



SAINT LUCIA CIVIL CODE REFORM PROJECT

A Joint Project of CIDA and the Government of Saint Lucia

REPORT OF THE COMMITTEE ON FAMILY LAW

July 26, 2004

ABBREVIATIONS USED IN THIS REPORT

In the interests of brevity, the following abbreviations have been used in this Report.

“AO” means the Affiliation Ordinance, No. 33 of 1955.

“Barbados Family Law Act” means the Family Law Act (CAP. 214) (Barbados).

“Brierley” means Quebec Civil Law, An Introduction to Quebec Private Law, Ed. by J. E. C. Brierley and R. A. Macdonald, *et al*, Emond Montgomery Publications Limited, Toronto, 1993.

“Report on Canvas of Lawyers” means the Report on Canvas of Lawyers Respecting the Civil Code of Saint Lucia

“CCQ” means the Civil Code of Quebec, S.Q. 1991 c. 64.

“CCRP” means the Saint Lucia Civil Code Reform Project.

“CEDAW” means the Convention on the Elimination of all Forms of Discrimination Against Women 1979.

“CIDA” means the Canadian International Development Agency.

“CRC” means the United Nations Convention on the Rights of the Child 1989.

“DA” means the Divorce Act, Laws of Saint Lucia, No. 13 of 1973.

“FLP” means the Family Law and Domestic Violence in the Eastern Caribbean: Judicial and Legal Reform under the management of the Organization of Eastern Caribbean States Secretariat.

“Green Paper” means the OECS Family Law and Domestic Violence Reform Initiative “Green Paper” commissioned by the OECS Secretariat for the FLP.

“Jamaica Family Property Act means the Family Property (Rights of Spouses) Act, 2003 (Jamaica).

“OECS” means the Organization of Eastern Caribbean States.

“reformed SLCC” means the SLCC that will result from the CCRP.

“PLD” means the Private Law Dictionary and Bilingual Lexicon Ed. by Robert P. Kouri et al. 2nd Ed. Les Editions Yvon Blais Inc. 1990-91.

“Robinson and Pierre” means the Research Report on the Law of Domestic Relationships: Marriage, Divorce, Spousal Maintenance During Marriage, Matrimonial Property and Financial Provision on Breakdown, Unions other than Marriage, 9 June 2001 by Tracy Robinson and Barbara Pierre.

“SLCC” means the Saint Lucia Civil Code, Revised Laws of Saint Lucia 1957 (Cap. 242).

“SMO” means the Separation and Maintenance Ordinance, Revised Laws of Saint Lucia 1957 (Cap. 9).

“SRR” means the Summary of Research Reports, October 2002 by Dr. Leighton M. Jackson, D. Jur. prepared for the FLP..

“Trinidad and Tobago Cohabital Relationships Act” means the Cohabital Relationships Act, Act No. 30 of 1998 (Trinidad and Tobago).

“UNDVAV” means the United Nations Declaration on Violence against Women 1993 G.A. Res. 48/104.

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PART 1: EXECUTIVE SUMMARY

Purpose of the Committee on Family Law

This document is the Report of the Committee on Family Law (the “Committee”), which was established by the Attorney General of Saint Lucia to consider and make recommendations with respect to the Family Law provisions of the Civil Code of Saint Lucia (the “SLCC”) and extra-codal legislation. In addition to reviewing the substantive law, one of the objectives of the Committee was to strengthen the role of the SLCC as the fundamental legal framework of law in Saint Lucia that is comprehensive in scope, coherent and without gaps. That means that Acts, such as the Civil Status Ordinance, the Affiliation Ordinance, the Adoption Ordinance, the Separation and Maintenance Ordinance and the Divorce Act, will be repealed and replaced with reformed provisions in the SLCC.

The Existing Law

Few social institutions have undergone greater changes in the last 100 years than the family. When the SLCC was enacted in 1879:

- marriage was the only recognized form of the family and was believed to be for life
- family structure was profoundly patriarchal and the wife had few rights in relation to family property
- children of the marriage were essentially the property of the father
- marriage was an institution that recognized the blood relationships of the husband; for example, the SLCC drew a sharp distinction between the blood relatives on the one hand and the wife and illegitimate children on the other; the institution of adoption was unrecognised as being incompatible with the concept of blood relationships.
- the primary function of the law was to protect the husband’s property during his lifetime and the rights of his legitimate children and his blood relations on his death.

