the *Domestic Relations Amendment Act, 1999*, c. 20 which amended the spousal support provisions to comply with the constitutional requirements respecting cohabitants called for by the Alberta C.A. judgment in *Taylor v. Rossu*.

*** "AJ" refers to Alberta Justice Technical Workbook

3. GUARDIANSHIP, CUSTODY AND ACCESS

Overview

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
1	<p>The law uses the concepts of guardianship, custody and access because children require adults to help them meet their needs. Guardianship is the cluster of rights and responsibilities associated with the care and raising of children. Custody and access are components of guardianship. Custody is the right to care for children full-time. Access is the right to interact with children temporarily.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
2	The <i>Divorce Act</i> deals with custody and access matters connected to divorce. In cases other than divorce, custody and access falls under provincial jurisdiction. Within Alberta's legislation, guardianship is the fundamental concept, and custody and access are components of guardianship.		
3	Six different provincial Acts (and the superior court's power to act in the best interests of the child in the absence of specific legislation) govern provincial guardianship, custody and access matters. Family Law Reform aims to consolidate and bring consistency to provincial legislation on these issues.		
4	Alberta Justice proposes that new provincial law retain guardianship as the fundamental concept and:	RFD18.4, Rec. 3.4: Alberta should enact legislation that builds on the existing concepts of guardianship, custody and access.	AGREE. AJ adopts basic ALRI approach.
5	[SUBSEQUENT WORKBOOK SECTIONS DEAL WITH EACH OF THE FOLLOWING ITEMS] <ul style="list-style-type: none"> • Define guardianship by describing a guardian's rights and responsibilities. • Describe three ways of becoming a guardian. 		
6	<ul style="list-style-type: none"> • Describe the guardianship rights of parents in an intact family. • Provide a method of determining the guardianship rights of parents in a family that is not intact. 		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
7	<ul style="list-style-type: none"> • State that decisions made about guardianship are to be made in the best interests of children. Factors that should be considered in determining the best interests of children would be described. • Provide guidelines to the court in determining whether access to children should be granted. 		

3.1 Defining Guardianship

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
8	<p>Alberta Justice proposes that guardianship be defined in legislation as the responsibility of an adult person for the care and custody of a child, including the responsibility to determine where the child lives, the responsibility for making day to day decisions associated with caring for the child, and the responsibility to make major decisions such as those involving religion, education, health and legal issues.</p>	<p>RFD18.4, Rec. 7.4: Alberta legislation should define “guardianship” and “guardian” as follows:</p> <p>(1) “guardianship” has the meaning attributed to it at common law and includes</p> <p style="padding-left: 40px;">(a) the responsibility of an adult person for the control and custody of the child, the responsibility for making decisions relating to the care and upbringing of the child and the responsibility to exercise all powers conferred by law upon a parent who is a guardian of a child, and</p> <p style="padding-left: 40px;">(b) the rights necessary to carry out this responsibility.</p> <p>(2) a “guardian” is a person who has the authority to exercise the powers of guardianship with respect to a child.</p>	<p>AJ proposal is similar to RFD18.4, Rec. 7.4. Where the parents (guardians) do not live together with the child, subject to court order otherwise, RFD 18.4, Rec. 28.4, sets out the powers, responsibilities and rights of a custodial guardian; RFD 18.4, Rec. 34.4 sets out the powers, responsibilities and rights of an access guardian.</p>

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
9	The legislation may list specific rights as part of the general definition but parents or a court could change the list, or add new rights and responsibilities to meet individual circumstances.		As just stated, the powers conferred on a guardian by law are listed in Appendix A to ALRI's response which compares the powers that ALRI recommends as the default position for the sharing of guardianship responsibilities by a custodial and non-custodial guardian

[Definition of Child]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
10		RFD18.4, Rec. 6.4: Alberta legislation should define “child”, for purposes of guardianship, as an unmarried person under 18 years of age.	Definition of “minor” in Age of Majority Act is sufficient.

3.2 Ways of Becoming a Guardian

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
11	The new law will continue to provide three ways of becoming a guardian of a child:		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Automatically		
12	1. <i>Automatically</i> - the mother will always be the guardian of a child, and the father will be the guardian of a child if he has a substantial connection to the mother.	RFD18.4, Rec. 10.4: Alberta legislation should provide: Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are (a) the mother, and	AJ statement reflects ALRI RFD18.4, Rec. 10.4. The ALRI recommendation makes the mother and father, as defined, joint guardians unless a court otherwise orders.
13		(b) the father, if (i) he was married to the mother of the child at the time of birth of the child, (ii) he was married to the mother of the child and the marriage was terminated by (A) a decree of nullity of marriage granted not more than 300 days before the birth of the child, or (B) a judgment of divorce granted not more than 300 days before the birth of the child, (iii) he cohabited with the mother of the child for at least 12 consecutive months calculated to include a period of time immediately before, during which or after the child was born and has acknowledged that he is the father of the child, or (iv) he married the mother of the child after the birth of the child and has acknowledged that he is the father of the child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	By application to the court		
14	<p>2. <i>By application to the court</i> - the court, acting in the child's best interest, will continue to have the power to appoint a person as the guardian of a child. It is proposed the new law provide:</p> <ul style="list-style-type: none"> ○ That the Provincial Court's guardianship jurisdiction will continue, but will be removed from the <i>Child Welfare Act</i>. Although the Provincial Court's jurisdiction is found in part 5 of that legislation, its jurisdiction is not limited to <i>Child Welfare Act</i> cases. ○ That the Court of Queen's Bench and the Provincial Court should have concurrent jurisdiction over guardianship. This means that if the Provincial Court has made a guardianship order, the Court of Queen's Bench could not hear another guardianship application. 	<p>RFD18.4, Rec. 11.4: The court, acting in the child's best interests, should have power to appoint a guardian of the person of a child to act jointly with any other guardian or guardians of the child or as the sole guardian of the child.</p>	<p>AJ proposal adopts RFD18.4, Rec. 11.4. ALRI made recommendations for one consistent body of substantive law that would apply regardless of the court in which the application is brought. The AJ references to removal of the guardianship provision in the <i>Child Welfare Act</i> and concurrent jurisdiction accord with ALRI's approach.</p>
15	<ul style="list-style-type: none"> ○ That the court will have the power to appoint a guardian either solely or together with another guardian or guardians and will also have the power to remove guardians. 	<p>RFD18.4, Rec. 44.4: The court should have power to make guardianship, custody or access orders in favour of one or more persons.</p>	<p>AGREE. AJ proposal on appointment is consistent with RFD18.4, Recs. 44.4 and 20.4.</p>
16		<p>RFD18.4, Rec. 20.4: The court, where it is of the opinion that the guardian's removal is in the best interests of the child, should have power to remove any guardian.</p>	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
17	<p>○ The test for the appointment of a guardian will be the best interests of the child.</p>	<p>RFD18.4, Rec. 1.4: All decisions with respect to guardianship, custody or access should be made in the best interests of the child.</p>	<p>AGREE. AJ adopts ALRI RFD18.4, Rec. 1.4. In RFD18.4, Rec. 12.4, ALRI recommends a list of factors for the court to consider in making a guardianship decision that is in the best interests of the child. This list is reproduced in Appendix B to ALRI’s response, along with comparable lists of factors for the court to consider in making custody and access decisions in the best interests of the child.</p>
18		<p>RFD18.4, Rec. 2.4: The “best interests of the child” should be the paramount consideration.</p>	<p>AJ does not state this explicitly.</p>
19	<p>○ That the following persons be eligible to apply for guardianship:</p> <ul style="list-style-type: none"> ▪ A parent of the child. ▪ A person standing in the place of a parent of the child. ▪ A relative of the child. ▪ A stepparent of the child. ▪ With the court's approval, any other person acting on behalf of the child. 	<p>RFD18.4, Rec. 38.4: The following persons should be eligible to apply for guardianship:</p> <ul style="list-style-type: none"> (a) a parent; (b) a person standing in the place of a parent in relation to a child; (c) a relative of the child; (d) a step-parent of the child; or (e) with the leave of the court, any other person on behalf of the child. 	<p>AJ proposal adopts ALRI RFD18.4, Rec. 38.4.</p>
By appointment by an existing guardian (testamentary guardianship)			
20	<p>3. <i>By appointment by an existing guardian (testamentary guardianship)</i> - the new legislation will continue to allow a guardian to appoint in a deed or a will a guardian for his or her child that will take effect after the death of the guardian.</p>	<p>RFD18.4, Rec. 13.4: A guardian of a child, either parent or non-parent, should have the power to name a guardian to act on the nominating guardian’s death.</p>	<p>Adopts RFD18.4, Rec. 13.4.</p>

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
21	Currently testamentary guardianship takes effect immediately after the death of the parent who appointed the guardian, even if the other parent is still living and competent. The testamentary guardian acts as a joint guardian with the surviving parent. It is proposed that the new law give a parent the power to appoint a testamentary guardian with the condition that such guardianship would only take effect if both parents die or if the surviving parent has a disability that prevents the parent from acting as a guardian.	RFD18.4, Rec. 14.4: Unless the nominating guardian stipulates otherwise, testamentary guardianship should take effect immediately on the nominating guardian’s death and the appointed guardian should act jointly with any other guardian of the child.	AJ’s position differs from RFD18.4, Rec. 14.4 in which ALRI recommended that, unless the nominating guardian stipulates otherwise, testamentary guardianship should take effect immediately on the nominating guardian’s death and the appointed guardian should act jointly with any other guardian of the child. It should be noted that unless a court orders otherwise, where the person named as guardian by the deceased parent / guardian does not live with the child, that person would have powers, responsibilities and rights of a non-custodial guardian under ALRI’s default provisions. The discussion in ALRI RFD18.4 at 98-109 is attached as Appendix C.
22	It is proposed that testamentary guardianship legislation also include the following provisions:		
23	<ul style="list-style-type: none"> • That the nomination of a guardian be recognized if it is made in a will or in a written document that has been signed, witnessed and dated. 	RFD18.4, Rec. 15.4: The nomination of a guardian should be effective if it is made (a) by will, or (b) in a written document that has been signed, witnessed and dated.	AGREE. Adopts RFD18.4, Rec. 15.4.
24	<ul style="list-style-type: none"> • That a guardian who appoints a testamentary guardian should be able to revoke that appointment at any time. 	RFD18.4, Rec. 16.4: The nominating guardian should be able to revoke the nomination.	AGREE. Adopts RFD18.4, Rec. 16.4.
25	<ul style="list-style-type: none"> • That the testamentary guardianship nomination should only take effect if the nominated person expressly or by his or her conduct accepts the nomination. 	RFD18.4, Rec. 17.4: A guardianship nomination should not take effect until accepted expressly, or impliedly by unequivocal conduct.	AGREE. Adopts RFD18.4, Rec. 17.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
26	<ul style="list-style-type: none"> • That if more than one person is nominated as guardian, any person so nominated can accept, even if declined by other nominated persons, unless the nominator expressly provides otherwise. 	RFD18.4, Rec. 18.4: If more than one person is nominated as a guardian, any person so nominated should be entitled to accept the nomination, even if it is declined by any other nominee, unless the nominator expressly provides otherwise.	AGREE. Adopts RFD18.4, Rec. 18.4.
27	<ul style="list-style-type: none"> • That a guardian may appoint another person to act in his or her place if the guardian is temporarily absent or incapacitated. 	RFD18.4, Rec. 19.4: A guardian should be able to appoint a person to act in their place in the event of the guardian’s temporary absence or incapacity to act as a guardian.	AGREE. Adopts RFD18.4, Rec. 19.4.
28	<ul style="list-style-type: none"> • That the court has the power to remove a testamentary guardian where the court is of the opinion that to do so is in the best interests of the child. 	RFD18.4, Rec. 20.4: The court, where it is of the opinion that the guardian’s removal is in the best interests of the child, should have power to remove any guardian.	AGREE. Adopts RFD18.4, Rec. 20.4.
29	<ul style="list-style-type: none"> • Except where an appointment or nomination provides for an earlier termination, guardianship would be terminated by the following: <ul style="list-style-type: none"> □ The guardian's resignation or death. □ The child turning 18 or marrying. □ A court order removing the guardian. 	RFD18.4, Rec. 21.4: Except where an appointment or nomination provides for earlier termination, guardianship should be terminated by <ul style="list-style-type: none"> (a) the guardian’s resignation; (b) the child <ul style="list-style-type: none"> (i) attaining the age of majority, or (ii) marrying; (c) the guardian’s death; or (d) a court order to remove the guardian. 	AGREE. Adopts RFD18.4, Rec. 21.4.
30	Issue for discussion: Testamentary guardianship in the non-intact family.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
31	<p>Background: Some people have suggested that special provision should be made for testamentary guardianship in non-intact families. For example, the law could provide that the surviving parent rather than the testamentary guardian is entitled to become the guardian, or it could provide that the surviving parent is entitled to become a joint guardian with the testamentary guardian.</p>		<p>DISAGREE. Under ALRI recommendations, any guardian would be able to appoint a guardian whose appointment would take place immediately upon the death of the guardian making the appointment. The guardian so appointed would act jointly with a surviving guardian. No distinction would be made between the situation of guardians in intact and non-intact families.</p>

AJ Questions:

3.2.a. Should there be any special provisions to deal with testamentary guardianship in a non-intact family where the parents are no longer joint guardians?

ALRI Responses:

No. See ALRI RFD18.4 (Guardianship, Custody and Access), Rec. 14.4. By way of example, AJ suggests the law could provide that the surviving parent rather than the testamentary guardian is entitled to become the guardian, or it could provide that the surviving parent is entitled to become a joint guardian with the testamentary guardian. (Under the AJ proposals, for intact families, testamentary guardianship would not take effect until after the death of a surviving parent / guardian – a position with which we disagree.

AJ Questions:

ALRI Responses (cont'd):

AJ uses the term “testamentary guardianship” to describe a guardian appointed by deed or will. For the sake of brevity, we do the same in this submission.

When we examined guardianship, we considered the ways in which guardianship could arise. We concluded that most parents should be guardians automatically as a matter of law: RFD18.4, Rec. 10.4; the court, acting in the child’s best interests, should have power to appoint or remove a guardian: RFD18.4, Recs. 11.4 and 18.4; and a guardian of the child, either parent or non-parent, should have power to name a guardian to act on the nominating guardian’s death: RFD18.4, Rec. 13.4. In the latter instance, the guardianship would take effect immediately on the nominating guardian’s death unless the nominating guardian made another stipulation: RFD18.4, Rec. 14.4.

AJ Questions:

ALRI Responses (cont'd):

We would make no distinction among guardians. That is to say, under ALRI's recommendations, any guardian would be able to appoint a guardian whose appointment would take place, in the usual case, immediately upon the death of the guardian making the appointment. The guardian so appointed would act jointly with a surviving guardian. For example, if a surviving parent is a guardian, the guardianship continues. That parent would be a guardian together with the person nominated in the appointing document. The surviving parent would have to work together with the guardian nominated by the deceased parent. If the surviving parent and the nominated guardian are unable to work out their differences, they could apply to the court for an order resolving their respective positions (as could parent guardians who live separate and apart and are unable to agree about how to share their guardianship responsibilities).

AJ Questions:

ALRI Responses (cont'd):

We would make no distinction among guardians. That is to say, under ALRI's recommendations, any guardian would be able to appoint a guardian whose appointment would take place, in the usual case, immediately upon the death of the guardian making the appointment. The guardian so appointed would act jointly with a surviving guardian. For example, if a surviving parent is a guardian, the guardianship continues. That parent would be a guardian together with the person nominated in the appointing document. The surviving parent would have to work together with the guardian nominated by the deceased parent. If the surviving parent and the nominated guardian are unable to work out their differences, they could apply to the court for an order resolving their respective positions (as could parent guardians who live separate and apart and are unable to agree about how to share their guardianship responsibilities).

AJ Questions:

ALRI Responses (cont'd):

The use of the word "joint" in AJ's question is confusing. Whether or not they are living together, under ALRI's recommendations, in the usual situation, both of a child's parents would be guardians and share in the distribution of the guardianship powers. The death of a parent guardian (or other guardian) should not change the status of a surviving parent guardian (or other guardian). Under no circumstances should a parent whose guardianship has been terminated by the court, or who never attained the status of guardian under the law, automatically become a guardian on the death of the other parent / guardian. The law should require a parent who is not a guardian but wishes to acquire the status of guardian to apply to court for an order appointing them.

3.2.b Should the responsibilities of the deceased guardian flow to the surviving guardian or to the guardian appointed by the deceased guardian?

The responsibilities of the deceased guardian should flow to the guardian appointed by the deceased guardian: RFD18.4 (Guardianship, Custody and Access), Rec. 14.4.

3.3 Guardianship in the Intact Family

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
32	Alberta Justice proposes that legislation provide each parent in an intact family with the rights, responsibilities and obligations of guardianship unless the guardians agree, or a court orders, otherwise. These rights, responsibilities and obligations will be spelled out in legislation. The legislation will assume that guardians in an intact family cooperate and work together ...	RFD18.4, Rec. 8.4: Alberta legislation should provide that, unless a court orders otherwise, where the guardian lives with the child, the guardian has all the powers, responsibilities, rights and duties of guardianship attributed to a custodial guardian by Recommendation No. 28.4.	AGREE. Under ALRI’s recommendations, where both parents live with the child, they will both have the full panoply of powers, responsibilities and rights that may be exercised by a custodial guardian.

3.4 Guardianship in the Non-intact Family

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
33	... but legislation will provide for those situations where cooperation and working together is no longer possible.		AGREE.
34	Issue for discussion: Determining parenting arrangements following a separation or where parents have never lived together.		
35	Background: Under Alberta's current law, parents who separate have two choices. They can continue to parent their children as they did prior to the separation (either informally or formally through a written agreement or court order) or they can establish a new parenting arrangement (either informally or formally through a written agreement or court order). Courts currently base their decisions on custody and access on the best interests of the child but the factors considered in determining parenting arrangements can be substantially different from case to case.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
36	Ideally, parents should agree on parenting arrangements themselves. This is often difficult for parents who have never lived together or are no longer living together because of separation or divorce. Parents that cannot agree on a suitable parenting arrangement require legislation that establishes a clear, comprehensive, and flexible mechanism for determining parenting arrangements.	RFD18.4, Rec. 4.4: Alberta law should encourage parents, or other guardians, to work out their own arrangements for sharing parenting responsibilities without requiring the use of judicial process or court order.	AGREE that legislation should establish a clear, comprehensive and flexible mechanism for determining parenting arrangements. AJ position reflects ALRI RFD18.4, Recs. 4.4 and 36.4, and Rec. 5.4. on the Sole Custody Model. See also RFD18.4, pp. 64-66 for ALRI’s discussion of three non-legislative mechanisms: parenting education, individualized parenting plans and the use of non-judicial processes to resolve parenting disputes. The flexible mechanisms should include: (1) opportunities for parents to take steps on their own volition (extra-judicial); (2) steps for parents to take on court order (court-connected); and (3) pre-trial settlement conferences involving the judiciary (judicial dispute resolution).
37		RFD18.4, Rec. 36.4: (1) The guardians of a child may enter into a written agreement with respect to matters pertaining to the upbringing of the child. (2) Where the guardians referred to in subsection (1) live together, or the agreement is made in anticipation that they will live together, that agreement shall not include the right to custody of or access to the child.	
38	• Parenting arrangements should focus on the needs and best interests of the children.	RFD18.4, Rec. 1.4: All decisions with respect to guardianship, custody and access should be made in the best interests of the child.	AGREE. Reflects ALRI RFD18.4, Rec. 1.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
39	<ul style="list-style-type: none"> Legislation should recognize the child's need for continuity of relationships after parents separate, particularly with extended family. 		AGREE. See ALRI RFD18.4, Rec. 23.4 for a list of factors for the court to consider in determining a child's best interests where parents do not live together.
40	<ul style="list-style-type: none"> Both parents whether living together or apart have a contribution to make to the children's development and well-being. 		AGREE.
41	<ul style="list-style-type: none"> All parents should be accountable for not fulfilling their parenting responsibilities. 		AGREE that all parents have responsibilities toward child. Uncertain what is meant by being "accountable for not fulfilling their parenting responsibilities." Does this mean that punitive sanctions would be imposed, or simply that lack of parental accountability would be a factor to consider in making decisions in the child's best interests?
42	<ul style="list-style-type: none"> Federal and provincial legislation on parenting roles and responsibilities should be consistent. 		AGREE. ALRI General Premise 1 is that Alberta legislation should be compatible with the federal <i>Divorce Act</i> : RFD18.1 at 51, reproduced in RFD18.4 at xiii-xiv.
43	<ul style="list-style-type: none"> Legislation to determine parenting arrangements should be clear to allow for certainty and flexible to respond to individual family circumstances and on-going child development. 		AGREE.
44	<ul style="list-style-type: none"> The legislation to determine parenting arrangements should encourage and facilitate cooperation and communication between parents. 		AGREE.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
45	In addition to the above principles, stakeholders emphasized the need for adequate support services such as counseling and education for parents and children experiencing separation and divorce.		AGREE.
46	Preliminary consultations were conducted with a cross-section of Albertans in June 2001 to discuss different models of determining parenting roles and responsibilities after separation and divorce. The consultations did not establish clear support for any particular model of parenting responsibility over another. However, from the information gathered at these meetings the following principles were identified:	RFD18.4, Rec. 5.4: The Sole Custody Model set out in Recommendations 23.4 to 35.4 should apply to parents living separate and apart who cannot agree about sharing their parenting responsibilities.	AJ avoids using the words “custody” and “access” when discussing the sharing of parenting responsibilities. In this sense, AJ does not accept ALRI’s Sole Custody Model. ALRI’s Model includes default guardianship powers, responsibilities and rights for parents who do not live together and who cannot reach their own agreement about how to share the parenting role. Under ALRI’s Model, either party could bring an application to the court for a different distribution, but court involvement would not be necessary. Under AJ’s approach, court order appears to be a necessary alternative to parent / guardian agreement.

AJ Questions:

3.4.a. Should provincial and federal legislation regarding parenting arrangements be consistent?

ALRI Responses:

AGREE, in general, that provincial and federal legislation regarding parenting arrangements should be consistent.

3.4.b. Are the attributes for parenting arrangements appropriate? What changes if any would you suggest?

Agree with AJ’s list of attributes, subject to discussion of the implications of making parents accountable for not fulfilling their responsibilities, and attention to ALRI’s lists of factors to consider in determining a child’s best interests in guardianship, custody and access cases, respectively: RFD18.4, Recs. 12.4, 23.4 and 32.4.

3.5 Best Interests of Children

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
47	Current legislation does not indicate what factors should be considered by the court in determining the best interests of children. It is proposed that new legislation include a list of factors that must be considered by the court. The court would be able to consider other factors not on the list that might be appropriate in a particular case.	RFD18.4, Rec. 22.4: Legislation should provide for the expeditious resolution, by the court, of disputes between guardians.	As noted, ALRI recommends three overlapping lists of factors for the court to consider in making guardianship, custody and access decisions: see Appendix B. ALRI’s lists are discretionary, whereas it appears that at least some portion of AJ’s list (which is set out below, lines 53, 56-76) would be mandatory.
48		RFD18.4, Rec. 42.4: The court should have wide powers of discretion in exercising jurisdiction over guardianship, custody and access.	
49		RFD18.4, Rec. 44.4: The court should have power to make guardianship, custody or access orders in favour of one or more persons.	See also line 15 above.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
50		RFD18.4, Rec. 25.4: The court, acting in the child’s best interests, should have power to make an order granting custody to any one or more persons who are guardians.	AJ is silent about restricting custody to persons who are guardians (but see comment on line 77 below).
51	It is proposed that Alberta law should provide that, in allocating the responsibilities of guardianship between guardians, courts shall ensure that the health or safety of a child should not be placed at risk.	RFD18.4, Rec. 43.4: The powers of discretion should include the power of the court, acting in the child’s best interests, to divide the incidents of guardianship among the guardians.	ALRI’s Sole Custody Model specifies the respective powers, responsibilities and rights of custodial and access parents who are unable to agree. All three lists of factors to consider (guardianship, custody and access) include consideration of the child’s health (Recs. 12.4(7)(b), 23.4(2), 32.4(2)) and safety (Rec. 12.4(11), 23.4(13), 32.4(7)). As already stated, AJ appears to contemplate only two alternatives: agreement or court-ordered division of guardianship incidents. It does not provide a default position that would apply in the absence of parental agreement or court order (see Appendix A for ALRI’s default division of guardianship incidents).
52		RFD18.4, Rec. 37.4: The court, acting in the child’s best interests, should have power to disregard any provision of a parenting agreement pertaining to the incidents of guardianship, including custody or access.	AJ is silent about the power of the court to disregard a provision in a parenting agreement. In cases brought before the Court of Queen’s Bench (but not the Provincial Court), this power may be found in the court’s <i>parens patriae</i> jurisdiction.
53	It is further proposed that Alberta law should provide that, in allocating the responsibilities of guardianship between guardians that is in the best interests of the child, the court may consider any of the following factors:	RFD18.4, Rec. 23.4: Alberta law should provide that, in making a custody determination that is in the best interests of the child, the court may consider any of the following factors:	RFD18.4, Rec. 23.4, and RFD 18.4, Rec. 29.4 list factors the court may consider in making custody and access determinations in the best interests of children.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
54			ALRI recommended separate, but similar, lists of factors for the court to consider in making guardianship, custody and access determinations. The ALRI lists are reproduced in Appendix A to this chart.
55			The AJ list builds on ALRI's list of factors to consider in making a custody determination that is in the best interests of the child. Factors 4 and 6 are government additions. Factor 19 is similar to RFD18.4, Rec. 24.4: The past conduct of the person seeking custody is irrelevant unless it affects parenting. All of the other factors are taken from the ALRI list. [COMPARE OUR FACTORS FOR ACCESS IN REC. 32.4.]
56	1. The child's age;	(1) the child's age;	
57	2. The child's; a. health, emotional well-being and special needs, b. personality, character and emotional needs, and c. physical, psychological, social and economic needs;	(2) the child's (a) health, emotional well-being and special needs, (b) personality, character and emotional needs, and (c) physical, psychological, social and economic needs;	
58	3. The nature and quality of the child's relationship with each guardian.	(3) the nature and quality of the child's relationship with each guardian;	
59	4. The impact on the child of continuing or not continuing the child's relationship with each guardian.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
60	5. The child's interaction with other persons residing in the child's household or involved in the care and upbringing of the child.	(4) the child's interaction with other persons residing in the child's household or involved in the care and upbringing of the child;	
61	6. The wishes of the child with respect to residence and contact with each guardian.		
62	7. If the child is 12 years of age or older, greater weight should be given to the views and preferences of the child.	(5) if the child is twelve years of age or older, the views and preferences of the child;	
63	8. The duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live.	(6) the duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live;	
64	9. The desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community.	(7) the desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community;	
65	10. The ability and willingness of each guardian to provide the child with guidance and education, the necessities of life and the special needs of the child.	(8) the ability and willingness of each guardian to provide the child with guidance and education, the necessities of life and the special needs of the child;	
66	11. The child's religious upbringing.	(9) the child's religious upbringing;	
67	12. The child's ethnic and cultural heritage.	(10) the child's ethnic and cultural heritage;	
68	13. The plans proposed for the care and upbringing of the child.	(11) the plans proposed for the care and upbringing of the child;	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
69	14. Contact with the child's other parent or other guardian.	(12) contact with the child's parent or other guardian;	
70	15. Whether the guardian has ever acted in a violent or abusive manner towards: a. this or any other child, or b. the child's parent or other guardian, or c. a member of their household.	(13) whether the guardian has ever acted in a violent manner towards (a) this or any other child, (b) the child's parent or other guardian, or (c) a member of their household;	
71	16. The motivation of each guardian and their capacities to give the child love, affection and guidance.	(14) the motivation of each guardian and their capacities to give the child love, affection and guidance;	
72	17. The capacity of each guardian to cooperate or to learn to cooperate in childcare.	(15) the capacity of each guardian to cooperate or to learn to cooperate in child care;	
73	18. Methods to help guardians cooperate, methods for resolving disputes and each guardian's willingness to use those methods.	(16) methods for assisting cooperation between or among guardians and resolving disputes and each guardian's willingness to use those methods;	
74	19. Where one of the guardians has acted in a violent or abusive manner as described in factor 15, the other guardian does not have an obligation to cooperate with that guardian in child care, and the provisions of factors 17 and 18 do not apply.	RFD 18.4, Rec. 24.4: The past conduct of the person seeking custody is irrelevant unless it affects parenting.	
75	20. The effect on the child if one guardian has sole authority over the child's upbringing.	(17) the effect on the child if one guardian has sole authority over the child's upbringing; and	
76	21. Any other factor the court considers relevant.	(18) any other factor the court considers relevant.	

3.6 Access to Children

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
77	Issue for discussion: Eligibility of non-guardians to have access to a child.		The wording of this issue implies that ordinarily custody and access are linked to guardianship. If this is so, then AJ would appear to accept ALRI’s recommendation restricting applications for custody to guardians: see line 50 above.
78	Background: Although some have suggested access be the right of the child, it is proposed that Alberta’s family law legislation continue to treat access as one of the rights of guardianship.	RFD18.4, Rec. 30.4: Alberta legislation should specify that access is the right of the child.	DISAGREE. This differs from ALRI position: RFD18.4, Rec. 30. ALRI recommends that legislation specify access is the right of the child, then distinguishes the access position of a non-custodial guardian and a non-guardian. RFD18.4, Rec. 34.4 stipulates that, subject to court order otherwise, a non-custodial guardian should have reasonable access to the child. The recommendations proceed from the assumption that, except where the court orders otherwise, access to both parents is in the child’s best interests and therefore the child’s right. The emphasis in guardianship should be placed on the responsibilities for, and not rights, to the child.
79	However, it is further proposed that new legislation give children a separate right of access so that a court could order continued access of the child to a person with whom the child has had frequent and positive contact, whether that person is a guardian or not.		AGREE. The distinction between the usual position of a parent / guardian and that of other persons should not be in the positioning of the “right” as one of the parent or child, but in the approach the law takes to promoting the child’s right of access to a parent / guardian in contrast to other persons.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
80	There is currently some judicial debate over whether or not a person has to be a guardian before the Provincial Court can make an access order. The proposed new law will clearly give the Provincial Court jurisdiction to make an access order in favour of someone who is not a guardian.	RFD18.4, Rec. 35.4: A non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.	AGREE. ALRI made recommendations for one body of substantive law that would apply, to the extent constitutionally allowed, regardless of the court in which the proceeding is brought.
81	The new law proposes to allow the following persons to apply for access: <ul style="list-style-type: none"> • A guardian. • A non-guardian who is: <ul style="list-style-type: none"> ○ a parent. ○ a person standing in the place of a parent. ○ a relative (e.g., grandparent). ○ a stepparent. • With leave of the court, any other person on behalf of the child. 	RFD18.4, Rec. 40.4: The following persons should be eligible to apply for access to a child: <ul style="list-style-type: none"> (a) a guardian, (b) a non-guardian who is <ul style="list-style-type: none"> (i) a parent, (ii) a person standing in the place of a parent in relation to a child, (iii) a relative of the child, (iv) a step-parent of the child, (c) with the leave of the court, any other person on behalf of the child. 	AGREE. Adopts RFD18.4, Rec. 40.4.
82	Any access order would consider the best interests of the child. It is further proposed that some restrictions be placed on persons applying for access who are not guardians to guard against potentially negative family disruptions and to respect the guardian's right to decide what is in the best interests of the child.		AGREE. Reflects RFD18.4, Rec. 35.4, recommending that a non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
83	Access applications by persons who are not guardians could be restricted to situations where the guardians or parents are not living together or where one of the guardians or parents is dead.	RFD18.4, Rec. 31.4: The court, acting in the child’s best interests, should have power to make an order granting access to a child to any one or more of the following persons: (a) a non-custodial guardian, or (b) any other person where (i) the child’s parents, if alive, are living separate and apart, or (ii) one or both of the child’s parents are deceased.	AGREE. Would be in accord with ALRI RFD18.4, Rec. 31.4. <i>Regarding custody, compare ALRI RFD18.4, Rec. 25.4: The court, acting in the child’s best interests, should have power to make an order granting custody to any one or more persons who are guardians.</i>
84	When an access application by a non-guardian was heard, it would be possible to place restrictions on access beyond the usual "in the best interests of the child" test.		ALRI did not address this point previously.
85	These restrictions could require that: • There has been frequent and positive contact in the past and that continuing contact would be in the best interests of the child.		AGREE. Under ALRI’s list of factors for the court to consider, the nature and quality of the child’s relationship with the person seeking access is a best interests consideration: Rec. 32.4(3). The requirement of “frequent and positive contact in the past” narrows the scope of the court’s best interest consideration but the outcome on a weighing of the circumstances is unlikely to be different.
	• Where a guardian is opposed to access by a person who is not a guardian, the court could not allow access unless it can be shown that it is so clearly in the best interests of the child as to make the guardian’s opposition unreasonable.		AGREE. ALRI’s list of “best interests” factors includes the wishes of the person with custody of the child: Rec. 32.4(8). The requirement that the guardian’s opposition must be shown to be unreasonable would enhance the weight given to the guardian’s wishes.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
86	Currently, grandparents are able to apply for access based on the best interests of the child. Criteria include the history of the grandparents' association with the child and the child's views and wishes. The current provision has been criticized by some because the application can be brought at any time and is not restricted to situations where the guardians are living separate and apart or where a parent is deceased.		

AJ Questions:

3.6.a. Is the list of persons who can apply for access appropriate? Should anyone be added or dropped from the list?

3.6.b. Should access applications by non-guardians be restricted to the situations where guardians or parents are not living together or where one of the guardians or parents is dead?

3.6.c. Are the proposed restrictions on access by non-guardians appropriate? Would you add or delete any of the conditions?

ALRI Responses:

Yes, the list is appropriate. No additions or deletions should be needed.

Yes, access applications by non-guardians should be restricted to these situations: ALRI RFD18.4, Rec. 31.4.

Yes, the proposed restrictions are appropriate. No additions or deletions need be made to any of the conditions.

3.6.d. Should the same conditions for access apply to grandparents as apply to other non-guardians? If not, what conditions, if any, should apply to access for grandparents?

Yes, the same conditions for access should apply to grandparents.

3.7 Child Access and Support

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
87	<i>Issue for discussion:</i> Link between access and child support.		
88	Background: Currently, case law maintains a separation between access and child support. Access is not withheld to force payment of child support, nor is child support made contingent upon receiving access. The rationale is that denying access to force payment of support, and visa versa, would cause further harm to the child.	RFD18.4, Rec. 33.4: The conferral or withholding of contact with the child should not be used to reward or punish a parent for compliance or non-compliance with the child support obligation.	AGREE: ALRI RFD18.4, Rec. 33.4.
89	However, the suggestion has been made that there may be some cases in which it would be appropriate for a court to link access and payment of support. The new law could expressly give the court the discretion to link access and support.		DISAGREE.

AJ Question:

3.7.a. Should the court have the discretion to link access and child support or should the two continue to be kept separate?

ALRI Response:

Keep separate. As we recommended in RFD18.4, Rec. 33.4, access and child support should continue to be kept separate. Access should be determined on the basis of the child's best interests being furthered by a continuing personal relationship with the non-custodial parent, not on whether the non-custodial parent does or does not pay support.

3.8 Access to Records

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
90	<i>Issue for discussion:</i> Access to a child's records by the non-custodial parent.		
91	Background: Parents who have access to their children have expressed frustration in being unable to obtain access to their children's health and education records. The <i>Divorce Act</i> gives parents the right to receive such records but does not provide an obligation upon custodial parents to provide them.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
92	It has been suggested that legislation require a custodial parent to provide records to the other parent and that third parties such as health authorities and school boards be required to provide records when served with the appropriate form, such as a copy of the court order entitling a parent to receive records.	RFD18.4, Rec. 28.4: Unless otherwise ordered by the court or agreed to by the parties in writing, the custodial guardian of the child should have the day-to-day care and control of the child, including the following powers, responsibilities and rights: (10) shall accommodate reasonable requests from a non-custodial guardian for information about matters relating to the child’s health, welfare and education [NOTE: COMPARE <i>DIVORCE ACT</i> , s. 16(5); SOME PROVINCIAL STATUTES.]	

AJ Questions:

3.8.a. Should legislation provide a mechanism that will assist parents to obtain access to records to which they are entitled?

3.8.b. What approach would be the most workable for health authorities, school boards and other third parties?

ALRI Responses:

Yes, but that mechanism should consist of placing an obligation on the parent who has custodial guardianship to provide the institution maintaining the record with written permission to release the information directly to the non-custodial guardian. The obligation should be spelled out in law and be enforceable: a) on application when the custodial guardian fails to accommodate the access guardian's (non-custodial parent's) reasonable request for information, or b) in accordance with the terms of an order made by the court when it determines access. Using this mechanisms will reduce the opportunities for conflict between the parents.

The most workable approach for third parties would be to act on the permission provided by the custodial guardian to release information directly to the non-custodial (access) guardian, or failing this, a court order for disclosure.

[Guardianship, custody and access applications]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	[Custody]		
93		RFD18.4, Rec. 39.4: Only a guardian of the child should be eligible to apply for custody.	As noted above on lines 50 and 77, AJ does not pick up this point. It may be implied.
	[Access]		
94	See line 81 above.		

[Application Before Child Born]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
95		RFD18.4, Rec. 41.4: The court should have power to grant guardianship, custody or access orders before the birth of a child but such orders should not take effect until the birth of the child.	AJ is silent.

[Notice of Change of Child’s Residence]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
96		RFD18.4, Rec. 29.4: Unless otherwise ordered by the court or agreed to by the parties in writing, at least thirty days before changing the child’s place of residence, the custodial guardian shall notify any other guardian, in writing, of the time at which the change will be made and the new place of residence of the child.	AJ does not discuss the inclusion of a requirement to give notice of an intended change of the child’s residence.

[Supervision of Custody or Access]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
97		RFD18.4, Rec. 46.4: The court should have power to give such directions as it considers appropriate for the supervision of the custody of, or access to, a child by another person or other body, provided that person or body has consented to act as supervisor.	AJ does not discuss the court’s power to make a supervisory order as part of its jurisdiction over custody and access. ALRI thought it would be useful to specify the power and requirement for the supervisor’s consent in legislation.

Guardianship in Non-Intact Families in the Absence of Parental Agreement or Court Order Otherwise

RFD18.4, Rec. 28.4: Custodial Guardian	RFD18.4, Rec. 34.4: Non-custodial Guardian
Unless otherwise ordered by the court or agreed to by the parties in writing, the custodial guardian of the child should have the day-to-day care and control of the child, including the following powers, responsibilities and rights:	Unless otherwise ordered by the court or agreed to by the parties in writing, the non-custodial guardian of the child should have reasonable access to the child, and the following powers, responsibilities and rights:
(1) may act on behalf of the child [NOTE: SEE <i>DRA</i> , s. 46(A).]	(1) with the consent of the custodial guardian, may act on behalf of the child, [NOTE: COMPARE <i>DRA</i> , s. 46(A).]
(2) may appear in court and prosecute or defend an action or proceedings in the name of the child, [NOTE: SEE <i>DRA</i> , s. 46(B).]	(2) with the consent of the custodial guardian, may appear in court and prosecute or defend an action or proceedings in the name of the child, [NOTE: COMPARE <i>DRA</i> , s. 46(B).]
(3) may decide where the child is to live, whether permanently or temporarily,	
(4) may decide with whom the child is to live and with whom the child is to associate,	
(5) may make decisions relating to the child’s education, [NOTE: REGARDING SS. (3), (4) AND (5), SEE <i>DRA</i> , s. 46(D).]	
(6) may appoint a person as guardian to act in the event of the guardian’s death or incapacity, [NOTE: COMPARE <i>DRA</i> , s. 48.]	(3) may appoint a person as guardian to act in the event of the guardian's death or incapacity, [NOTE: COMPARE <i>DRA</i> , s. 48.]
(7) shall protect the child, [NOTE: EXTREME FAILURE TO PROTECT LEADS TO <i>CWA</i> INTERVENTION.]	(4) shall protect the child, [NOTE: EXTREME FAILURE TO PROTECT LEADS TO <i>CWA</i> INTERVENTION.]
	(5) may take custody where the custodial parent dies,
(8) if a parent, shall give the child love and affection,	(6) if a parent, shall give the child love and affection,
(9) if a parent, shall provide the child with the necessities of life from the parent’s personal resources, [NOTE: COMPARE <i>MOA</i> , s. 2(2) AND (3).]	(7) if a parent, shall provide the child with the necessities of life from the parent's personal resources, [NOTE: COMPARE <i>MOA</i> , s. 2(2) AND (3).]
	(8) may maintain communication with the child and visit the child on terms as agreed by the parties or ordered by the court,
(10) shall accommodate reasonable requests from a non-custodial guardian for information about matters relating to the child’s health, welfare and education [NOTE: COMPARE <i>DIVORCE ACT</i> , s. 16(5); SOME PROVINCIAL STATUTES.]	(9) may request from the custodial guardian information about matters relating to the child's health, welfare and education, [Note: Compare Divorce Act, s. 16(5); some provincial statutes.]

RFD18.4, Rec. 28.4: Custodial Guardian	RFD18.4, Rec. 34.4: Non-custodial Guardian
	(11) may exercise guardianship powers consistent with the wishes of the custodial guardian,
(11) may discipline the child	(12) may discipline the child as reasonable when in contact with the child,
(12) may decide the child’s religious upbringing	
(13) may make medical treatment decisions,	(13) may make urgent or emergency medical treatment decisions for the child,
(14) may grant or refuse consent in matters concerning the child, <i>e.g.</i> , (a) adoption [NOTE: SEE <i>CWA</i> , SS. 56, 57.] (b) marriage [NOTE: SEE <i>MARRIAGE ACT</i> , S. 18.] (c) private guardianship [NOTE: SEE <i>CWA</i> , S. 52.] (d) change of name [NOTE: SEE <i>CHANGE OF NAME ACT</i> , SS. 7, 7.1, 11, 12.]	(14) may grant or refuse consent in matters concerning the child, <i>e.g.</i> , (a) adoption, [NOTE: SEE <i>CWA</i> , SS. 56, 57.] (b) marriage, [NOTE: SEE <i>MARRIAGE ACT</i> , S. 18.] (c) private guardianship, [NOTE: SEE <i>CWA</i> , S. 52.] (d) change of name, and [NOTE: SEE <i>CHANGE OF NAME ACT</i> , SS. 7, 7.1, 11., 12.]
(15) is entitled to receive notice of matters affecting the child, <i>e.g.</i> proceedings for (a) declaration of parentage [NOTE: SEE <i>DRA</i> , S. 66.] (b) adoption [NOTE: SEE <i>CWA</i> , S. 60.] (c) child welfare apprehension, supervision, temporary or permanent guardianship [NOTE: SEE <i>CWA</i> , SS. 18, 19, 21, 27.] (d) private guardianship [NOTE: SEE <i>CWA</i> , S. 50.].	(15) is entitled to receive notice of matters affecting the child, <i>e.g.</i> , (a) declaration of parentage, [NOTE: SEE <i>DRA</i> , S. 66.] (b) adoption, [NOTE: SEE <i>CWA</i> , S. 60.] (c) child welfare apprehension, supervision, temporary or permanent guardianship, [Note: See <i>CWA</i> , ss. 18, 19, 21 27.] (d) private guardianship. [NOTE: SEE <i>CWA</i> , S. 50.]
RFD18.4, Rec. 29.4: Unless otherwise ordered by the court or agreed to by the parties in writing, at least thirty days before changing the child’s place of residence, the custodial guardian shall notify any other guardian, in writing, of the time at which the change will be made and the new place of residence of the child.	(10) is entitled to receive at least thirty days notice from the custodial guardian of an intended change in the child's place of residence, [OR LESS IF COURT ABRIDGES TIME: SEE REC. 29.4.]

Child’s Best Interests – Factors for Court to Consider

Guardianship	Custody	Access
RFD18.4, Rec. 12.4: Alberta law should provide that, in making a guardianship decision that is in the best interests of the child, the court may consider any of the following factors:	RFD18.4, Rec. 23.4: Alberta law should provide that, in making a custody determination that is in the best interests of the child, the court may consider any of the following factors:	RFD18.4, Rec. 32.4: Alberta law should provide that, in making an access determination that is in the best interests of the child, the court may consider any of the following factors:
(1) the need for guardianship;		
(2) the motivation of the person seeking guardianship;	(14) the motivation of each guardian and their capacities to give the child love, affection and guidance;	(11) the motivation of the person seeking access and their capacity to give the child love, affection and guidance;
(3) the wishes of any existing guardian;		
(7) the suitability of the person seeking guardianship, having regard to (a) the child’s age;	(1) the child’s age;	(1) the child’s age;
(7) the suitability of the person seeking guardianship, having regard to (b) the child’s (i) health, emotional well-being and special needs, (iii) physical, psychological, social and economic needs;	(2) the child’s (a) health, emotional well-being and special needs, (b) personality, character and emotional needs, and (c) physical, psychological, social and economic needs;	(2) the child’s (a) health, emotional well-being and special needs, (b) personality, character and emotional needs, and (c) physical, psychological, social and economic needs;
(5) the child’s relationship with the person seeking guardianship;	(3) the nature and quality of the child’s relationship with each guardian;	(3) the nature and quality of the child’s relationship with the person seeking access;
	(4) the child’s interaction with other persons residing in the child’s household or involved in the care and upbringing of the child;	
(6) if the child is twelve years of age or older, the views and preferences of the child;	(5) if the child is twelve years of age or older, the views and preferences of the child;	(4) if the child is twelve years of age or older, the views and preferences of the child, which shall be given considerable weight;

Guardianship	Custody	Access
	(6) the duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live;	
(8) the ability and willingness of the person seeking guardianship to make decisions with respect to the child's guidance and education, special needs, and the provision of the necessities of life;	(8) the ability and willingness of each guardian to provide the child with guidance and education, the necessities of life and the special needs of the child;	
(9) the child's religious upbringing;	(9) the child's religious upbringing;	
(10) the child's ethnic and cultural heritage;	(10) the child's ethnic and cultural heritage;	(5) the child's ethnic and cultural heritage;
(4) the plans the person seeking guardianship has for the child, including the desirability of maintaining continuity in the child's life;	(7) the desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community;	
	(11) the plans proposed for the care and upbringing of the child;	(6) the parenting ability of the person seeking access;
		(10) the child's needs to maintain a stable schedule, to participate in activities, or to have unstructured free time;
(11) whether the person seeking guardianship has ever acted in a violent manner towards (a) this or any other child, (b) the child's parent or other guardian, or (c) a member of their household;	(13) whether the guardian has ever acted in a violent manner towards (a) this or any other child, (b) the child's parent or other guardian, or (c) a member of their household;	(7) whether the person seeking access has ever acted in a violent manner towards (a) this or any other child, (b) the child's parent or other guardian, or (c) a member of their household;
(13) the effect on the child if more than one person is appointed guardian	(17) the effect on the child if one guardian has sole authority over the child's upbringing; and	(8) the wishes of the person with custody of the child;
(14) the capacity of the person seeking guardianship to cooperate with an existing guardian;	(15) the capacity of each guardian to cooperate or to learn to cooperate in child care;	(12) the capacity of the person seeking access to cooperate or to learn to cooperate with the custodial guardian;

Guardianship	Custody	Access
(12) the connection of the person seeking guardianship with any other guardian;	(12) contact with the child's parent or other guardian;	(9) the relationship between the custodial guardian and the person seeking access;
(15) the methods for assisting cooperation in resolving disputes between guardians and the willingness of the person seeking guardianship to use those methods;	(16) methods for assisting cooperation between or among guardians and resolving disputes and each guardian's willingness to use those methods;	(13) methods for assisting cooperation with the custodial guardian and resolving disputes and the willingness of the person seeking access to use these methods;
(16) any other factor the court considers relevant.	(18) any other factor the court considers relevant.	(14) any other factor the court considers relevant.

FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

[Topic headings follow Alberta Justice Technical Workbook]

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FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

4. COURT JURISDICTION AND POWERS

NOTE: ALRI's made recommendations for a uniform substantive law that would apply to the resolution of all family law matters, regardless of the court in which the matter is raised. A corollary of this position is that, in the interests of facilitating the fullest possible access to justice in family matters, the Provincial Court should have the fullest jurisdiction that is constitutionally available to it.

Overview

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
1	Over time, some aspects of provincial legislation involving family law have become out-dated, particularly given the way in which Albertans now live their lives. Family Law Reform has identified a number of areas where the courts' jurisdiction and powers within family law could be consolidated or updated.		ALRI's Reports by and large exclude from consideration constitutional and other issues relating to court structure, the assignment of court jurisdiction and court procedures: RD18.1, pp. 10-11. This being said, the ALRI recommendations are designed with the idea that a single body of substantive law would apply no matter in what court a proceeding is brought and, further, that within the existing court structure the Provincial Court would have the broadest jurisdiction over family law that is constitutionally allowable. ALRI also made recommendations with respect to procedural powers that are necessary to the effective exercise by the courts of family law jurisdiction.

4.1 Provincial Court Jurisdiction to Make and Enforce Support Orders

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
2	Alberta Justice proposes that the Provincial Court continue to have jurisdiction to make and enforce support orders but that the requirement for the court to find matrimonial fault be eliminated.	RD18.3, Rec. 33.3: (1) Any court having jurisdiction over child support should be able to make, vary and enforce its own orders. (2) The <i>MEA</i> should be amended to confer the same powers of enforcement on courts with jurisdiction over child support to the fullest extent constitutionally allowable.	AGREE. The summary procedure provided in the <i>Domestic Relations Act</i> , Part 4, for obtaining spousal or child support is based on the out-dated notion of desertion. The jurisdiction is restricted to married persons and their children. The procedural approach is quasi-criminal. Both substantive and procedural modernization is desirable.
3	It is further proposed that the Provincial Court's jurisdiction expand to include persons in conjugal and other interdependent relationships that do not involve marriage and all children of such interdependent relationships.		AGREE with respect to marriage-like relationships between two people of the opposite or same sex, and with respect to children in any situation in which an adult has a child support obligation or guardianship, custody or access is in issue. DISAGREE with respect to “other independent relationships” and limiting jurisdiction over children to the children of persons in conjugal and other interdependent relationships.
4	There is currently some judicial debate over whether or not a person has to be a guardian before the Provincial Court can make an access order. The proposed new law will clearly give the Provincial Court jurisdiction to make an access order in favour of someone who is not a guardian.	RD18.4, Rec. 35.4: A non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.	AGREE. See 3. Guardianship, Custody and Access, line 83.

4.2 Securing Payments

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
5	The Alberta Law Reform Institute recommends that legislation give the courts the same broad range of powers for child support as it has for spousal support. This would include the following:	RD18.3, Rec. 27.3: RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (a) periodic payments [RFD No. 18.2, Recommendation No. 18.2 at 137] (b) lump sum payments, [RFD No. 18.2, Recommendation No. 19.2 at 144] (c) security for payment, [RFD No. 18.2, Recommendation No. 20.2 at 147]	AGREE: ALRI RD18.3, Rec. 27.3.
6		(d) the transfer or settlement of property. [RFD No. 18.2, Recommendation No. 21.2 at 150] (e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary or the assignment of a life insurance policy to the child, [RFD No. 18.2, Recommendation No. 23.2 at 152]	
7		(f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan, [RFD No. 18.2, Recommendation No. 24.2 at 152] (g) remedies that protect against gifts or transfers of property for inadequate consideration, or [RFD No. 18.2, Recommendation No. 25.2 at 154]	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
8		(h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child. [RFD No. 18.2, Recommendation No. 22.2 at 151].	
9	<ul style="list-style-type: none"> • Upon or after making a support order, the court for the purpose of securing payments due and to become due thereafter, may by order to any of the following: <ul style="list-style-type: none"> ▪ Charge specified property or a specified interest in property with the payments. 	RD18.2, Rec. 20.2: Alberta legislation should provide that: (1) Upon or after making a spousal support order the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following: (a) charge specified property or a specified interest in property with the payments, ...	AGREE. Embraces ALRI RD18.2, Rec. 20.2(1)(a) and (2) and RD18.3, Rec. 27.3(c) (see line 5 above).
10	Upon default in payment of the amount charged on property, the court may:	(2) Upon default in payment of an amount charged on property under paragraph (a) of subsection (1), the court may	
11	a. appoint a receiver of rents, profits or other money receivable from the property or interest.	(a) appoint a receiver of rents, profits or other money receivable from the property or interest, or	AGREE.
12	b. Order the sale of the property or interest upon notice to all persons having an interest in it.	(b) order sale of the property or interest upon notice to all persons having an interest in it, and	AGREE.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
13	c. In the event described in either paragraph (a) or (b), direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.	(c) in the event described in either paragraph (a) or (b), direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.	AGREE.
14	<ul style="list-style-type: none"> ■ Order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security interest charging specified property or a specified interest in property with the payments. ■ Order the party liable under the order or any other person on his behalf to convey specified property or a specified interest in property with the payments. ■ Suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it. 	<p>RD18.2, Rec. 20.2: Alberta legislation should provide that:</p> <p>(1) Upon or after making a spousal support order the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following:</p> <ul style="list-style-type: none"> (b) order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security instrument charging specified property or a specified interest in property with the payments, (c) order the party liable under the order or other person on his behalf to convey specified property or a specified interest in property to a trustee upon specified trusts, and (d) suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it. 	AGREE. Embraces ALRI RD18.2, Rec. 20.2(1)9b) and RD18.3, Rec. 27.3(c).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
15	<ul style="list-style-type: none"> Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter. 	RD18.2, Rec. 20.2: Alberta legislation should provide that: (3) Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter.	AGREE. Embraces ALRI RD18.2, Rec. 20.2(3) and RD18.3, Rec. 27.3(c).
16	<ul style="list-style-type: none"> Security for payment. 		AGREE. Embraces ALRI RD18.2, Rec. 20.2 and RD18.3, Rec. 27.3(c).

AJ Question:

4.2.a. Should the court have the aforementioned powers regarding child and spousal support orders?

ALRI Response:

Yes: ALRI RD18.2, Rec. 20.2 and RD18.3, Rec. 27.3(c).

4.3 Third Party Payment Orders

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
17	<i>Issue for discussion:</i> Court authority to order third party payment orders.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
18	Background: It has been suggested that legislation empower the court to order payment of spousal support to the court or to a third party for the benefit of the person receiving support.	RD18.2, Rec. 47.2: Alberta legislation should empower the court to order the payment of support into court or to a third party for the benefit of the spouse receiving support.	AGREE. Reflects ALRI RD18.2, Rec. 47.2.
19	Similarly, this legislation would allow the court to order payment of child support directly to a child, to the court or to a third party for the benefit of the child receiving the support.	RD18.3, Rec. 47.3: Alberta legislation should empower the court to order the payment of support directly to the child, or into court or to a third party for the benefit of the child receiving support.	AGREE. Reflects ALRI RD18.3, Rec. 47.3.
20	Concerns regarding such a change include interference with the custodial parent and the ability of a third party to adequately administer the payments.		The court would decide whether to grant or refuse an order on the basis of the evidence before it. It can be assumed that the before making an order, the court would have a good reason to interfere with the custodial parent and be satisfied of the third party's ability to adequately administer the payments.

AL Questions:

4.3.a. Should the court be given discretion to order third party payments or in the case of child support, to order payment directly to the child?

4.3.b. Should the court's power in this regard be restricted to only certain types of cases or circumstances?

ALRI Responses:

Yes: ALRI RD18.2, Rec. 47.2 and RD18.3, Rec. 47.3.

No. Rely on the court to exercise its discretion wisely in such matters.

4.4 Matrimonial Actions

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
21	There are a number of matrimonial laws in Alberta that are out-dated or redundant. Therefore, the following changes are proposed:		
22	<ul style="list-style-type: none"> That the law that enables the court to order a person to resume cohabitation with another person be repealed. 	Rep65, Rec. 1: We recommend that the action for a judgment of restitution of conjugal rights be abolished and that sections 2 to 4 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 1.
23	<ul style="list-style-type: none"> That the law that allows a person to seek damages for adultery be repealed. 	Rep65, Rec. 4: We recommend that the action for damages for adultery be abolished and that sections 13 and 14 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 4.
24	<ul style="list-style-type: none"> That the law that allows a married person to seek damages against a third party for inducing that person's spouse to leave the marriage, or for harbouring the deserting spouse, be repealed. 	Rep65, Rec. 5: We recommend that the action for damages for the enticement of a spouse be abolished and that section 40 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 5 and Rep65, Rec. 6.
25		Rep65, Rec. 6: We recommend that the action for damages for harbouring a spouse be abolished and that sections 41 and 42 of the <i>DRA</i> be repealed.	
26	<ul style="list-style-type: none"> That the law that allows a parent to seek damages against a third party for enticing, harbouring or seducing a child be repealed. 	Rep65, Rec. 7: We recommend that legislation be enacted to abolish the common law actions by a parent for loss of the services of a child due to enticement, harbouring or seduction.	AGREE. Adopts Rep65, Rec. 7.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
27	<ul style="list-style-type: none"> That the ordinary law of gifts be expanded to include engagement gifts, including the engagement ring. 	<p>Rep65, Rec. 9: We recommend that the following provision be enacted in Alberta:</p> <p style="padding-left: 40px;">Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.</p>	AGREE. Embodies the intent of ALRI Rep65, Rec. 9.
28	<ul style="list-style-type: none"> That the law that allows a person to ask the court to declare the validity of a marriage and grant an injunction against someone making a false claim of marriage be repealed. 	<p>Rep65, Rec. 10: We recommend that the action for jactitation of marriage be abolished and that section 44 of the <i>DRA</i> be repealed.</p>	AGREE. Adopts Rep65, Rec. 10

4.5 Judicial Separation

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
29	<p><i>Issue for discussion:</i> Retention of judicial separation as an option to divorce.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
30	Background: Judicial separation legally ends the duty of married persons to live together. Several cases of judicial separation are brought to the courts each year as an alternative to divorce although it is unknown why the parties do so. If the judicial separation option is to be retained, it's proposed that legislation remove the existing matrimonial fault requirements and bring judicial separation in line with the terms and conditions of the federal <i>Divorce Act</i> .	Rep65, Rec. 2: We recommend that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the <i>DRA</i> be repealed. Implementation of this recommendation should be deferred until appropriate remedies to restrain domestic violence have been introduced.	DISAGREE that judicial separation should be retained. AGREE that if it is retained, legislation should remove the existing matrimonial fault requirements and bring judicial separation in line with the terms and conditions of the federal <i>Divorce Act</i> .
31		Rep65, Rec. 3: We recommend that the following provision be enacted in the <i>DRA</i> : (1) For all purposes of the law of Alberta, including the determination of domicile, a person has a legal personality that is independent, separate and distinct from that of his or her spouse.	AJ does not raise the issue of the need for legislation to ensure that a married woman has full legal capacity.
32		(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.	
33		(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.	

AJ Question:

4.3.a. Are there reasons why judicial separation should be retained as an option for married persons?

ALRI Response:

We have recommended that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed: Rep65, Rec. 2. The abolition would be accompanied by the enactment of a provision making it clear that married men and married women are to be treated equally as independent persons with full legal capacity (Rep65, Rec. 3). Under our recommendations, the entitlements that come with judicial separation under the existing law would be available on the breakdown of the relationship.

4.6 Breach of Promise of Marriage

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
34	<i>Issue for discussion:</i> Retention of the right to seek damages for failure to keep a marriage commitment.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
35	<p>Background: Current Alberta family law permits a person to sue another person if that individual fails to keep a promise of marriage. It is believed by many that this law is obsolete given today's societal views of engagement and marriage. Others believe such a law still has value. Alberta Justice suggests that if the law is retained, it should be restricted to claims that seek to recover expenses incurred as a result of the marriage promise.</p>	<p>Rep65, Rec. 8: We recommend that the action for breach of promise of marriage be abolished by express statutory provision.</p>	<p>AGREE that this law is obsolete. DISAGREE that such a law still has value. AGREE that if the law is retained, it should be restricted to claims that seek to recover expenses incurred as a result of the marriage promise.</p>

AJ Question:

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

ALRI Response:

No, the right to sue should not be retained: ALRI Rep65, Rec. 8. Yes, if the right to sue is retained, claims should be restricted to recovering expenses.

4.7 Jury Act

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
36	<p>Issue for discussion: Appropriateness of a family law matter going to jury trial.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
37	Background: The Jury Act currently allows a family law matter to go to trial before a jury. The Unified Family Court Task Force questioned the appropriateness of trial by jury for such matters.		ALRI did not look at this issue.

AJ Question:

4.7.a. Should family law cases only be heard by a judge and never by jury trial?

ALRI Response:

Yes. Family law cases should only be heard by a judge. In cases involving children, we have concerns about the potential of jury trials to exacerbate conflict, contrary to the child’s best interests. We also have concerns about the inappropriate use of jury trial by a party with a controlling personality to gain an unfair advantage by prolonging the proceeding, building up costs, and giving that party more clout in negotiations. (We did not consider this matter in our earlier work.)

4.8 Matrimonial Property Act

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
38	<i>Issue for discussion:</i> Estate application by a surviving spouse.		
39	Background: It is proposed that the <i>Matrimonial Property Act</i> be amended so that upon the death of a spouse, the surviving spouse can seek the division of property acquired over the course of the marriage even if the spouses continued to reside together until death. The rights of the surviving spouse under the <i>Matrimonial Property Act</i> would be in addition to the rights of the surviving spouse under the will of the deceased spouse or upon intestacy.		AGREE. ALRI made recommendations to allow a surviving spouse to seek division of property acquired over the course of the marriage on the death of a spouse in Report No. 83 (May 2000).

AJ Question:

4.8.a. Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the *Matrimonial Property Act* when there has been a breakdown of the marriage?

ALRI Response:

Yes: ALRI Report No. 83 (May 2000).

4.9 Life Insurance and Pension Plans

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
40	<i>Issue for discussion:</i> Court authority to order designation of a spouse or child as beneficiary.		
41	<p>Background: The Alberta Law Reform Institute recommends that a court be given the authority to order a spouse or a parent who has a life insurance policy, pension plan, other benefit plan, or death benefits under a pension plan to:</p> <ul style="list-style-type: none"> • Continue to pay the premiums and designate the other spouse or child as the beneficiary under the policy or plan, either irrevocably or for such a period as is fixed by the order. 	<p>RD18.2, Rec. 23.2: Alberta legislation should authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan</p> <p>(a) to continue to pay the premiums and designate the other spouse as the beneficiary under the policy or plan, either irrevocably or for such period as is fixed by the order, ...</p>	<p>AGREE. This is ALRI RD18.2, Rec. 23.2(a) and RD18.3, Rec. 27.3(e).</p>
42		<p>RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order</p> <p>(e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary ... [RFD No. 18.2, Recommendation No. 23.2 at 152]</p>	
43	<ul style="list-style-type: none"> • Assign his or her life insurance policy to the other spouse or child. 	<p>RD18.2, Rec. 23.2: Alberta legislation should authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan</p> <p>(b) to assign his or her life insurance policy to the other spouse.</p>	<p>AGREE. This is ALRI RD18.2, Rec. 23.2 and RD18.3, Rec. 27.3(e).</p>

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
44		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (e) ... or the assignment of a life insurance policy to the child, [RFD No. 18.2, Recommendation No. 23.2 at 152]	
45	• Order that an irrevocable designation of a beneficiary be revoked.	RD18.2, Rec. 24.2: Alberta legislation should authorize a court to order that an irrevocable designation of a beneficiary under a policy of life insurance, pension plan or other benefit plan be revoked.	AGREE. This is ALRI RD18.2, Rec. 24.2 and RD18.3, Rec. 27.3(f).
46		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan, [RFD No. 18.2, Recommendation No. 24.2 at 152]	
47	The effectiveness of this recommendation with respect to public pension plans may be an issue as there is no provision in the Employment Pension Plan Act for the irrevocable designation of a beneficiary, although the regulations provide that a matrimonial property order would prevail over the member's entitlement to benefits under the plan.		

AJ Questions:

4.9.a. Should a court be given the authority to order that a spouse or child be continued as the beneficiary of any pension, benefit or life insurance plan held by a spouse or parent?

4.9.b. Should a court be given the authority to revoke an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan?

ALRI Responses:

Yes: ALRI RD18.2, Rec. 23.2(a) and RD18.3, Rec. 27.3(e).

Yes. ALRI RD18.2, Rec. 24.2 and RD18.3, Rec. 27.3(f).

4.10 Other Court Powers

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
48	There are a number of other proposed changes to the legislation regarding adjustments to the courts' power and authority. These include:		
	Adding Parties		
49	• Empower the court to add as a party another person who may have an obligation to provide child support to the same independent child.	RD18.3, Rec. 46.3: Alberta legislation should expressly empower the court to add as a party another person who may have an obligation to provide support to the same dependent child.	AGREE. Adopts RD18.3, Rec. 26.3.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
50	<ul style="list-style-type: none"> Empower the court on its own motion to add a party to guardianship, custody or access proceedings, or require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party. Alternatively, empower the court on its own motion to direct that notice of the proceedings and an opportunity to appear be given to a person who is not a party but who may want to apply to participate in the proceedings and who has a significant connection to the child.. 	RD18.4, Rec. 59.4: In proceedings with respect to guardianship, custody or access, the court should have power, on its own motion, to add a party to the proceedings, or to require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party.	AGREE. Adopts RD18.3, Rec. 59.4.
Conditional Orders			
51	<ul style="list-style-type: none"> Empower the court to order the payment of spousal or child support for a definite or indefinite period or until the happening of a specified event. The court may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just. 	RD18.2, Rec. 37.2: Alberta legislation should provide that a court may order the payment of spousal support for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	AGREE. Adopts RD18.2, Recs. 37.2 and 55.2, RD18.3, Recs. 37.3 and 55.3.
52		RD18.2, Rec. 55.2: Alberta legislation should empower the court to make any provision in an order made in connection with an application for spousal support subject to such terms and conditions as the court deems proper.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
53		RD18.3, Rec. 37.3: Alberta legislation should provide that a court may order the payment of child support for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	
54		RD18.3, Rec. 55.3: Alberta legislation should empower the court to make any provision in an order made in connection with an application for child support subject to such terms and conditions as the court deems proper.	
55	• Empower the court to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event. The court may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	RD18.4, Rec. 55.4: The court should have power to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event.	AGREE. Adopts RD18.4, Recs. 55.4 and 45.4.
56		RD18.4, Rec. 45.4: The court should have power to make a guardianship, custody or access order on such terms, conditions or restrictions as the court thinks fit and just.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Consent Orders		
57	<ul style="list-style-type: none"> Empower the court, where the parties consent to a spousal support order, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.2, Rec. 29.2: (1) Where the parties consent to a spousal support order, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.2, Rec. 29.2(1).
58	<ul style="list-style-type: none"> Empower the court, where the parties consent to a child support order and the court is satisfied that the order is in the child’s best interests, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.3, Rec. 29.3: (1) Where the parties consent to a child support order and the court is satisfied that the order is in the child’s best interests, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.3, Rec. 29.3(1).
59	<ul style="list-style-type: none"> Empower the court, where the parties consent to a guardianship, custody or access order, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.4, Rec. 47.4: (1) Where the parties consent to a guardianship, custody or access order and the court is satisfied that the order is in the child’s best interests, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.4, Rec. 47.4(1).
60	<ul style="list-style-type: none"> Enable a court granting a spousal support, child support or a guardianship, custody or access order to incorporate in its order all or part of a provision in a written agreement previously made by the parties. 	RD18.2, Rec. 29.2: (2) A court granting a spousal support order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	AGREE. Adopts RD18.2, Rec. 29.2, RD18.3, Rec. 29.3 and RD18.4, Rec. 47.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
61		RD18.3, Rec. 29.3: (2) A court granting a child support order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	
62		RD18.4, Rec. 47.4: (2) A court granting a guardianship, custody or access order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	
	Costs		
63	• Empower the court to make an order with respect to the payment of costs.	RD18.2, Rec. 56.2: Alberta legislation should empower the court to make an order with respect to the payment of costs. [spousal support]	AGREE. Adopts RD18.2, Rec. 56.2, RD18.3, Rec. 56.3 and RD18.4, Rec. 63.4.
64		RD18.3, Rec. 56.3: Alberta legislation should empower the court to make an order with respect to the payment of costs. [child support]	
65		RD18.4, Rec. 63.4: Alberta legislation should empower the court to make an order with respect to the payment of costs. [CGCA]	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
66	<ul style="list-style-type: none"> • Provide the court discretion, on an application for interim spousal support, child support or guardianship, custody and access, when it thinks it fit and just to do so, to make an order: <ul style="list-style-type: none"> • Requiring one spouse to make a payment or payments to or for the benefit of the other party on account of interim costs and disbursements of and incidental to the application. 	RD18.2, Rec. 57.2: Alberta legislation should give the court discretion, on an application for interim support, when it thinks it fit and just to do so, to make an order requiring one spouse to make a payment or payments to or for the benefit of the other party on account of interim costs and disbursements of and incidental to the application.	AGREE. Adopts RD18.2, Rec. 57.2 and RD18.3, Rec. 57.3.
67		RD18.3, Rec. 57.3: Alberta legislation should give the court discretion, on an application for interim support, when it thinks it fit and just to do so, to make an order requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.	
68	<ul style="list-style-type: none"> • Requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application. 	RD18.4, Rec. 64.4: Alberta legislation should give the court discretion, on an application for an interim order, when it thinks it fit and just to do so, to make an order requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.	AGREE. Adopts RD18.4, Rec. 64.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Death		
69	<ul style="list-style-type: none"> Provide that a spousal or child support order survives the death of the spouse or party having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i>. 	RD18.2, Rec. 39.2: Alberta legislation should provide that a spousal support order survive the death of the spouse having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i> .	AGREE. Adopts RD18.2, Rec. 29.2 and RD18.3, Rec. 38.3.
70		RD18.3, Rec. 38.3: Alberta legislation should provide that a child support order survive the death of a parent having a support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i> .	
71	<ul style="list-style-type: none"> Provide that a spousal or child support order terminate on the death of the spouse or child receiving support, except where the court expressly declares otherwise, but that arrears of support accumulated while the spouse or child was alive continue to be enforceable. 	RD18.2, Rec. 40.2: Alberta legislation should provide that a spousal support order terminate on the death of the spouse receiving support, except where the court expressly declares otherwise, but that arrears of support accumulated while the spouse was alive continue to be enforceable.	AGREE. Adopts RD18.2, Rec. 40.2 and RD18.3, Rec. 39.3.
72		RD18.3, Rec. 39.3: Alberta legislation should provide that a child support order terminate on the death of the child receiving support, except where a court expressly declares otherwise, but that arrears of support accumulated while the child was alive continue to be enforceable.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Disclosure		
73	<ul style="list-style-type: none"> Provide that in an application for a spousal or child support order, or on the written request of one of the spouses or parties not more than once a year after the making of a spousal or child support order, each spouse or party shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of court. 	<p>RD18.2, Rec. 48.2: Alberta legislation should provide that:</p> <p>(1) In an application for a spousal support order or on the written request of one of the spouses not more than once a year after the making of a spousal support order, each spouse shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.</p>	AGREE. Adopts RD18.2, Rec. 43.2(1) and RD18.3, Rec 48.3(1).
74		<p>RD18.3, Rec. 48.3: Alberta legislation should provide that:</p> <p>(1) In an application for a child support order or on the written request of one of the parties not more than once a year after the making of a child support order, each party shall serve on the others and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.</p>	
75	<ul style="list-style-type: none"> Where, in an application for a spousal or child support order, a spouse or party fails to provide a financial statement, a court on application by the other spouse or party may either set the application down for a hearing and proceed to judgment or order that the documents be provided. 	<p>RD18.2, Rec. 48.2: Alberta legislation should provide that:</p> <p>(2) Where, in an application for a spousal support order, a spouse fails to comply with subsection (1), a court on application by the other spouse, may</p> <p>(a) set the application down for a hearing and proceed to judgment, or</p> <p>(b) order that the documents be provided.</p>	AGREE. Adopts RD18.2, Rec. 48.2(2) and RD18.3, Rec. 48.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
76		RD18.3, Rec. 48.3: Alberta legislation should provide that: (2) Where, in an application for a child support order, a party fails to comply with subsection (1), a court on application by another party, may (a) set the application down for a hearing and proceed to judgment, or (b) order that the documents be provided.	
77	• Where the court proceeds to a hearing, it may draw an adverse inference against the spouse or party who failed to comply and impute income to that spouse or party in such amount as it considers appropriate.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (3) Where the court proceeds to a hearing, it may draw an adverse inference against the spouse who failed to comply with subsection (1) and impute income to that spouse in such amount as it considers appropriate.	AGREE. Adopts RD18.2, Rec. 48.2(3) and RD18.3, Rec. 48.3(3).
78		RD18.3, Rec. 48.3: Alberta legislation should provide that: (3) Where the court proceeds to a hearing, it may draw an adverse inference against the party who failed to comply and impute income to that party in such amount as it considers appropriate.	
79	• Where a spouse or party fails to comply with an order that the documents be provided, the court may: a) Strike out any of the spouse or party’s pleadings.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (4) Where a spouse fails to comply with an order that the documents be provided, the court may (a) strike out any of the spouse’s pleadings,	AGREE. Adopts RD18.2, Rec. 48.2(4) and RD18.3, Rec. 48.3(4).
80	b) Make a contempt order against the spouse or party.	(b) make a contempt order against the spouse,	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
81	c) Proceed to a hearing, in the course of which it may draw an adverse inference against the spouse or party and impute income to that spouse or party in such an amount as it considers appropriate.	(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate, and	
82	d) Award costs in favour of the other spouse or party up to an amount that fully compensates the other spouse or party for all costs incurred in the proceedings.	(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.	
83		RD18.3, Rec. 48.3: Alberta legislation should provide that: (4) Where a party fails to comply with an order that the documents be provided, the court may (a) strike out any of the party’s pleadings, (b) make a contempt order against the party, (c) proceed to a hearing, in the course of which it may draw an adverse inference against the party and impute income to that party in such amount as it considers appropriate, and (d) award costs in favour of another party up to an amount that fully compensates the other party for all costs incurred in the proceedings.	
84	• Where, after a spousal or child support order has been made, a spouse or party fails to comply with the written request of the other spouse or party not more than once a year after the making of a spousal support order or child support order to provide financial information, the court, on application, may:	RD18.2, Rec. 48.2: Alberta legislation should provide that: (5) Where, after a spousal support order has been made, a spouse fails to comply with the written request of the other spouse not more than once a year after the making of a spousal support order to provide financial information, the court, on application, may	AGREE. Adopts RD18.2, Rec. 48.2(5) and RD18.3, Rec. 48.3(5).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
85	a) Consider the non-complying spouse or party to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or	(a) consider the non-complying spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or	
86	b) Make an order requiring the other spouse or party to provide the required documents.	(b) make an order requiring the other spouse to provide the required documents.	
87		RD18.3, Rec. 48.3: Alberta legislation should provide that: (5) Where, after a child support order has been made, a party fails to comply with the written request of the other party not more than once a year after the making of a child support order to provide financial information, the court, on application, may (a) consider the non-complying party to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or (b) make an order requiring the other party to provide the required documents.	
88	• The court may, on application by the other spouse or party, in addition to or in substitution for any other penalty to which the non-complying spouse or party is liable, order that spouse or party to pay to the applicant an amount not exceeding \$5,000.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (6) The court may, on application by the other spouse, in addition to or in substitution for any other penalty to which the non-complying spouse is liable, order that spouse to pay to the applicant an amount not exceeding \$5,000.	AGREE. Adopts RD18.2, Rec. 48.2(6) and RD18.3, Rec. 48.3(6).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
89		RD18.3, Rec. 48.3: Alberta legislation should provide that: (6) The court may, on application by another party, in addition to or in substitution for any other penalty to which the non-complying party is liable, order that party to pay to the applicant an amount not exceeding \$5,000.	
Third Party [Disclosure]			
90	<ul style="list-style-type: none"> Provide that in an application for a spousal or child support order, the court may order that the employer, partner or principal, as the case may be, of a spouse, parent or other person having a spousal or child support obligation, provide the spouse, child, other parent and any other party with any information, accountings or documents that a party is entitled to request under disclosure laws. 	RD18.2, Rec. 49.2: Alberta legislation should provide that: (1) In an application for a spousal support order, the court may order that the employer, partner or principal of one spouse, as the case may be, provide the other spouse with any information, accountings or documents that a spouse is entitled to request under Recommendation No. 48.2.	AGREE. Appears to adopt RD18.2, Rec. 49.2 and RD18.3, Rec. 49.3 on financial disclosure and RD18.2, Rec. 51.2 and RD18.3, Rec. 51.3 and RD18.4, Rec. 60.4 on locating a respondent or child. However, the AJ Workbooks do not clarify what is meant by the reference to “any information, accountings or documents that a party is entitled to request under disclosure laws” nor does AJ indicate where these laws are to be found.
91		RD18.3, Rec. 49.3: Alberta legislation should provide that: (1) In an application for a child support order, the court may order that the employer, partner or principal, as the case may be, of a parent or other person having a child support obligation, provide the child, other parent and any other party with any information, accountings or documents that a party is entitled to request under Recommendation 48.3.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
92		RD18.2, Rec. 51.2: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for spousal support, the moving party needs to learn or confirm the proposed respondent's whereabouts.	
93		RD18.3, Rec. 51.3: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for child support, the moving party needs to learn or confirm the proposed respondent's whereabouts.	
94		RD18.4, Rec. 60.4: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for a child guardianship, custody or access order, the applicant needs to learn or confirm the whereabouts of the proposed respondent or child.	And see Withholding, Removal and Production of Child: RD18.4, Rec. 26.4 and RD18.4, Rec. 27.4 (lines 180 and 181 below).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
95		RD18.2, Rec. 51.2: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.	
96		RD18.3, Rec. 51.3: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.	
97		RD18.4, Rec. 60.4: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the applicant with any information that is shown on a record in the person's or public body's possession or control and that indicates the place of employment, address or location of the proposed respondent or child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
98	<ul style="list-style-type: none"> Provide that a return purporting to be signed by the employer, partner or principal may be received in evidence as prima facie proof of its contents 	RD18.2, Rec. 49.2: Alberta legislation should provide that: (2) A return purporting to be signed by the employer, partner or principal may be received in evidence as <i>prima facie</i> proof of its contents.	AGREE. Adopts RD18.2, Rec. 49.2(2) and RD18.3, Rec. 49.3(2).
99		RD18.3, Rec. 49.3: Alberta legislation should provide that: (2) A return purporting to be signed by the employer, partner or principal may be received in evidence as <i>prima facie</i> proof of its contents.	
100	[Crown Bound]	RD18.2, Rec. 52.2: Alberta legislation should provide that: The sections provided for by Recommendation No. 49.2 or Recommendation No. 51.2 (a) bind the Crown in right of Alberta, and (b) in so doing, prevail over the Alberta <i>Freedom of Information and Privacy Act</i> .	AJ does not include reference to ALRI RD18.2, Rec. 52.2 and ALRI RD18.3, Rec. 52.3 providing that the recommendations on disclosing financial information and the location of a respondent or child would bind the Crown. This may be the result of the reference to “any information any information, accountings or documents that a party is entitled to request under disclosure laws” in line 90 above, but that is not apparent on the face of the AJ Workbooks.
101		RD18.3, Rec. 52.3: Alberta legislation should provide that: The sections provided for by Recommendation No. 49.3 or Recommendation No. 51.3 (a) bind the Crown in right of Alberta, and (b) in so doing, prevail over the <i>Freedom of Information and Privacy Act</i> .	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
102	<ul style="list-style-type: none"> Provide that upon an application for a spousal or child support order, a court may order that any information, accountings or documents ordered to be provided and any examination or cross-examination thereon, be treated as confidential and not form part of the public record of the court. 	<p>RD18.2, Rec. 50.2: Alberta legislation should provide that: Upon an application for a spousal support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.2 or Recommendation No. 49.2, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.</p>	AGREE. Adopts ALRI RD18.2, Rec. 50.2 and RD18.3, Rec. 50.3.
103		<p>RD18.3, Rec. 50.3: Alberta legislation should provide that: Upon an application for a child support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.3 or Recommendation No. 49.3, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.</p>	
<i>Divorce Act Orders</i>			
104	<ul style="list-style-type: none"> Provide that the jurisdiction of the court under Alberta law to award or vary a spousal support, child support or child custody or access order continues in effect unless and until the court makes an order with respect to spousal support, child support or child custody or access in a divorce proceeding under the <i>Divorce Act</i>. 	<p>RD18.2, Rec. 41.2: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to award or vary spousal support continues in effect unless and until the court makes an order with respect to spousal support in a divorce proceeding under the <i>Divorce Act</i> (Canada).</p>	AGREE. Adopts ALRI RD18.2, Rec. 41.2(1), RD18.3, Rec. 41.3(1) and RD18.4, Rec. 56.4(1).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
105		RD18.3, Rec. 41.3: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to award or vary child support continues in effect unless and until the court makes an order with respect to child support in a divorce proceeding under the <i>Divorce Act</i> (Canada).	
106		RD18.4, Rec. 56.4: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to make or vary a child custody or access order continues in effect unless and until the court makes an order with respect to child custody or access in a divorce proceeding under the <i>Divorce Act</i> (Canada).	
107	<ul style="list-style-type: none"> • Provide that the court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> be allowed to determine the amount of arrears owing under a spousal support or child support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i>. 	RD18.2, Rec. 41.2: Alberta legislation should provide that: (2) The court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> (Canada) may determine the amount of arrears owing under a spousal support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i> (Canada).	AGREE. Adopts ALRI RD18.2, Rec. 41.2(2) and RD18.3, Rec. 41.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
108		RD18.3, Rec. 41.3: Alberta legislation should provide that: (2) The court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> (Canada) may determine the amount of arrears owing under a child support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i> (Canada).	
109	• Provide that, if a marriage is terminated by divorce or a judgment of nullity and no order is made with respect to spousal support, child support, or child custody or access in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the court under provincial law.	RD18.2, Rec. 41.2: Alberta legislation should provide that: (3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to spousal support is made in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the court under provincial law.	AGREE. Adopts ALRI RD18.2, Rec. 41.2(3), RD18.3, Rec. 41.3(3) and RD18.4, Rec. 56.4(2).
110		RD18.3, Rec. 41.3: Alberta legislation should provide that: (3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to child support is made in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
111		RD18.4, Rec. 56.4: Alberta legislation should provide that: (2) If a marriage is terminated by divorce or judgment of nullity and no order with respect to child custody or access is made in the divorce or nullity proceedings, an order for child custody or access made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.	
112	• Provide that, unless the court orders otherwise, a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of competent jurisdiction.	RD18.4, Rec. 57.4: Unless the court orders otherwise, a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of competent jurisdiction.	AGREE. Adopts ALRI RD18.4, Rec. 57.4.
Exclusive Possession of Family Home			
113	• Empower the court, in conjunction with proceedings for spousal or child support, or for child guardianship, custody or access, on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application, to grant an order for exclusive use for all or part of the family home and exclusive use of any or all household goods.	RD18.2, Rec. 22.2: Alberta should statutorily empower the court, in proceedings for spousal support, to grant orders for exclusive possession of the matrimonial home, or part thereof, and exclusive use of any or all household goods.	AGREE. Appears to adopt ALRI RD18.2, Rec. 22.2, RD18.3, Rec. 27.3 and RD18.4, Rec. 48.4. However, query whether there is a difference between “exclusive use of all or part of the family home” and “exclusive possession of the matrimonial home.”

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
114		RD18.2, Rec. 28.2: <i>The Matrimonial Property Act</i> , s. 23, and the <i>Personal Property Security Act</i> , ss. 23 and 26, as modified by the recommendations in ALRI RFD No. 14 on <i>The Matrimonial Home</i> , should apply where an application is brought in a spousal support proceeding.	AJ does not refer to RD18.2, Rec. 28.2, RD 18.3, Rec. 27.3 and RD18.4, Rec. 48.4. [The recommendations in ALRI RFD No. 14 on <i>The Matrimonial Home</i> are reproduced as Appendix D to this chart.]
115		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child. [RFD No. 18.2, Recommendation No. 22.2 at 151].	
116		RD18.4, Rec. 48.4: In conjunction with proceedings for child guardianship, custody or access, on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application, the court should have power to grant an order for exclusive use of all or part of the family home and exclusive use of any or all household goods for the benefit of a child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Fraudulent Preferences		
117	<ul style="list-style-type: none"> Provide that spousal support legislation include specific provisions to protect against gifts or transfers of property owned by a spouse for inadequate consideration. 	RD18.2, Rec. 25.2: Alberta spousal support legislation should include specific provisions to protect against gifts or transfers of property owned by a spouse for inadequate consideration.	AGREE. Adopts RD18.2, Rec. 25.2.
118	<ul style="list-style-type: none"> Empower the court with the same broad powers with respect to child support that legislation confers on the court with respect to spousal support, including the power to order remedies that protect against gifts or transfers of property for inadequate consideration. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (g) remedies that protect against gifts or transfers of property for inadequate consideration, or [RFD No. 18.2, Recommendation No. 25.2 at 154]	AGREE. Adopts RD18.3, Rec. 27.3.
	General Powers		
119	<ul style="list-style-type: none"> Empower the court to make any provision in an order made in connection with an application for spousal support or child support subject to such terms and conditions as the court deems proper. 	RD18.2, Rec. 55.2: Alberta legislation should empower the court to make any provision in an order made in connection with an application for spousal support subject to such terms and conditions as the court deems proper.	AGREE. Adopts RD18.2, Rec. 55.2 and RD18.3, Rec. 55.3.
120		RD18.3, Rec. 55.3: Alberta legislation should empower the court to make any provision in an order made in connection with an application for child support subject to such terms and conditions as the court deems proper.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Interim Orders		
121	<ul style="list-style-type: none"> Provide that the court has discretion to make an interim spousal or child support order that will be in effect in accordance with its terms until the order is varied or the application for a spousal or child support order or an appeal is adjudicated. 	RD18.2, Rec. 46.2: The court should have discretion to make an interim support order that will be in effect in accordance with its terms until the order is varied or the application for a spousal support order or an appeal is adjudicated.	AGREE. Adopts RD18.2, Rec. 46.2 and RD18.3, Rec. 45.3.
122		RD18.3, Rec. 45.3: Subject to Recommendation 46.2, an interim support order should remain in effect in accordance with its terms until the order is varied or the application for a child support order or an appeal is adjudicated.	
123	<ul style="list-style-type: none"> Provide that the court consider the same factors and pursue the same objectives in an application for an interim spousal or child support order as it would in an application for a spousal or child support order. 	RD18.2, Rec. 34.2: The court should consider the same factors and pursue the same objectives in an application for an interim spousal support order as it would in an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 34.2 and RD18.3, Rec. 34.3.
124		RD18.3, Rec. 34.3: The court should consider the same factors and pursue the same objectives in an application for an interim child support order that it would in an application for a child support order.	
125	<ul style="list-style-type: none"> Provide that the court have the same discretion and power of disposition in an application for an interim spousal or child support order that it has on an application for a spousal or child support order. 	RD18.2, Rec. 35.2: The court should have the same discretion and power of disposition in an application for an interim support order that it has on an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 35.2 and RD18.3, Rec. 35.3. Enacted with respect to spousal support in DRA 1999 amendments.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
126		RD18.3, Rec. 35.3: The court should have the same discretion and other powers of disposition in an application for an interim child support order that it has on an application for a child support order.	
127	<ul style="list-style-type: none"> • Provide that the same provisions that govern the duration of child support orders should apply to the duration of interim child support orders. 	RD18.3, Rec. 44.3: The same provisions that govern the duration of child support orders should apply to the duration of interim child support orders.	
128	<ul style="list-style-type: none"> • Empower the court to make an interim guardianship, custody or access order, including an <i>ex parte</i> interim order, as the court sees fit. 	RD18.4, Rec. 52.4: The court should have power to make an interim guardianship, custody or access order, including an <i>ex parte</i> interim order, as the court sees fit.	AGREE. Adopts RD18.4, Rec. 52.4.
129	<ul style="list-style-type: none"> • Provide that, on application for an interim guardianship, custody or access order, that the court consider the same factors and apply the same criteria as it would on the application in the main proceeding. 	RD18.4, Rec. 53.4: On an application for an interim order, the court should consider the same factors and apply the same criteria as it would on the application in the main proceeding.	AGREE. Adopts RD18.4, Rec. 53.4.
130	<ul style="list-style-type: none"> • Provide that, on application for an interim guardianship, custody or access order, that the court have the same discretion and powers of disposition as it would have on the application in the main proceeding. 	RD18.4, Rec. 54.4: On an application for an interim order, the court should have the same discretion and powers of disposition as it would on the application in the main proceeding.	AGREE. Adopts RD18.4, Rec. 54.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Land Titles Registration		
131	<ul style="list-style-type: none"> Provide that spousal support orders may be registered in any land titles office in accordance with the authority provided in the <i>Maintenance Enforcement Act</i>. 	RD18.2, Rec. 26.2: Spousal support orders should be registrable in any land titles office in accordance with the authority provided in section 17 of the <i>MEA</i> .	AGREE. Adopts RD18.4, Rec. 26.2. Enacted in DRA 1999 but with different wording.
132	<ul style="list-style-type: none"> Provide that, where the court makes an order to secure spousal support payments, that order or instrument may be registered in the same way as a mortgage of the property described in it and does not affect an interest in the property acquired in good faith and for value without notice before such registration. 	RD18.2, Rec. 27.2: Alberta legislation should provide that where the court makes an order under subsection (1) of Recommendation No. 20.2, that order or instrument (a) is registrable in the same way as a mortgage of the property described in it, and (b) does not affect an interest in the property acquired in good faith and for value without notice before such registration.	AGREE. Adopts RD18.2, Rec. 27.2.
133	<ul style="list-style-type: none"> Provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is able to be registered. 	RD18.3, Rec. 28.3: Alberta legislation should provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is registrable. [RFD No. 18.2, Recommendation No. 27.2 at 156]	AGREE. Adopts RD18.3, Rec. 28.3.
	Lump Sum Payments		
134	<ul style="list-style-type: none"> Empower the court to, on application for spousal support, make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse. 	RD18.2, Rec. 19.2: Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse.	AGREE. Adopts RD18.2, Rec. 19.2. Enacted in DRA 1999.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
135	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order lump sum payments. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (b) lump sum payments, [RFD No. 18.2, Recommendation No. 19.2 at 144]	AGREE. Adopts RD18.3, Rec. 27.3.
Periodic Payments			
136	<ul style="list-style-type: none"> • Empower the court, on application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse. This power should not be limited to the joint lives of the spouses. 	RD18.2, Rec. 18.2: (1) Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse. (2) The power should not be limited to the joint lives of the spouses.	AGREE. Adopts RD18.2, Rec. 18.2. Rec. 18.2(1) was enacted in DRA 1999.
137	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order periodic payments. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (a) periodic payments [RFD No. 18.2, Recommendation No. 18.2 at 137]	AGREE. Adopts RD18.3 Rec. 27.3(a).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Private Court Proceedings & Publication Bans		
138	<ul style="list-style-type: none"> Provide that the court has discretion to direct some degree of privacy in family proceedings provided that, if the government is a party to the proceedings, that the government may not be excluded. This discretion should include prohibiting publication of information or broadcast of identifying information relating to applications in family proceedings. 	RD18.2, Rec. 53.2: Staying within <i>Charter</i> boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	AGREE. Adopts RD18.2, Recs. 53.2 and 54.2, RD18.3, Recs. 53.3 and 54.3, and RD18.4, Recs. 61.4 and 62.4.
139		RD18.2, Rec. 54.2: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information filed in a spousal support proceeding or produced in court.	
140		RD18.3, Rec. 53.3: Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	
141		RD18.3, Rec. 54.3: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information relating to applications in family proceedings.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
142		RD18.4, Rec. 61.4: Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	
143		RD18.4, Rec. 62.4: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information relating to applications in family proceedings.	
Reconciliation			
144	• Provide that a spousal support order terminate upon cohabitation having been resumed by the parties and continued for a period of more than 90 days.	RD18.2, Rec. 42.2: A spousal support order should terminate upon cohabitation having been resumed by the parties and continued for a period of more than ninety days.	AGREE. Adopts RD18.2, Rec. 42.2.
145	• Provide that a child support order terminate where a child’s parents commence and continue, or resume and continue, to cohabit for a period of more than 90 days.	RD18.3, Rec. 42.3: A child support order should terminate where a child’s parents commence and continue, or resume and continue, to cohabit for a period of more than ninety days.	AGREE. Adopts RD18.3, Rec. 42.3.
Retroactive Application of Legislation			
146	• Legislation should expressly state that the new spousal support, child support and child guardianship, custody and access laws should operate retroactively.	RD18.2, Rec. 59.2: The legislation enacting the new spousal support law should expressly state that it operates retroactively.	AGREE. Adopts RD18.2, Rec. 59.2, RD18.3, Rec. 59.3 and RD18.4, Rec. 66.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
147		RD18.3, Rec. 59.3: The legislation enacting the new child support law should expressly state that it operates retroactively.	
148		RD18.4, Rec. 66.4: The legislation enacting the new child guardianship, custody and access law should expressly state that it operates retroactively.	
	Retroactive Orders		
149	• Provide the court with the discretion to order that spousal or child support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of the proceedings.	RD18.2, Rec. 36.2: Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings. [spousal support]	AGREE. Adopts RD18.2, Rec. 36.2 and RD18.3, Rec. 36.3.
150		RD18.3, Rec. 36.3: Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings. [child support]	
	Rules of Court		
151	• Provide that, where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family matters.	RD18.2, Rec. 58.2: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family law matters.	AGREE. Adopts RD18.2 Rec. 58.2, RD18.3, Rec. 58.3 and RD18.4, Rec. 65.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
152		RD18.3, Rec. 58.3: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family law matters.	
153		RD18.4, Rec. 65.4: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court should have discretion to apply the Alberta Rules of Court in family law matters.	
154		RD18.4, Rec. 58.4: The Rules of Court and Forms should facilitate joint applications for guardianship, custody and access.	AJ does not mention ALRI RD18.4., Rec. 58.4.
	Transfer or Settlement of Property		
155	<ul style="list-style-type: none"> Provide that the court may, in granting an application for spousal support, make an order requiring a spouse to convey or transfer property or an interest in property to or for the benefit of the other spouse. Such an order may authorize another person to execute the conveyance or transfer on behalf of the party, in order to satisfy the spousal support obligation. 	RD18.2, Rec. 21.2: Alberta legislation should provide that: (1) In granting an application for spousal support, the court may make any one or more of the following orders: (a) an order requiring one spouse to convey or transfer property or an interest in property to or for the benefit of the other spouse, or	AGREE. Adopts RD18.2, Rec. 21.2(1)(a) and (2).
156		(b) an order varying, suspending or terminating an ante-nuptial or post-nuptial settlement made on the spouses, but not so as to affect adversely the interest of a third party benefitted by the settlement.	AJ does not mention RD 18.2, Rec. 21.2(b).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
157		(2) An order under subsection (1) requiring a party to convey or transfer property may authorize another person to execute the conveyance or transfer on behalf of the party, in order to satisfy the spousal support obligation.	
158	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order the transfer or settlement of property. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (d) the transfer or settlement of property. [RFD No. 18.2, Recommendation No. 21.2 at 150]	AGREE. Adopts RD18.3, Rec. 27.3(d).
	Variations		
159	<ul style="list-style-type: none"> • Empower the court to make an order discharging, varying or suspending, prospectively and retroactively, a spousal support order or any provision thereof if the court is satisfied that: 	RD18.2, Rec. 30.2: Alberta legislation should empower the court to make an order discharging, varying or suspending, prospectively or retroactively, a spousal support order or any provision thereof if the court is satisfied that	AGREE. Adopts RD18.2, Rec. 30.2.
160	<ul style="list-style-type: none"> • A change in the condition, means, needs or other circumstances of either spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order. 	(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, or	
161	<ul style="list-style-type: none"> • Evidence of a substantial nature that was not available at the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available,	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
162	In making the variation order, the court shall take that change of circumstance or evidence into consideration.	and, in making the variation order, the court shall take that change of circumstance or evidence into consideration.	
163	<ul style="list-style-type: none"> Empower the court to make an order discharging, varying or suspending, prospectively or retroactively, a child support order or any provision thereof if the court is satisfied that: 	RD18.3, Rec. 30.3: (1) Alberta legislation should empower the court to make an order varying, suspending or discharging, prospectively or retroactively, a child support order or any provision thereof if the court is satisfied that	AGREE. Adopts RD18.3, Rec. 30.3(1).
164	<ul style="list-style-type: none"> A change of circumstances has occurred since the making of the child support order or the last variation order made in respect of that order. 	(a) a change of circumstances has occurred since the making of the child support order or the last variation order made in respect of that order, or	
165	<ul style="list-style-type: none"> Evidence of a substantial nature that was not available at the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available,	
166	In making the variation order, the court shall take that change of circumstance or evidence into consideration.	and, in making the variation order, the court shall take that change of circumstance or evidence into consideration.	
167	A change of circumstances is: <ul style="list-style-type: none"> In the case where the amount of the child support includes a determination made in accordance with child support guidelines, a change in circumstances that would result in a different child support order or any provision thereof. 	RD18.3, Rec. 30.3: (2) For the purposes of subsection (1), a change of circumstances is (a) in the case where the amount of child support includes a determination made in accordance with the applicable table in the child support guidelines, a change in circumstances that would result in a different child support order or any provision thereof,	AGREE. Adopts RD18.3, Rec. 30.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
168	<ul style="list-style-type: none"> In the case where the amount of child support does not include a determination made in accordance with child support guidelines, a change in the condition, means, needs or other circumstances of either parent or of any child who is entitled to support. 	(b) in the case where the amount of child support does not include a determination made in accordance with a table in the child support guidelines, a change in the condition, means, needs or other circumstances of either parent or of any child who is entitled to support, or	
169	<ul style="list-style-type: none"> In the case of an order made before the child support guidelines come into force, the date of the coming into force of those guidelines. 	(c) in the case of an order made before the child support guidelines come into force, the date of the coming into force of those guidelines.	
170	<ul style="list-style-type: none"> Empower the court to make an order to vary, suspend or discharge a guardianship, custody or access order if the court is satisfied that: <ul style="list-style-type: none"> A change in the condition, means, needs or other circumstances of the child or guardian has occurred since the making of the custody order or the last variation order made in respect of that order 	RD18.4, Rec. 49.4: The court should have power to vary, suspend or discharge a guardianship, custody or access order where the court is satisfied that <ul style="list-style-type: none"> (a) there has been a change in the condition, means, needs or other circumstances of the child or any guardian occurring since the making of the custody order or the last variation order made in respect of that order, or 	AGREE. Adopts RD18.4, Rec. 49.4.
171	<ul style="list-style-type: none"> Evidence of a substantial nature that was not available on the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
172	<ul style="list-style-type: none"> Provide that the court consider the same factors and pursue the same objectives in an application to vary a spousal, child support or guardianship, custody and access order as it would in an application for a spousal, child support or guardianship, custody and access order. 	RD18.2, Rec. 31.2: The court should consider the same factors and pursue the same objectives in an application to vary a spousal support order as it would in an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 31.2, RD18.3, Rec. 31.3 and RD18.4, Rec. 50.4.
173		RD18.3, Rec. 31.3: The court should consider the same factors and pursue the same objectives in an application to vary a child support order as it would in an application for a child support order.	
174		RD18.4, Rec. 50.4: On an application for a variation order, the court should consider the same factors and apply the same criteria as it would on an original application.	
175	<ul style="list-style-type: none"> Provide that the court have the same discretion and powers of disposition in an application to vary a spousal, child support or guardianship, custody and access order that it has in respect to an application for a spousal, child support or guardianship, custody and access order. 	RD18.2, Rec. 32.2: The court should have the same discretion and powers of disposition in an application to vary a spousal support order that it had in the original application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 32.2, RD18.3, Rec. 32.3 and RD18.4, Rec. 51.4.
176		RD18.3, Rec. 32.3: The court should have the same discretion and powers of disposition in an application to vary a child support order as it has with respect to an application for a child support order.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
177		RD18.4, Rec. 51.4: On an application for a variation order, the court should have the same discretion and powers of disposition as it would on an original application.	
178	• Provide that the provisions that govern the duration of spousal or child support orders should apply to the duration of variation orders.	RD18.2, Rec. 45.2: The provisions that govern the duration' of spousal support orders should apply to the duration of variation orders.	AGREE. Adopts RD18.2, Rec. 45.2 and RD18.3, Rec. 43.3.
179		RD18.3, Rec. 43.3: The provisions that govern the duration of child support orders should apply to the duration of variation orders.	

[Unlawful Withholding or Removal of Child]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
180		RD18.4, Rec. 26.4: Alberta legislation should contain provisions to prevent the unlawful withholding or removal of a child by either parent or any third party.	AJ does not mention ALRI RD18.4, Rec. 26.4. ALRI's recommendation carries forward a provision in the existing <i>DRA</i> .

[Production of Child]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
181		RD18.4, Rec. 27.4: The court should have discretion to grant or refuse an order for the production of a child depending on the circumstances of the child and merits of the application.	AJ does not mention ALRI RD18.4, Rec. 27.4.

FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

[Topic headings follow Alberta Justice Technical Workbook]

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FAMILY LAW REFORM
ALRI and Alberta Justice Positions Compared

[April 9, 2002]

4. COURT JURISDICTION AND POWERS

NOTE: ALRI's made recommendations for a uniform substantive law that would apply to the resolution of all family law matters, regardless of the court in which the matter is raised. A corollary of this position is that, in the interests of facilitating the fullest possible access to justice in family matters, the Provincial Court should have the fullest jurisdiction that is constitutionally available to it.

Overview

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
1	Over time, some aspects of provincial legislation involving family law have become out-dated, particularly given the way in which Albertans now live their lives. Family Law Reform has identified a number of areas where the courts' jurisdiction and powers within family law could be consolidated or updated.		ALRI's Reports by and large exclude from consideration constitutional and other issues relating to court structure, the assignment of court jurisdiction and court procedures: RD18.1, pp. 10-11. This being said, the ALRI recommendations are designed with the idea that a single body of substantive law would apply no matter in what court a proceeding is brought and, further, that within the existing court structure the Provincial Court would have the broadest jurisdiction over family law that is constitutionally allowable. ALRI also made recommendations with respect to procedural powers that are necessary to the effective exercise by the courts of family law jurisdiction.

4.1 Provincial Court Jurisdiction to Make and Enforce Support Orders

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
2	Alberta Justice proposes that the Provincial Court continue to have jurisdiction to make and enforce support orders but that the requirement for the court to find matrimonial fault be eliminated.	RD18.3, Rec. 33.3: (1) Any court having jurisdiction over child support should be able to make, vary and enforce its own orders. (2) The <i>MEA</i> should be amended to confer the same powers of enforcement on courts with jurisdiction over child support to the fullest extent constitutionally allowable.	AGREE. The summary procedure provided in the <i>Domestic Relations Act</i> , Part 4, for obtaining spousal or child support is based on the out-dated notion of desertion. The jurisdiction is restricted to married persons and their children. The procedural approach is quasi-criminal. Both substantive and procedural modernization is desirable.
3	It is further proposed that the Provincial Court's jurisdiction expand to include persons in conjugal and other interdependent relationships that do not involve marriage and all children of such interdependent relationships.		AGREE with respect to marriage-like relationships between two people of the opposite or same sex, and with respect to children in any situation in which an adult has a child support obligation or guardianship, custody or access is in issue. DISAGREE with respect to “other independent relationships” and limiting jurisdiction over children to the children of persons in conjugal and other interdependent relationships.
4	There is currently some judicial debate over whether or not a person has to be a guardian before the Provincial Court can make an access order. The proposed new law will clearly give the Provincial Court jurisdiction to make an access order in favour of someone who is not a guardian.	RD18.4, Rec. 35.4: A non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.	AGREE. See 3. Guardianship, Custody and Access, line 83.

4.2 Securing Payments

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
5	The Alberta Law Reform Institute recommends that legislation give the courts the same broad range of powers for child support as it has for spousal support. This would include the following:	RD18.3, Rec. 27.3: RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (a) periodic payments [RFD No. 18.2, Recommendation No. 18.2 at 137] (b) lump sum payments, [RFD No. 18.2, Recommendation No. 19.2 at 144] (c) security for payment, [RFD No. 18.2, Recommendation No. 20.2 at 147]	AGREE: ALRI RD18.3, Rec. 27.3.
6		(d) the transfer or settlement of property. [RFD No. 18.2, Recommendation No. 21.2 at 150] (e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary or the assignment of a life insurance policy to the child, [RFD No. 18.2, Recommendation No. 23.2 at 152]	
7		(f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan, [RFD No. 18.2, Recommendation No. 24.2 at 152] (g) remedies that protect against gifts or transfers of property for inadequate consideration, or [RFD No. 18.2, Recommendation No. 25.2 at 154]	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
8		(h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child. [RFD No. 18.2, Recommendation No. 22.2 at 151].	
9	<ul style="list-style-type: none"> • Upon or after making a support order, the court for the purpose of securing payments due and to become due thereafter, may by order to any of the following: <ul style="list-style-type: none"> ▪ Charge specified property or a specified interest in property with the payments. 	RD18.2, Rec. 20.2: Alberta legislation should provide that: (1) Upon or after making a spousal support order the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following: (a) charge specified property or a specified interest in property with the payments, ...	AGREE. Embraces ALRI RD18.2, Rec. 20.2(1)(a) and (2) and RD18.3, Rec. 27.3(c) (see line 5 above).
10	Upon default in payment of the amount charged on property, the court may:	(2) Upon default in payment of an amount charged on property under paragraph (a) of subsection (1), the court may	
11	a. appoint a receiver of rents, profits or other money receivable from the property or interest.	(a) appoint a receiver of rents, profits or other money receivable from the property or interest, or	AGREE.
12	b. Order the sale of the property or interest upon notice to all persons having an interest in it.	(b) order sale of the property or interest upon notice to all persons having an interest in it, and	AGREE.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
13	c. In the event described in either paragraph (a) or (b), direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.	(c) in the event described in either paragraph (a) or (b), direct, upon satisfaction of any accrued liability, that any surplus be paid into court as security for any future obligation under the order of support or may make such other directions as it thinks fit and just.	AGREE.
14	<ul style="list-style-type: none"> ■ Order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security interest charging specified property or a specified interest in property with the payments. ■ Order the party liable under the order or any other person on his behalf to convey specified property or a specified interest in property with the payments. ■ Suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it. 	<p>RD18.2, Rec. 20.2: Alberta legislation should provide that:</p> <p>(1) Upon or after making a spousal support order the court, for the purpose of securing payments due and to become due thereafter, may by order do any or all of the following:</p> <ul style="list-style-type: none"> (b) order the party liable under the order of support or other person on his behalf to execute and deliver a mortgage or other security instrument charging specified property or a specified interest in property with the payments, (c) order the party liable under the order or other person on his behalf to convey specified property or a specified interest in property to a trustee upon specified trusts, and (d) suspend, amend, vary or discharge an order made under this section and provide for amendment, discharge and substitution of any security provided under it. 	AGREE. Embraces ALRI RD18.2, Rec. 20.2(1)9b) and RD18.3, Rec. 27.3(c).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
15	<ul style="list-style-type: none"> Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter. 	RD18.2, Rec. 20.2: Alberta legislation should provide that: (3) Unless the court otherwise orders, an order or security under this section has effect as security only and the person liable under the order of support is and remains personally liable for the payments due and to become due thereafter.	AGREE. Embraces ALRI RD18.2, Rec. 20.2(3) and RD18.3, Rec. 27.3(c).
16	<ul style="list-style-type: none"> Security for payment. 		AGREE. Embraces ALRI RD18.2, Rec. 20.2 and RD18.3, Rec. 27.3(c).

AJ Question:

4.2.a. Should the court have the aforementioned powers regarding child and spousal support orders?

ALRI Response:

Yes: ALRI RD18.2, Rec. 20.2 and RD18.3, Rec. 27.3(c).

4.3 Third Party Payment Orders

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
17	<i>Issue for discussion:</i> Court authority to order third party payment orders.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
18	Background: It has been suggested that legislation empower the court to order payment of spousal support to the court or to a third party for the benefit of the person receiving support.	RD18.2, Rec. 47.2: Alberta legislation should empower the court to order the payment of support into court or to a third party for the benefit of the spouse receiving support.	AGREE. Reflects ALRI RD18.2, Rec. 47.2.
19	Similarly, this legislation would allow the court to order payment of child support directly to a child, to the court or to a third party for the benefit of the child receiving the support.	RD18.3, Rec. 47.3: Alberta legislation should empower the court to order the payment of support directly to the child, or into court or to a third party for the benefit of the child receiving support.	AGREE. Reflects ALRI RD18.3, Rec. 47.3.
20	Concerns regarding such a change include interference with the custodial parent and the ability of a third party to adequately administer the payments.		The court would decide whether to grant or refuse an order on the basis of the evidence before it. It can be assumed that the before making an order, the court would have a good reason to interfere with the custodial parent and be satisfied of the third party's ability to adequately administer the payments.

AL Questions:

4.3.a. Should the court be given discretion to order third party payments or in the case of child support, to order payment directly to the child?

4.3.b. Should the court's power in this regard be restricted to only certain types of cases or circumstances?

ALRI Responses:

Yes: ALRI RD18.2, Rec. 47.2 and RD18.3, Rec. 47.3.

No. Rely on the court to exercise its discretion wisely in such matters.

4.4 Matrimonial Actions

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
21	There are a number of matrimonial laws in Alberta that are out-dated or redundant. Therefore, the following changes are proposed:		
22	<ul style="list-style-type: none"> That the law that enables the court to order a person to resume cohabitation with another person be repealed. 	Rep65, Rec. 1: We recommend that the action for a judgment of restitution of conjugal rights be abolished and that sections 2 to 4 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 1.
23	<ul style="list-style-type: none"> That the law that allows a person to seek damages for adultery be repealed. 	Rep65, Rec. 4: We recommend that the action for damages for adultery be abolished and that sections 13 and 14 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 4.
24	<ul style="list-style-type: none"> That the law that allows a married person to seek damages against a third party for inducing that person's spouse to leave the marriage, or for harbouring the deserting spouse, be repealed. 	Rep65, Rec. 5: We recommend that the action for damages for the enticement of a spouse be abolished and that section 40 of the <i>DRA</i> be repealed.	AGREE. Adopts Rep65, Rec. 5 and Rep65, Rec. 6.
25		Rep65, Rec. 6: We recommend that the action for damages for harbouring a spouse be abolished and that sections 41 and 42 of the <i>DRA</i> be repealed.	
26	<ul style="list-style-type: none"> That the law that allows a parent to seek damages against a third party for enticing, harbouring or seducing a child be repealed. 	Rep65, Rec. 7: We recommend that legislation be enacted to abolish the common law actions by a parent for loss of the services of a child due to enticement, harbouring or seduction.	AGREE. Adopts Rep65, Rec. 7.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
27	<ul style="list-style-type: none"> That the ordinary law of gifts be expanded to include engagement gifts, including the engagement ring. 	<p>Rep65, Rec. 9: We recommend that the following provision be enacted in Alberta:</p> <p style="padding-left: 40px;">Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.</p>	AGREE. Embodies the intent of ALRI Rep65, Rec. 9.
28	<ul style="list-style-type: none"> That the law that allows a person to ask the court to declare the validity of a marriage and grant an injunction against someone making a false claim of marriage be repealed. 	<p>Rep65, Rec. 10: We recommend that the action for jactitation of marriage be abolished and that section 44 of the <i>DRA</i> be repealed.</p>	AGREE. Adopts Rep65, Rec. 10

4.5 Judicial Separation

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
29	<p><i>Issue for discussion:</i> Retention of judicial separation as an option to divorce.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
30	Background: Judicial separation legally ends the duty of married persons to live together. Several cases of judicial separation are brought to the courts each year as an alternative to divorce although it is unknown why the parties do so. If the judicial separation option is to be retained, it's proposed that legislation remove the existing matrimonial fault requirements and bring judicial separation in line with the terms and conditions of the federal <i>Divorce Act</i> .	Rep65, Rec. 2: We recommend that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the <i>DRA</i> be repealed. Implementation of this recommendation should be deferred until appropriate remedies to restrain domestic violence have been introduced.	DISAGREE that judicial separation should be retained. AGREE that if it is retained, legislation should remove the existing matrimonial fault requirements and bring judicial separation in line with the terms and conditions of the federal <i>Divorce Act</i> .
31		Rep65, Rec. 3: We recommend that the following provision be enacted in the <i>DRA</i> : (1) For all purposes of the law of Alberta, including the determination of domicile, a person has a legal personality that is independent, separate and distinct from that of his or her spouse.	AJ does not raise the issue of the need for legislation to ensure that a married woman has full legal capacity.
32		(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.	
33		(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.	

AJ Question:

4.3.a. Are there reasons why judicial separation should be retained as an option for married persons?

ALRI Response:

We have recommended that the action for a judgment of judicial separation be abolished and that sections 5 to 14 of the *DRA* be repealed: Rep65, Rec. 2. The abolition would be accompanied by the enactment of a provision making it clear that married men and married women are to be treated equally as independent persons with full legal capacity (Rep65, Rec. 3). Under our recommendations, the entitlements that come with judicial separation under the existing law would be available on the breakdown of the relationship.

4.6 Breach of Promise of Marriage

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
34	<i>Issue for discussion:</i> Retention of the right to seek damages for failure to keep a marriage commitment.		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
35	<p>Background: Current Alberta family law permits a person to sue another person if that individual fails to keep a promise of marriage. It is believed by many that this law is obsolete given today's societal views of engagement and marriage. Others believe such a law still has value. Alberta Justice suggests that if the law is retained, it should be restricted to claims that seek to recover expenses incurred as a result of the marriage promise.</p>	<p>Rep65, Rec. 8: We recommend that the action for breach of promise of marriage be abolished by express statutory provision.</p>	<p>AGREE that this law is obsolete. DISAGREE that such a law still has value. AGREE that if the law is retained, it should be restricted to claims that seek to recover expenses incurred as a result of the marriage promise.</p>

AJ Question:

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

ALRI Response:

No, the right to sue should not be retained: ALRI Rep65, Rec. 8. Yes, if the right to sue is retained, claims should be restricted to recovering expenses.

4.7 Jury Act

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
36	<p>Issue for discussion: Appropriateness of a family law matter going to jury trial.</p>		

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
37	Background: The Jury Act currently allows a family law matter to go to trial before a jury. The Unified Family Court Task Force questioned the appropriateness of trial by jury for such matters.		ALRI did not look at this issue.

AJ Question:

4.7.a. Should family law cases only be heard by a judge and never by jury trial?

ALRI Response:

Yes. Family law cases should only be heard by a judge. In cases involving children, we have concerns about the potential of jury trials to exacerbate conflict, contrary to the child’s best interests. We also have concerns about the inappropriate use of jury trial by a party with a controlling personality to gain an unfair advantage by prolonging the proceeding, building up costs, and giving that party more clout in negotiations. (We did not consider this matter in our earlier work.)

4.8 Matrimonial Property Act

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
38	<i>Issue for discussion:</i> Estate application by a surviving spouse.		
39	Background: It is proposed that the <i>Matrimonial Property Act</i> be amended so that upon the death of a spouse, the surviving spouse can seek the division of property acquired over the course of the marriage even if the spouses continued to reside together until death. The rights of the surviving spouse under the <i>Matrimonial Property Act</i> would be in addition to the rights of the surviving spouse under the will of the deceased spouse or upon intestacy.		AGREE. ALRI made recommendations to allow a surviving spouse to seek division of property acquired over the course of the marriage on the death of a spouse in Report No. 83 (May 2000).

AJ Question:

4.8.a. Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the *Matrimonial Property Act* when there has been a breakdown of the marriage?

ALRI Response:

Yes: ALRI Report No. 83 (May 2000).

4.9 Life Insurance and Pension Plans

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
40	<i>Issue for discussion:</i> Court authority to order designation of a spouse or child as beneficiary.		
41	<p>Background: The Alberta Law Reform Institute recommends that a court be given the authority to order a spouse or a parent who has a life insurance policy, pension plan, other benefit plan, or death benefits under a pension plan to:</p> <ul style="list-style-type: none"> • Continue to pay the premiums and designate the other spouse or child as the beneficiary under the policy or plan, either irrevocably or for such a period as is fixed by the order. 	<p>RD18.2, Rec. 23.2: Alberta legislation should authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan</p> <p>(a) to continue to pay the premiums and designate the other spouse as the beneficiary under the policy or plan, either irrevocably or for such period as is fixed by the order, ...</p>	AGREE. This is ALRI RD18.2, Rec. 23.2(a) and RD18.3, Rec. 27.3(e).
42		<p>RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order</p> <p>(e) the payment of premiums on a life insurance policy, pension plan or other benefit plan and designation of the child as beneficiary ... [RFD No. 18.2, Recommendation No. 23.2 at 152]</p>	
43	<ul style="list-style-type: none"> • Assign his or her life insurance policy to the other spouse or child. 	<p>RD18.2, Rec. 23.2: Alberta legislation should authorize a court to order a spouse who has a life insurance policy, or death benefits under a pension plan or other benefit plan</p> <p>(b) to assign his or her life insurance policy to the other spouse.</p>	AGREE. This is ALRI RD18.2, Rec. 23.2 and RD18.3, Rec. 27.3(e).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
44		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (e) ... or the assignment of a life insurance policy to the child, [RFD No. 18.2, Recommendation No. 23.2 at 152]	
45	• Order that an irrevocable designation of a beneficiary be revoked.	RD18.2, Rec. 24.2: Alberta legislation should authorize a court to order that an irrevocable designation of a beneficiary under a policy of life insurance, pension plan or other benefit plan be revoked.	AGREE. This is ALRI RD18.2, Rec. 24.2 and RD18.3, Rec. 27.3(f).
46		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (f) the revocation of an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan, [RFD No. 18.2, Recommendation No. 24.2 at 152]	
47	The effectiveness of this recommendation with respect to public pension plans may be an issue as there is no provision in the Employment Pension Plan Act for the irrevocable designation of a beneficiary, although the regulations provide that a matrimonial property order would prevail over the member's entitlement to benefits under the plan.		

AJ Questions:

4.9.a. Should a court be given the authority to order that a spouse or child be continued as the beneficiary of any pension, benefit or life insurance plan held by a spouse or parent?

4.9.b. Should a court be given the authority to revoke an irrevocable designation of a beneficiary under a life insurance policy, pension plan or other benefit plan?

ALRI Responses:

Yes: ALRI RD18.2, Rec. 23.2(a) and RD18.3, Rec. 27.3(e).

Yes. ALRI RD18.2, Rec. 24.2 and RD18.3, Rec. 27.3(f).

4.10 Other Court Powers

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
48	There are a number of other proposed changes to the legislation regarding adjustments to the courts' power and authority. These include:		
	Adding Parties		
49	• Empower the court to add as a party another person who may have an obligation to provide child support to the same independent child.	RD18.3, Rec. 46.3: Alberta legislation should expressly empower the court to add as a party another person who may have an obligation to provide support to the same dependent child.	AGREE. Adopts RD18.3, Rec. 26.3.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
50	<ul style="list-style-type: none"> Empower the court on its own motion to add a party to guardianship, custody or access proceedings, or require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party. Alternatively, empower the court on its own motion to direct that notice of the proceedings and an opportunity to appear be given to a person who is not a party but who may want to apply to participate in the proceedings and who has a significant connection to the child.. 	RD18.4, Rec. 59.4: In proceedings with respect to guardianship, custody or access, the court should have power, on its own motion, to add a party to the proceedings, or to require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party.	AGREE. Adopts RD18.3, Rec. 59.4.
Conditional Orders			
51	<ul style="list-style-type: none"> Empower the court to order the payment of spousal or child support for a definite or indefinite period or until the happening of a specified event. The court may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just. 	RD18.2, Rec. 37.2: Alberta legislation should provide that a court may order the payment of spousal support for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	AGREE. Adopts RD18.2, Recs. 37.2 and 55.2, RD18.3, Recs. 37.3 and 55.3.
52		RD18.2, Rec. 55.2: Alberta legislation should empower the court to make any provision in an order made in connection with an application for spousal support subject to such terms and conditions as the court deems proper.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
53		RD18.3, Rec. 37.3: Alberta legislation should provide that a court may order the payment of child support for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	
54		RD18.3, Rec. 55.3: Alberta legislation should empower the court to make any provision in an order made in connection with an application for child support subject to such terms and conditions as the court deems proper.	
55	• Empower the court to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event. The court may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.	RD18.4, Rec. 55.4: The court should have power to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event.	AGREE. Adopts RD18.4, Recs. 55.4 and 45.4.
56		RD18.4, Rec. 45.4: The court should have power to make a guardianship, custody or access order on such terms, conditions or restrictions as the court thinks fit and just.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Consent Orders		
57	<ul style="list-style-type: none"> Empower the court, where the parties consent to a spousal support order, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.2, Rec. 29.2: (1) Where the parties consent to a spousal support order, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.2, Rec. 29.2(1).
58	<ul style="list-style-type: none"> Empower the court, where the parties consent to a child support order and the court is satisfied that the order is in the child’s best interests, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.3, Rec. 29.3: (1) Where the parties consent to a child support order and the court is satisfied that the order is in the child’s best interests, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.3, Rec. 29.3(1).
59	<ul style="list-style-type: none"> Empower the court, where the parties consent to a guardianship, custody or access order, to grant a consent order without holding a hearing. Such an order has the same force and effect as an order made after a hearing. 	RD18.4, Rec. 47.4: (1) Where the parties consent to a guardianship, custody or access order and the court is satisfied that the order is in the child’s best interests, the court in its discretion may grant a consent order without holding a hearing and such an order has the same force and effect as an order made after a hearing.	AGREE. Adopts RD18.4, Rec. 47.4(1).
60	<ul style="list-style-type: none"> Enable a court granting a spousal support, child support or a guardianship, custody or access order to incorporate in its order all or part of a provision in a written agreement previously made by the parties. 	RD18.2, Rec. 29.2: (2) A court granting a spousal support order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	AGREE. Adopts RD18.2, Rec. 29.2, RD18.3, Rec. 29.3 and RD18.4, Rec. 47.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
61		RD18.3, Rec. 29.3: (2) A court granting a child support order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	
62		RD18.4, Rec. 47.4: (2) A court granting a guardianship, custody or access order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.	
	Costs		
63	• Empower the court to make an order with respect to the payment of costs.	RD18.2, Rec. 56.2: Alberta legislation should empower the court to make an order with respect to the payment of costs. [spousal support]	AGREE. Adopts RD18.2, Rec. 56.2, RD18.3, Rec. 56.3 and RD18.4, Rec. 63.4.
64		RD18.3, Rec. 56.3: Alberta legislation should empower the court to make an order with respect to the payment of costs. [child support]	
65		RD18.4, Rec. 63.4: Alberta legislation should empower the court to make an order with respect to the payment of costs. [CGCA]	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
66	<ul style="list-style-type: none"> • Provide the court discretion, on an application for interim spousal support, child support or guardianship, custody and access, when it thinks it fit and just to do so, to make an order: <ul style="list-style-type: none"> • Requiring one spouse to make a payment or payments to or for the benefit of the other party on account of interim costs and disbursements of and incidental to the application. 	RD18.2, Rec. 57.2: Alberta legislation should give the court discretion, on an application for interim support, when it thinks it fit and just to do so, to make an order requiring one spouse to make a payment or payments to or for the benefit of the other party on account of interim costs and disbursements of and incidental to the application.	AGREE. Adopts RD18.2, Rec. 57.2 and RD18.3, Rec. 57.3.
67		RD18.3, Rec. 57.3: Alberta legislation should give the court discretion, on an application for interim support, when it thinks it fit and just to do so, to make an order requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.	
68	<ul style="list-style-type: none"> • Requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application. 	RD18.4, Rec. 64.4: Alberta legislation should give the court discretion, on an application for an interim order, when it thinks it fit and just to do so, to make an order requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.	AGREE. Adopts RD18.4, Rec. 64.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Death		
69	<ul style="list-style-type: none"> Provide that a spousal or child support order survives the death of the spouse or party having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i>. 	RD18.2, Rec. 39.2: Alberta legislation should provide that a spousal support order survive the death of the spouse having the support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i> .	AGREE. Adopts RD18.2, Rec. 29.2 and RD18.3, Rec. 38.3.
70		RD18.3, Rec. 38.3: Alberta legislation should provide that a child support order survive the death of a parent having a support obligation except where the court directs to the contrary and subject to a subsequent order made pursuant to the <i>Family Relief Act</i> .	
71	<ul style="list-style-type: none"> Provide that a spousal or child support order terminate on the death of the spouse or child receiving support, except where the court expressly declares otherwise, but that arrears of support accumulated while the spouse or child was alive continue to be enforceable. 	RD18.2, Rec. 40.2: Alberta legislation should provide that a spousal support order terminate on the death of the spouse receiving support, except where the court expressly declares otherwise, but that arrears of support accumulated while the spouse was alive continue to be enforceable.	AGREE. Adopts RD18.2, Rec. 40.2 and RD18.3, Rec. 39.3.
72		RD18.3, Rec. 39.3: Alberta legislation should provide that a child support order terminate on the death of the child receiving support, except where a court expressly declares otherwise, but that arrears of support accumulated while the child was alive continue to be enforceable.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Disclosure		
73	<ul style="list-style-type: none"> Provide that in an application for a spousal or child support order, or on the written request of one of the spouses or parties not more than once a year after the making of a spousal or child support order, each spouse or party shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of court. 	<p>RD18.2, Rec. 48.2: Alberta legislation should provide that:</p> <p>(1) In an application for a spousal support order or on the written request of one of the spouses not more than once a year after the making of a spousal support order, each spouse shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.</p>	AGREE. Adopts RD18.2, Rec. 43.2(1) and RD18.3, Rec 48.3(1).
74		<p>RD18.3, Rec. 48.3: Alberta legislation should provide that:</p> <p>(1) In an application for a child support order or on the written request of one of the parties not more than once a year after the making of a child support order, each party shall serve on the others and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.</p>	
75	<ul style="list-style-type: none"> Where, in an application for a spousal or child support order, a spouse or party fails to provide a financial statement, a court on application by the other spouse or party may either set the application down for a hearing and proceed to judgment or order that the documents be provided. 	<p>RD18.2, Rec. 48.2: Alberta legislation should provide that:</p> <p>(2) Where, in an application for a spousal support order, a spouse fails to comply with subsection (1), a court on application by the other spouse, may</p> <p>(a) set the application down for a hearing and proceed to judgment, or</p> <p>(b) order that the documents be provided.</p>	AGREE. Adopts RD18.2, Rec. 48.2(2) and RD18.3, Rec. 48.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
76		RD18.3, Rec. 48.3: Alberta legislation should provide that: (2) Where, in an application for a child support order, a party fails to comply with subsection (1), a court on application by another party, may (a) set the application down for a hearing and proceed to judgment, or (b) order that the documents be provided.	
77	• Where the court proceeds to a hearing, it may draw an adverse inference against the spouse or party who failed to comply and impute income to that spouse or party in such amount as it considers appropriate.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (3) Where the court proceeds to a hearing, it may draw an adverse inference against the spouse who failed to comply with subsection (1) and impute income to that spouse in such amount as it considers appropriate.	AGREE. Adopts RD18.2, Rec. 48.2(3) and RD18.3, Rec. 48.3(3).
78		RD18.3, Rec. 48.3: Alberta legislation should provide that: (3) Where the court proceeds to a hearing, it may draw an adverse inference against the party who failed to comply and impute income to that party in such amount as it considers appropriate.	
79	• Where a spouse or party fails to comply with an order that the documents be provided, the court may: a) Strike out any of the spouse or party's pleadings.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (4) Where a spouse fails to comply with an order that the documents be provided, the court may (a) strike out any of the spouse's pleadings,	AGREE. Adopts RD18.2, Rec. 48.2(4) and RD18.3, Rec. 48.3(4).
80	b) Make a contempt order against the spouse or party.	(b) make a contempt order against the spouse,	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
81	c) Proceed to a hearing, in the course of which it may draw an adverse inference against the spouse or party and impute income to that spouse or party in such an amount as it considers appropriate.	(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate, and	
82	d) Award costs in favour of the other spouse or party up to an amount that fully compensates the other spouse or party for all costs incurred in the proceedings.	(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.	
83		RD18.3, Rec. 48.3: Alberta legislation should provide that: (4) Where a party fails to comply with an order that the documents be provided, the court may (a) strike out any of the party’s pleadings, (b) make a contempt order against the party, (c) proceed to a hearing, in the course of which it may draw an adverse inference against the party and impute income to that party in such amount as it considers appropriate, and (d) award costs in favour of another party up to an amount that fully compensates the other party for all costs incurred in the proceedings.	
84	• Where, after a spousal or child support order has been made, a spouse or party fails to comply with the written request of the other spouse or party not more than once a year after the making of a spousal support order or child support order to provide financial information, the court, on application, may:	RD18.2, Rec. 48.2: Alberta legislation should provide that: (5) Where, after a spousal support order has been made, a spouse fails to comply with the written request of the other spouse not more than once a year after the making of a spousal support order to provide financial information, the court, on application, may	AGREE. Adopts RD18.2, Rec. 48.2(5) and RD18.3, Rec. 48.3(5).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
85	a) Consider the non-complying spouse or party to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or	(a) consider the non-complying spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or	
86	b) Make an order requiring the other spouse or party to provide the required documents.	(b) make an order requiring the other spouse to provide the required documents.	
87		RD18.3, Rec. 48.3: Alberta legislation should provide that: (5) Where, after a child support order has been made, a party fails to comply with the written request of the other party not more than once a year after the making of a child support order to provide financial information, the court, on application, may (a) consider the non-complying party to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings, or (b) make an order requiring the other party to provide the required documents.	
88	• The court may, on application by the other spouse or party, in addition to or in substitution for any other penalty to which the non-complying spouse or party is liable, order that spouse or party to pay to the applicant an amount not exceeding \$5,000.	RD18.2, Rec. 48.2: Alberta legislation should provide that: (6) The court may, on application by the other spouse, in addition to or in substitution for any other penalty to which the non-complying spouse is liable, order that spouse to pay to the applicant an amount not exceeding \$5,000.	AGREE. Adopts RD18.2, Rec. 48.2(6) and RD18.3, Rec. 48.3(6).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
89		RD18.3, Rec. 48.3: Alberta legislation should provide that: (6) The court may, on application by another party, in addition to or in substitution for any other penalty to which the non-complying party is liable, order that party to pay to the applicant an amount not exceeding \$5,000.	
Third Party [Disclosure]			
90	<ul style="list-style-type: none"> Provide that in an application for a spousal or child support order, the court may order that the employer, partner or principal, as the case may be, of a spouse, parent or other person having a spousal or child support obligation, provide the spouse, child, other parent and any other party with any information, accountings or documents that a party is entitled to request under disclosure laws. 	RD18.2, Rec. 49.2: Alberta legislation should provide that: (1) In an application for a spousal support order, the court may order that the employer, partner or principal of one spouse, as the case may be, provide the other spouse with any information, accountings or documents that a spouse is entitled to request under Recommendation No. 48.2.	AGREE. Appears to adopt RD18.2, Rec. 49.2 and RD18.3, Rec. 49.3 on financial disclosure and RD18.2, Rec. 51.2 and RD18.3, Rec. 51.3 and RD18.4, Rec. 60.4 on locating a respondent or child. However, the AJ Workbooks do not clarify what is meant by the reference to “any information, accountings or documents that a party is entitled to request under disclosure laws” nor does AJ indicate where these laws are to be found.
91		RD18.3, Rec. 49.3: Alberta legislation should provide that: (1) In an application for a child support order, the court may order that the employer, partner or principal, as the case may be, of a parent or other person having a child support obligation, provide the child, other parent and any other party with any information, accountings or documents that a party is entitled to request under Recommendation 48.3.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
92		RD18.2, Rec. 51.2: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for spousal support, the moving party needs to learn or confirm the proposed respondent's whereabouts.	
93		RD18.3, Rec. 51.3: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for child support, the moving party needs to learn or confirm the proposed respondent's whereabouts.	
94		RD18.4, Rec. 60.4: Alberta legislation should provide that: (1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for a child guardianship, custody or access order, the applicant needs to learn or confirm the whereabouts of the proposed respondent or child.	And see Withholding, Removal and Production of Child: RD18.4, Rec. 26.4 and RD18.4, Rec. 27.4 (lines 180 and 181 below).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
95		RD18.2, Rec. 51.2: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.	
96		RD18.3, Rec. 51.3: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.	
97		RD18.4, Rec. 60.4: Alberta legislation should provide that: (2) The order shall require the person or public body to whom it is directed to provide the court or the applicant with any information that is shown on a record in the person's or public body's possession or control and that indicates the place of employment, address or location of the proposed respondent or child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
98	<ul style="list-style-type: none"> Provide that a return purporting to be signed by the employer, partner or principal may be received in evidence as prima facie proof of its contents 	RD18.2, Rec. 49.2: Alberta legislation should provide that: (2) A return purporting to be signed by the employer, partner or principal may be received in evidence as <i>prima facie</i> proof of its contents.	AGREE. Adopts RD18.2, Rec. 49.2(2) and RD18.3, Rec. 49.3(2).
99		RD18.3, Rec. 49.3: Alberta legislation should provide that: (2) A return purporting to be signed by the employer, partner or principal may be received in evidence as <i>prima facie</i> proof of its contents.	
100	[Crown Bound]	RD18.2, Rec. 52.2: Alberta legislation should provide that: The sections provided for by Recommendation No. 49.2 or Recommendation No. 51.2 (a) bind the Crown in right of Alberta, and (b) in so doing, prevail over the Alberta <i>Freedom of Information and Privacy Act</i> .	AJ does not include reference to ALRI RD18.2, Rec. 52.2 and ALRI RD18.3, Rec. 52.3 providing that the recommendations on disclosing financial information and the location of a respondent or child would bind the Crown. This may be the result of the reference to “any information any information, accountings or documents that a party is entitled to request under disclosure laws” in line 90 above, but that is not apparent on the face of the AJ Workbooks.
101		RD18.3, Rec. 52.3: Alberta legislation should provide that: The sections provided for by Recommendation No. 49.3 or Recommendation No. 51.3 (a) bind the Crown in right of Alberta, and (b) in so doing, prevail over the <i>Freedom of Information and Privacy Act</i> .	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
102	<ul style="list-style-type: none"> Provide that upon an application for a spousal or child support order, a court may order that any information, accountings or documents ordered to be provided and any examination or cross-examination thereon, be treated as confidential and not form part of the public record of the court. 	<p>RD18.2, Rec. 50.2: Alberta legislation should provide that: Upon an application for a spousal support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.2 or Recommendation No. 49.2, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.</p>	AGREE. Adopts ALRI RD18.2, Rec. 50.2 and RD18.3, Rec. 50.3.
103		<p>RD18.3, Rec. 50.3: Alberta legislation should provide that: Upon an application for a child support order, a court may order that any information, accountings or documents ordered to be provided under Recommendation No. 48.3 or Recommendation No. 49.3, and any examination or cross-examination thereon, shall be treated as confidential and shall not form part of the public record of the court.</p>	
<i>Divorce Act Orders</i>			
104	<ul style="list-style-type: none"> Provide that the jurisdiction of the court under Alberta law to award or vary a spousal support, child support or child custody or access order continues in effect unless and until the court makes an order with respect to spousal support, child support or child custody or access in a divorce proceeding under the <i>Divorce Act</i>. 	<p>RD18.2, Rec. 41.2: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to award or vary spousal support continues in effect unless and until the court makes an order with respect to spousal support in a divorce proceeding under the <i>Divorce Act</i> (Canada).</p>	AGREE. Adopts ALRI RD18.2, Rec. 41.2(1), RD18.3, Rec. 41.3(1) and RD18.4, Rec. 56.4(1).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
105		RD18.3, Rec. 41.3: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to award or vary child support continues in effect unless and until the court makes an order with respect to child support in a divorce proceeding under the <i>Divorce Act</i> (Canada).	
106		RD18.4, Rec. 56.4: Alberta legislation should provide that: (1) The jurisdiction of the court under Alberta law to make or vary a child custody or access order continues in effect unless and until the court makes an order with respect to child custody or access in a divorce proceeding under the <i>Divorce Act</i> (Canada).	
107	• Provide that the court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> be allowed to determine the amount of arrears owing under a spousal support or child support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i> .	RD18.2, Rec. 41.2: Alberta legislation should provide that: (2) The court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> (Canada) may determine the amount of arrears owing under a spousal support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i> (Canada).	AGREE. Adopts ALRI RD18.2, Rec. 41.2(2) and RD18.3, Rec. 41.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
108		RD18.3, Rec. 41.3: Alberta legislation should provide that: (2) The court with jurisdiction in a divorce proceeding under the <i>Divorce Act</i> (Canada) may determine the amount of arrears owing under a child support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the <i>Divorce Act</i> (Canada).	
109	<ul style="list-style-type: none"> • Provide that, if a marriage is terminated by divorce or a judgment of nullity and no order is made with respect to spousal support, child support, or child custody or access in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the court under provincial law. 	RD18.2, Rec. 41.2: Alberta legislation should provide that: (3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to spousal support is made in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the court under provincial law.	AGREE. Adopts ALRI RD18.2, Rec. 41.2(3), RD18.3, Rec. 41.3(3) and RD18.4, Rec. 56.4(2).
110		RD18.3, Rec. 41.3: Alberta legislation should provide that: (3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to child support is made in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
111		RD18.4, Rec. 56.4: Alberta legislation should provide that: (2) If a marriage is terminated by divorce or judgment of nullity and no order with respect to child custody or access is made in the divorce or nullity proceedings, an order for child custody or access made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.	
112	• Provide that, unless the court orders otherwise, a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of competent jurisdiction.	RD18.4, Rec. 57.4: Unless the court orders otherwise, a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of competent jurisdiction.	AGREE. Adopts ALRI RD18.4, Rec. 57.4.
Exclusive Possession of Family Home			
113	• Empower the court, in conjunction with proceedings for spousal or child support, or for child guardianship, custody or access, on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application, to grant an order for exclusive use for all or part of the family home and exclusive use of any or all household goods.	RD18.2, Rec. 22.2: Alberta should statutorily empower the court, in proceedings for spousal support, to grant orders for exclusive possession of the matrimonial home, or part thereof, and exclusive use of any or all household goods.	AGREE. Appears to adopt ALRI RD18.2, Rec. 22.2, RD18.3, Rec. 27.3 and RD18.4, Rec. 48.4. However, query whether there is a difference between “exclusive use of all or part of the family home” and “exclusive possession of the matrimonial home.”

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
114		RD18.2, Rec. 28.2: <i>The Matrimonial Property Act</i> , s. 23, and the <i>Personal Property Security Act</i> , ss. 23 and 26, as modified by the recommendations in ALRI RFD No. 14 on <i>The Matrimonial Home</i> , should apply where an application is brought in a spousal support proceeding.	AJ does not refer to RD18.2, Rec. 28.2, RD 18.3, Rec. 27.3 and RD18.4, Rec. 48.4. [The recommendations in ALRI RFD No. 14 on <i>The Matrimonial Home</i> are reproduced as Appendix D to this chart.]
115		RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (h) on application and on notice to all persons who may be entitled to be added as parties to the proceeding, exclusive possession of the family home and use of household goods to a parent for the benefit of the child. [RFD No. 18.2, Recommendation No. 22.2 at 151].	
116		RD18.4, Rec. 48.4: In conjunction with proceedings for child guardianship, custody or access, on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application, the court should have power to grant an order for exclusive use of all or part of the family home and exclusive use of any or all household goods for the benefit of a child.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Fraudulent Preferences		
117	<ul style="list-style-type: none"> Provide that spousal support legislation include specific provisions to protect against gifts or transfers of property owned by a spouse for inadequate consideration. 	RD18.2, Rec. 25.2: Alberta spousal support legislation should include specific provisions to protect against gifts or transfers of property owned by a spouse for inadequate consideration.	AGREE. Adopts RD18.2, Rec. 25.2.
118	<ul style="list-style-type: none"> Empower the court with the same broad powers with respect to child support that legislation confers on the court with respect to spousal support, including the power to order remedies that protect against gifts or transfers of property for inadequate consideration. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (g) remedies that protect against gifts or transfers of property for inadequate consideration, or [RFD No. 18.2, Recommendation No. 25.2 at 154]	AGREE. Adopts RD18.3, Rec. 27.3.
	General Powers		
119	<ul style="list-style-type: none"> Empower the court to make any provision in an order made in connection with an application for spousal support or child support subject to such terms and conditions as the court deems proper. 	RD18.2, Rec. 55.2: Alberta legislation should empower the court to make any provision in an order made in connection with an application for spousal support subject to such terms and conditions as the court deems proper.	AGREE. Adopts RD18.2, Rec. 55.2 and RD18.3, Rec. 55.3.
120		RD18.3, Rec. 55.3: Alberta legislation should empower the court to make any provision in an order made in connection with an application for child support subject to such terms and conditions as the court deems proper.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Interim Orders		
121	<ul style="list-style-type: none"> Provide that the court has discretion to make an interim spousal or child support order that will be in effect in accordance with its terms until the order is varied or the application for a spousal or child support order or an appeal is adjudicated. 	RD18.2, Rec. 46.2: The court should have discretion to make an interim support order that will be in effect in accordance with its terms until the order is varied or the application for a spousal support order or an appeal is adjudicated.	AGREE. Adopts RD18.2, Rec. 46.2 and RD18.3, Rec. 45.3.
122		RD18.3, Rec. 45.3: Subject to Recommendation 46.2, an interim support order should remain in effect in accordance with its terms until the order is varied or the application for a child support order or an appeal is adjudicated.	
123	<ul style="list-style-type: none"> Provide that the court consider the same factors and pursue the same objectives in an application for an interim spousal or child support order as it would in an application for a spousal or child support order. 	RD18.2, Rec. 34.2: The court should consider the same factors and pursue the same objectives in an application for an interim spousal support order as it would in an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 34.2 and RD18.3, Rec. 34.3.
124		RD18.3, Rec. 34.3: The court should consider the same factors and pursue the same objectives in an application for an interim child support order that it would in an application for a child support order.	
125	<ul style="list-style-type: none"> Provide that the court have the same discretion and power of disposition in an application for an interim spousal or child support order that it has on an application for a spousal or child support order. 	RD18.2, Rec. 35.2: The court should have the same discretion and power of disposition in an application for an interim support order that it has on an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 35.2 and RD18.3, Rec. 35.3. Enacted with respect to spousal support in DRA 1999 amendments.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
126		RD18.3, Rec. 35.3: The court should have the same discretion and other powers of disposition in an application for an interim child support order that it has on an application for a child support order.	
127	<ul style="list-style-type: none"> • Provide that the same provisions that govern the duration of child support orders should apply to the duration of interim child support orders. 	RD18.3, Rec. 44.3: The same provisions that govern the duration of child support orders should apply to the duration of interim child support orders.	
128	<ul style="list-style-type: none"> • Empower the court to make an interim guardianship, custody or access order, including an <i>ex parte</i> interim order, as the court sees fit. 	RD18.4, Rec. 52.4: The court should have power to make an interim guardianship, custody or access order, including an <i>ex parte</i> interim order, as the court sees fit.	AGREE. Adopts RD18.4, Rec. 52.4.
129	<ul style="list-style-type: none"> • Provide that, on application for an interim guardianship, custody or access order, that the court consider the same factors and apply the same criteria as it would on the application in the main proceeding. 	RD18.4, Rec. 53.4: On an application for an interim order, the court should consider the same factors and apply the same criteria as it would on the application in the main proceeding.	AGREE. Adopts RD18.4, Rec. 53.4.
130	<ul style="list-style-type: none"> • Provide that, on application for an interim guardianship, custody or access order, that the court have the same discretion and powers of disposition as it would have on the application in the main proceeding. 	RD18.4, Rec. 54.4: On an application for an interim order, the court should have the same discretion and powers of disposition as it would on the application in the main proceeding.	AGREE. Adopts RD18.4, Rec. 54.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Land Titles Registration		
131	<ul style="list-style-type: none"> Provide that spousal support orders may be registered in any land titles office in accordance with the authority provided in the <i>Maintenance Enforcement Act</i>. 	RD18.2, Rec. 26.2: Spousal support orders should be registrable in any land titles office in accordance with the authority provided in section 17 of the <i>MEA</i> .	AGREE. Adopts RD18.4, Rec. 26.2. Enacted in DRA 1999 but with different wording.
132	<ul style="list-style-type: none"> Provide that, where the court makes an order to secure spousal support payments, that order or instrument may be registered in the same way as a mortgage of the property described in it and does not affect an interest in the property acquired in good faith and for value without notice before such registration. 	RD18.2, Rec. 27.2: Alberta legislation should provide that where the court makes an order under subsection (1) of Recommendation No. 20.2, that order or instrument (a) is registrable in the same way as a mortgage of the property described in it, and (b) does not affect an interest in the property acquired in good faith and for value without notice before such registration.	AGREE. Adopts RD18.2, Rec. 27.2.
133	<ul style="list-style-type: none"> Provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is able to be registered. 	RD18.3, Rec. 28.3: Alberta legislation should provide that a court order charging real property for security of payment under a child support order or an instrument giving effect to the charging order is registrable. [RFD No. 18.2, Recommendation No. 27.2 at 156]	AGREE. Adopts RD18.3, Rec. 28.3.
	Lump Sum Payments		
134	<ul style="list-style-type: none"> Empower the court to, on application for spousal support, make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse. 	RD18.2, Rec. 19.2: Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make a lump sum payment to or for the benefit of the other spouse.	AGREE. Adopts RD18.2, Rec. 19.2. Enacted in DRA 1999.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
135	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order lump sum payments. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (b) lump sum payments, [RFD No. 18.2, Recommendation No. 19.2 at 144]	AGREE. Adopts RD18.3, Rec. 27.3.
Periodic Payments			
136	<ul style="list-style-type: none"> • Empower the court, on application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse. This power should not be limited to the joint lives of the spouses. 	RD18.2, Rec. 18.2: (1) Alberta legislation should authorize the court, on an application for spousal support, to make an order requiring one spouse to make periodic payments to the other spouse. (2) The power should not be limited to the joint lives of the spouses.	AGREE. Adopts RD18.2, Rec. 18.2. Rec. 18.2(1) was enacted in DRA 1999.
137	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order periodic payments. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (a) periodic payments [RFD No. 18.2, Recommendation No. 18.2 at 137]	AGREE. Adopts RD18.3 Rec. 27.3(a).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
	Private Court Proceedings & Publication Bans		
138	<ul style="list-style-type: none"> Provide that the court has discretion to direct some degree of privacy in family proceedings provided that, if the government is a party to the proceedings, that the government may not be excluded. This discretion should include prohibiting publication of information or broadcast of identifying information relating to applications in family proceedings. 	RD18.2, Rec. 53.2: Staying within <i>Charter</i> boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	AGREE. Adopts RD18.2, Recs. 53.2 and 54.2, RD18.3, Recs. 53.3 and 54.3, and RD18.4, Recs. 61.4 and 62.4.
139		RD18.2, Rec. 54.2: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information filed in a spousal support proceeding or produced in court.	
140		RD18.3, Rec. 53.3: Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	
141		RD18.3, Rec. 54.3: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information relating to applications in family proceedings.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
142		RD18.4, Rec. 61.4: Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.	
143		RD18.4, Rec. 62.4: The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information relating to applications in family proceedings.	
Reconciliation			
144	• Provide that a spousal support order terminate upon cohabitation having been resumed by the parties and continued for a period of more than 90 days.	RD18.2, Rec. 42.2: A spousal support order should terminate upon cohabitation having been resumed by the parties and continued for a period of more than ninety days.	AGREE. Adopts RD18.2, Rec. 42.2.
145	• Provide that a child support order terminate where a child’s parents commence and continue, or resume and continue, to cohabit for a period of more than 90 days.	RD18.3, Rec. 42.3: A child support order should terminate where a child’s parents commence and continue, or resume and continue, to cohabit for a period of more than ninety days.	AGREE. Adopts RD18.3, Rec. 42.3.
Retroactive Application of Legislation			
146	• Legislation should expressly state that the new spousal support, child support and child guardianship, custody and access laws should operate retroactively.	RD18.2, Rec. 59.2: The legislation enacting the new spousal support law should expressly state that it operates retroactively.	AGREE. Adopts RD18.2, Rec. 59.2, RD18.3, Rec. 59.3 and RD18.4, Rec. 66.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
147		RD18.3, Rec. 59.3: The legislation enacting the new child support law should expressly state that it operates retroactively.	
148		RD18.4, Rec. 66.4: The legislation enacting the new child guardianship, custody and access law should expressly state that it operates retroactively.	
	Retroactive Orders		
149	• Provide the court with the discretion to order that spousal or child support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of the proceedings.	RD18.2, Rec. 36.2: Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings. [spousal support]	AGREE. Adopts RD18.2, Rec. 36.2 and RD18.3, Rec. 36.3.
150		RD18.3, Rec. 36.3: Alberta legislation should give the court discretion to order that support be paid in respect of any period before the date of the order, including the period of entitlement occurring before the commencement of proceedings. [child support]	
	Rules of Court		
151	• Provide that, where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family matters.	RD18.2, Rec. 58.2: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family law matters.	AGREE. Adopts RD18.2 Rec. 58.2, RD18.3, Rec. 58.3 and RD18.4, Rec. 65.4.

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
152		RD18.3, Rec. 58.3: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court may apply the Alberta Rules of Court in family law matters.	
153		RD18.4, Rec. 65.4: Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court should have discretion to apply the Alberta Rules of Court in family law matters.	
154		RD18.4, Rec. 58.4: The Rules of Court and Forms should facilitate joint applications for guardianship, custody and access.	AJ does not mention ALRI RD18.4., Rec. 58.4.
	Transfer or Settlement of Property		
155	<ul style="list-style-type: none"> • Provide that the court may, in granting an application for spousal support, make an order requiring a spouse to convey or transfer property or an interest in property to or for the benefit of the other spouse. Such an order may authorize another person to execute the conveyance or transfer on behalf of the party, in order to satisfy the spousal support obligation. 	<p>RD18.2, Rec. 21.2: Alberta legislation should provide that:</p> <p>(1) In granting an application for spousal support, the court may make any one or more of the following orders:</p> <p>(a) an order requiring one spouse to convey or transfer property or an interest in property to or for the benefit of the other spouse, or</p>	AGREE. Adopts RD18.2, Rec. 21.2(1)(a) and (2).
156		<p>(b) an order varying, suspending or terminating an ante-nuptial or post-nuptial settlement made on the spouses, but not so as to affect adversely the interest of a third party benefitted by the settlement.</p>	AJ does not mention RD 18.2, Rec. 21.2(b).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
157		(2) An order under subsection (1) requiring a party to convey or transfer property may authorize another person to execute the conveyance or transfer on behalf of the party, in order to satisfy the spousal support obligation.	
158	<ul style="list-style-type: none"> • Provide the court with the same broad powers with respect to child support that it confers with respect to spousal support including the power to order the transfer or settlement of property. 	RD18.3, Rec. 27.3: Alberta legislation should confer the same broad powers on the court with respect to child support that it confers with respect to spousal support, including the power to order (d) the transfer or settlement of property. [RFD No. 18.2, Recommendation No. 21.2 at 150]	AGREE. Adopts RD18.3, Rec. 27.3(d).
	Variations		
159	<ul style="list-style-type: none"> • Empower the court to make an order discharging, varying or suspending, prospectively and retroactively, a spousal support order or any provision thereof if the court is satisfied that: 	RD18.2, Rec. 30.2: Alberta legislation should empower the court to make an order discharging, varying or suspending, prospectively or retroactively, a spousal support order or any provision thereof if the court is satisfied that	AGREE. Adopts RD18.2, Rec. 30.2.
160	<ul style="list-style-type: none"> • A change in the condition, means, needs or other circumstances of either spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order. 	(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, or	
161	<ul style="list-style-type: none"> • Evidence of a substantial nature that was not available at the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available,	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
162	In making the variation order, the court shall take that change of circumstance or evidence into consideration.	and, in making the variation order, the court shall take that change of circumstance or evidence into consideration.	
163	<ul style="list-style-type: none"> Empower the court to make an order discharging, varying or suspending, prospectively or retroactively, a child support order or any provision thereof if the court is satisfied that: 	RD18.3, Rec. 30.3: (1) Alberta legislation should empower the court to make an order varying, suspending or discharging, prospectively or retroactively, a child support order or any provision thereof if the court is satisfied that	AGREE. Adopts RD18.3, Rec. 30.3(1).
164	<ul style="list-style-type: none"> A change of circumstances has occurred since the making of the child support order or the last variation order made in respect of that order. 	(a) a change of circumstances has occurred since the making of the child support order or the last variation order made in respect of that order, or	
165	<ul style="list-style-type: none"> Evidence of a substantial nature that was not available at the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available,	
166	In making the variation order, the court shall take that change of circumstance or evidence into consideration.	and, in making the variation order, the court shall take that change of circumstance or evidence into consideration.	
167	A change of circumstances is: <ul style="list-style-type: none"> In the case where the amount of the child support includes a determination made in accordance with child support guidelines, a change in circumstances that would result in a different child support order or any provision thereof. 	RD18.3, Rec. 30.3: (2) For the purposes of subsection (1), a change of circumstances is (a) in the case where the amount of child support includes a determination made in accordance with the applicable table in the child support guidelines, a change in circumstances that would result in a different child support order or any provision thereof,	AGREE. Adopts RD18.3, Rec. 30.3(2).

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
168	<ul style="list-style-type: none"> In the case where the amount of child support does not include a determination made in accordance with child support guidelines, a change in the condition, means, needs or other circumstances of either parent or of any child who is entitled to support. 	(b) in the case where the amount of child support does not include a determination made in accordance with a table in the child support guidelines, a change in the condition, means, needs or other circumstances of either parent or of any child who is entitled to support, or	
169	<ul style="list-style-type: none"> In the case of an order made before the child support guidelines come into force, the date of the coming into force of those guidelines. 	(c) in the case of an order made before the child support guidelines come into force, the date of the coming into force of those guidelines.	
170	<ul style="list-style-type: none"> Empower the court to make an order to vary, suspend or discharge a guardianship, custody or access order if the court is satisfied that: <ul style="list-style-type: none"> A change in the condition, means, needs or other circumstances of the child or guardian has occurred since the making of the custody order or the last variation order made in respect of that order 	RD18.4, Rec. 49.4: The court should have power to vary, suspend or discharge a guardianship, custody or access order where the court is satisfied that <ul style="list-style-type: none"> (a) there has been a change in the condition, means, needs or other circumstances of the child or any guardian occurring since the making of the custody order or the last variation order made in respect of that order, or 	AGREE. Adopts RD18.4, Rec. 49.4.
171	<ul style="list-style-type: none"> Evidence of a substantial nature that was not available on the previous hearing has become available. 	(b) evidence of a substantial nature that was not available on the previous hearing has become available.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
172	<ul style="list-style-type: none"> Provide that the court consider the same factors and pursue the same objectives in an application to vary a spousal, child support or guardianship, custody and access order as it would in an application for a spousal, child support or guardianship, custody and access order. 	RD18.2, Rec. 31.2: The court should consider the same factors and pursue the same objectives in an application to vary a spousal support order as it would in an application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 31.2, RD18.3, Rec. 31.3 and RD18.4, Rec. 50.4.
173		RD18.3, Rec. 31.3: The court should consider the same factors and pursue the same objectives in an application to vary a child support order as it would in an application for a child support order.	
174		RD18.4, Rec. 50.4: On an application for a variation order, the court should consider the same factors and apply the same criteria as it would on an original application.	
175	<ul style="list-style-type: none"> Provide that the court have the same discretion and powers of disposition in an application to vary a spousal, child support or guardianship, custody and access order that it has in respect to an application for a spousal, child support or guardianship, custody and access order. 	RD18.2, Rec. 32.2: The court should have the same discretion and powers of disposition in an application to vary a spousal support order that it had in the original application for a spousal support order.	AGREE. Adopts RD18.2, Rec. 32.2, RD18.3, Rec. 32.3 and RD18.4, Rec. 51.4.
176		RD18.3, Rec. 32.3: The court should have the same discretion and powers of disposition in an application to vary a child support order as it has with respect to an application for a child support order.	

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
177		RD18.4, Rec. 51.4: On an application for a variation order, the court should have the same discretion and powers of disposition as it would on an original application.	
178	• Provide that the provisions that govern the duration of spousal or child support orders should apply to the duration of variation orders.	RD18.2, Rec. 45.2: The provisions that govern the duration' of spousal support orders should apply to the duration of variation orders.	AGREE. Adopts RD18.2, Rec. 45.2 and RD18.3, Rec. 43.3.
179		RD18.3, Rec. 43.3: The provisions that govern the duration of child support orders should apply to the duration of variation orders.	

[Unlawful Withholding or Removal of Child]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
180		RD18.4, Rec. 26.4: Alberta legislation should contain provisions to prevent the unlawful withholding or removal of a child by either parent or any third party.	AJ does not mention ALRI RD18.4, Rec. 26.4. ALRI's recommendation carries forward a provision in the existing <i>DRA</i> .

[Production of Child]

	ALBERTA JUSTICE – FAMILY LAW REFORM PROJECT (FLRP)	ALRI – FAMILY LAW RECOMMENDATIONS	ALRI COMMENTS
181		RD18.4, Rec. 27.4: The court should have discretion to grant or refuse an order for the production of a child depending on the circumstances of the child and merits of the application.	AJ does not mention ALRI RD18.4, Rec. 27.4.



THE MATRIMONIAL HOME

Report for Discussion No. 14

March 1995

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Spouses should be entitled to equal possession of the matrimonial home, regardless of the state of title, and without the need to obtain a court order. Spouses may therefore not expel each other from the home. This right of possession should be capable of being protected by the filing of a caveat in the Land Titles Office. (p. 29)

RECOMMENDATION 2

When granting an order under Part 2 of the Matrimonial Property Act, a court should have regard to the following factors:

- (a) The interests of any dependent children, taking into account such factors as (i) the health of the children and their need for continued stability, and (ii) the impact that a move might have on the ability of the children to attend school or participate in extra-curricular activities.
- (b) The financial position of the spouses, including their ability to continue to maintain the property as well as to continue to dwell under separate roofs.
- (c) Any existing orders pertaining to property or support.
- (d) The health and safety of the family, including the apprehension of violence.
- (e) The special character of the neighbourhood, including such considerations as the presence of friends, relatives, members of a specific ethnic community.
- (f) The date when the property was acquired.
- (g) The historical ties of the parties to the property in question.
- (h) The extent to which the property was acquired by one of the spouses by gift or special effort.
- (i) The effect of an order on any other person who holds an interest in the home.
- (j) Any informal agreement between the parties as to the home.
- (k) Any other fact or circumstance that is relevant. (p. 34)

RECOMMENDATION 3

An order for possession of the home can be made to cover the whole or any part of the premises. However, an order should not be made granting possession of part of the premises to one of the spouses, and part to the other, where there is an apprehension of violence. (p. 35)

RECOMMENDATION 4

Children should not be entitled to seek orders for possession under Part 2 of the Matrimonial Property Act. (p. 36)

RECOMMENDATION 5

When granting an order of possession under Part 2, a court should continue to be able to grant orders allowing for the possession of household goods. (p. 37)

RECOMMENDATION 6

When granting an order for possession under Part 2 of the Matrimonial Property Act, the court may also:

(a) determine any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order

(c) fix the obligation to repair and maintain a matrimonial home

(d) fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of the matrimonial home

(e) direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order.

(f) grant such other orders as are necessary for the proper management or maintenance of the property covered by the order. (p. 39)

RECOMMENDATION 7

The right to a life estate under the Dower Act should be replaced with a right of occupancy governed by Part 2 of the Matrimonial Property Act. The right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of the home to the widowed spouse are substantially outweighed by the benefits that would accrue to those making a claim. The burden of proof should be a heavy one to provide the widowed spouse with security of tenure in the home. The factors to be taken into account should include financial and non-financial considerations. (p. 60)

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The powers of a court to grant ancillary orders under Part 2 of the Matrimonial Property Act should be applicable to situations in which a widowed spouse remains in the home on the death of the owning spouse. Unless varied by court order, the surviving spouse should be responsible for all current expenses and repairs. (p. 61)

RECOMMENDATION 9

A surviving spouse enjoying a right of occupancy under Part 2 of the Matrimonial Property Act should also be entitled to possession of the household furnishings and appliances normally found in the house, and one automobile (unless the surviving spouse owns an automobile). This right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of to the widowed spouse in relation to the personal property are substantially outweighed by the benefits that would accrue to those entitled to make a claim. A court may also grant an order of possession in favour of the widowed spouse in relation to other “household goods” (as that term is defined in the Matrimonial Property Act). (p. 66)

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Matrimonial misconduct should not constitute a bar to the enjoyment of any of the rights contained in Part 2 of the Matrimonial Property Act. (p. 69)

RECOMMENDATION 11

The current definition of a “disposition” should be amended to include leases of less than three years. When a lease of less than three years is granted without compliance with the consent provisions, the lease is valid, unless it can be shown that the tenant was aware that consent was required and had no reason to believe that the consent was given. If the lease cannot be set aside, a court should have the power to order that all or part of the rents should be paid to the spouse whose consent was not obtained. The court should also have the power to direct that the lease be terminated at the earliest opportunity allowable under the terms of the lease. (p. 95)

RECOMMENDATION 12

The law should continue to require a consent and acknowledgment; the use of a standard form should be continued. That form should include both the consent and acknowledgment. It should clearly state that the rights being surrendered are those contained in Part 2 of the Matrimonial Property Act, as reformed, and that a given transaction is not effective until the document is completed. (p. 98)

RECOMMENDATION 13

(1) The law should require that the consent and acknowledgment form be properly completed. Minor defects should be ignored; the absence of a signature should not be treated as a minor defect.

(2) Where the formalities are not complied with properly, the law should provide that the transaction is void for all purposes. The law should also provide that the doctrine of estoppel does not apply to prevent any party from relying on the absence of a spousal consent.

(3) When the form is properly completed, the voluntariness of the consent can still be challenged by demonstrating that the consent was in fact given under duress. (p. 103)

RECOMMENDATION 14

The law governing the time at which a wrongful disposition of the matrimonial home can be set aside should conform with the general law governing land titles registration. Occupancy rights should not be classified as overriding interests under the land titles system. (p. 107)

RECOMMENDATION 15

(1) An action for damages should be available as a remedy for a wrongful disposition of any kind. This cause of action should not be extinguished by divorce.

(2) The quantum of damages to be awarded should be left to the discretion of the court. In assessing damages, a court should take into account all of the circumstances of the case, including the costs of relocation and comparable accommodation, and any inconvenience caused to a spouse or the children of the marriage. In the case of a wrongful mortgage, a court can assess damages at the level of the monies advanced, together with any incidental affects associated with the mortgage.

(3) Damages awarded to compensate for the loss of occupancy rights on death should be ordered to be secured against property, or paid into court, to be paid to the plaintiff-spouse only if that spouse survives the defendant. (p. 116)

RECOMMENDATION 16

A spouse who suffers a loss of occupancy rights owing, at least in part, to the operation of the land titles system, should be able to seek compensation from the assurance fund in accordance with the general law governing that fund. (p. 117)

RECOMMENDATION 17

A wrongful disposition of the matrimonial home should not give rise to quasi-criminal liability under provincial law. (p. 118)

RECOMMENDATION 18

The provisions governing dispensing with consent under the Dower Act should be incorporated into the consent rules under Part 2 of the Matrimonial Property Act. (p. 120)

RECOMMENDATION 19

(1) Spouses should be free to enter into a contract releasing their rights to occupancy of the matrimonial home on the death of the owning spouse. When such a contract is validly entered into the court should not be empowered to grant an order conferring possession on death unless it can be shown (i) that there has been a substantial change of circumstance since the entering into of the agreement that imposes a hardship on a spouse, or (ii) that the agreement would not be in the best interests of any children of the marriage.

(2) When a contract releasing rights of occupancy on death has been entered into and the owning spouse subsequently dies, the surviving spouse should be able to remain in the home for a transitional period. That period should be three months.

(3) An order that overrides the terms of a contract releasing occupancy rights should not be granted where to do so would affect the rights of a third party who acquired an interest in the home under a valid disposition of the home. (p. 130)

RECOMMENDATION 20

Spouses should be allowed to contract out of their rights of occupation arising prior to death. However, a contract entered into prior to separation should be unenforceable. Such a contract would be variable on the same grounds as contracts affecting occupancy rights on death. Third parties acting on the faith of a valid contract should not be prejudiced by a judicial alteration of the contract. (p. 132)

RECOMMENDATION 21

Part 1 of the Matrimonial Property Act should be amended to provide explicitly that an order under Part 2 can be made, even where no separate application under that Part has been launched. (p. 137)

RECOMMENDATION 22

Where the homestead is seized and sold under execution, the exempt portion of the proceeds of sale should be placed in the hands of the judgment debtor in accordance with general principles of exemptions law. (p. 144)

RECOMMENDATION 23

The current definitions of “homestead” under the Dower Act and “matrimonial home” under the Matrimonial Property Act should be replaced by a single definition. (p. 152)

RECOMMENDATION 24

The “matrimonial home” should be defined to include (a) lot in a subdivision, and (b) a “residential unit” as defined by the Condominium Property Act together with the owner’s interest in the common areas of the condominium. (p. 154)

RECOMMENDATION 25

The “matrimonial home” should be defined to include an ascertainable parcel of land of not more than one quarter section of land on which the home is situated. (p. 154)

RECOMMENDATION 26

(1) Where the matrimonial home is situated on a parcel of greater than a quarter section, the court should be empowered to delineate an area as the home of not more than 160 acres.

(2) Where the home straddles two or more parcels, each of these parcels should be treated as the home, unless a court orders a delineation, or orders compensation in lieu of occupancy rights.

(3) Where the parcel of land on which the home is located is a quarter section, that area should constitute the home, whether contained within a municipal area or otherwise. (p. 155)

RECOMMENDATION 27

- (1) The “matrimonial home” should be defined to include a suite.
- (2) When an order of exclusive possession is made under Part 2 of the Matrimonial Property Act in relation to a rental suite, excluding the original tenant, that spouse in whose favour the order has been made should be deemed to be an assignee of the interest of the other spouse in the lease.
- (3) When an order of exclusive possession is made excluding the original tenant, the obligations of that tenant to the landlord will continue only until the earliest time at which the tenant could have terminated the lease following the granting of the order.
- (4) The Matrimonial Property Act should provide for notice to the landlord of an order made under Part 2, and the effects of that order on the rights of the landlord that are affected by the order. (p. 158)

RECOMMENDATION 28

- (1) The “matrimonial home” should be defined to include a mobile home.
- (2) When a mobile home is located on a rented site, the recommendations concerning tenant liability and notice to the landlord that apply to residential tenancies should apply in relation to the mobile home site tenancy.
- (3) As a general rule, the provisions governing the disposition of the matrimonial home should apply to a mobile home. However, a disposition of a mobile home is valid, unless it can be shown that the transferee was aware that consent was required and had no reason to believe that the consent was given.
- (4) A spouse should be able to file a notice in the Personal Property Register, identifying a mobile home as a matrimonial home. That notice should specify that the consent requirements that apply. As under the present law, a spouse should also be able to file an order for possession.
- (5) Once an order for possession of a mobile home has been made, neither spouse should be allowed to relocate the home without either a consent or a court order having first been obtained. (p. 161)

RECOMMENDATION 29

The “matrimonial home” should be defined to include a part of business premises (other than a farm) used as living accommodation. (p. 163)

RECOMMENDATION 30

Rights over mines and minerals should not be considered to be part of the matrimonial home. (p. 165)

RECOMMENDATION 31

A home owned by a third party and one of the spouses should fall within the definition of the matrimonial home. The rights conferred on the other spouse under a possession order should be no greater than those held by the owning spouse. The

interests of the third party should be a consideration when an order for possession is sought. (p. 166)

RECOMMENDATION 32

The definition of the matrimonial home should not include property owned by a corporation. (p. 170)

RECOMMENDATION 33

The current requirement under the Matrimonial Property Act that a property falls within the definition of the matrimonial home only if lived in by both spouses should be retained. (p. 171)

RECOMMENDATION 34

A property should not cease to be a matrimonial home because a subsequent matrimonial home has been acquired. The election procedures currently contained in the Dower Act where a spouse dies owning more than one homestead should apply. The general rules governing releases and contracts should apply to all matrimonial homes. (p. 174)

RECOMMENDATION 35

- (1) The reforms proposed in the Report should be given prospective application.
- (2) Reform of the law should not affect dower life estates that have vested in possession.
- (3) The new provisions governing consent and the remedies for wrongful dispositions should apply only to dispositions occurring after the reforms become law. However, conduct giving rise to a quasi-criminal offence under the present Dower Act should not be amenable to prosecution after the new law takes effect.
- (4) Agreements made under the Dower Act and Part 2 of the Matrimonial Property Act prior to the coming into force of these reforms should remain binding on the spouses. (p. 178)



THE MATRIMONIAL HOME

Report for Discussion No. 14

March 1995

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Spouses should be entitled to equal possession of the matrimonial home, regardless of the state of title, and without the need to obtain a court order. Spouses may therefore not expel each other from the home. This right of possession should be capable of being protected by the filing of a caveat in the Land Titles Office. (p. 29)

RECOMMENDATION 2

When granting an order under Part 2 of the Matrimonial Property Act, a court should have regard to the following factors:

- (a) The interests of any dependent children, taking into account such factors as (i) the health of the children and their need for continued stability, and (ii) the impact that a move might have on the ability of the children to attend school or participate in extra-curricular activities.
- (b) The financial position of the spouses, including their ability to continue to maintain the property as well as to continue to dwell under separate roofs.
- (c) Any existing orders pertaining to property or support.
- (d) The health and safety of the family, including the apprehension of violence.
- (e) The special character of the neighbourhood, including such considerations as the presence of friends, relatives, members of a specific ethnic community.
- (f) The date when the property was acquired.
- (g) The historical ties of the parties to the property in question.
- (h) The extent to which the property was acquired by one of the spouses by gift or special effort.
- (i) The effect of an order on any other person who holds an interest in the home.
- (j) Any informal agreement between the parties as to the home.
- (k) Any other fact or circumstance that is relevant. (p. 34)

RECOMMENDATION 3

An order for possession of the home can be made to cover the whole or any part of the premises. However, an order should not be made granting possession of part of the premises to one of the spouses, and part to the other, where there is an apprehension of violence. (p. 35)

RECOMMENDATION 4

Children should not be entitled to seek orders for possession under Part 2 of the Matrimonial Property Act. (p. 36)

RECOMMENDATION 5

When granting an order of possession under Part 2, a court should continue to be able to grant orders allowing for the possession of household goods. (p. 37)

RECOMMENDATION 6

When granting an order for possession under Part 2 of the Matrimonial Property Act, the court may also:

(a) determine any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order

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