Since 1879 the legislature has amended the law to respond to changing social conditions. Adoption has been recognized. So has divorce. The law has responded to some of the demands for equality by women and for rights of children, but many disabilities and inequities remain. For example, a woman now has the right to hold and manage her separate property but is still considered legally incapable with respect to the administration of community property. She does not have equal rights in relation to the children of the marriage. When they are compared to legitimate children, illegitimate children are discriminated against in almost all aspects of the law, and more particularly in terms of their rights in relation to their parents (and the reciprocal obligations of parents to their children) and in important areas such as the right of a child to maintenance and to succeed his parents. The rights of fathers and mothers in relation to their illegitimate children are profoundly discriminatory.

Policy Considerations

One of the most important tasks of the Committee was to ensure that the SLCC and the related laws of Saint Lucia were brought into compliance with the United Nations Convention on the Rights of the Child 1989 (the “CRC”) and the Convention on the Elimination of all Forms of Discrimination Against Women 1979 (the “CEDAW”), to both of which Saint Lucia is a party.

There were also enumerable related policy considerations, including the rights and obligations of spouses in relation to each other, in relation to the family home and in relation to property acquired during the marriage.

The emphasis of modern family law is in saving salvageable marriages, in making separation and divorce easier when there is no chance of reconciliation and promoting, as much as possible, a harmonious relationship between the spouses and between the spouses and the children of the family even if the marriage has broken down.

In addition to dealing with the reality of separation and divorce, there has been agitation to recognize the rights of partners in unions other than marriage..

Summary of Major Recommendations:

The following is a summary of the recommendations made in the Report and a brief statement of the reasoning behind them. For the sake of brevity, they can be grouped into a number of subject areas. The reader is cautioned that only the most important recommendations appear here. He or she is advised to consult the text of the Report for all of the recommendations. Of necessity, the numbering and arrangement of the summary recommendations is different than those in the Report.

Rights of Children, the Rights and Obligations of Parents and Adoption

Under the CRC, all children should be equal regardless of the status of the parents at the time of the child's birth. The CRC goes well beyond the equality of the parents in relation to children. The CRC gives the child rights *independent* of the wishes of the parents. Children are considered persons in their own right and are granted special rights to achieve that objective. The Committee made recommendations which may be summarized as follows:

Summary Recommendation #1: That all children whose filiation is established should have the same rights and obligations, regardless of the circumstances of their birth, and that any distinction between legitimate and illegitimate children be abolished and that the reformed SLCC include the right of a child whose filiation is declared:

- (1) to have his or her record of civil status corrected; and*
- (2) to be maintained by and to succeed his parents on the same basis as a child born in wedlock.*

Summary Recommendation # 2: That the reformed SLCC recognize that a child is entitled:

- (1) to protection, security and attention from his or her parents or legal guardian;*
- (2) to have every decision concerning him or her taken with respect to his or her best interests and with respect to his or her rights, including without limitation the decision to permit the adoption of a child, the custody of and access to a child; and*
- (3) to be heard in any court proceeding affecting his or her interests where his or her age and understanding permit.*

Summary Recommendation #3: That men and women have equal rights and obligations in respect of their children, regardless of whether they are married to each other or not.

Summary Recommendation #4: That the law of adoption be reformed to establish criteria for eligibility for adoption, to put in place more stringent legal requirements such as background checks, police reports and home study reports in the case of children adopted by non-citizens and to ensure that adoption records are kept confidential except when the child, the child's birth parents and adoptive parents consent to disclosure.

Rights and Obligations of Spouses to each other and in respect of the Family Residence and Property Acquired during the Marriage:

The CEDAW requires that the Government of Saint Lucia ensure the equality of men and women and emphasize the autonomy of women and their freedom to make decisions for themselves on the same basis as men. Its objective is substantive equality, not just technical legal equality. It is recommended that the basic rights and obligations of the spouses to each other, the rights and obligations in respect of the family residence and the rights and obligations to share the family patrimony (which is the civil law term for the core of family property consisting of the family residence, the movables and vehicles used by the family and the accrued benefits under a retirement plan) be mandatory.

1. Basic Rights and Obligations: The basic rights and obligations of the spouses are mandatory and are based on complete equality. They are set out in the following:

Summary Recommendation #5. The rights and obligations of spouses with respect to each other should include the following, all of which should be binding on spouses and should not be capable of being modified by contract:

- (1) Each spouse has the same rights and obligations in relation to the marriage.*
- (2) Spouses owe each other fidelity, succour, assistance and respect and have the obligation to live together, but cannot be compelled to do so.*
- (3) Spouses must share the responsibilities associated with the moral and material direction of the family unit and exercise parental authority together.*
- (4) Spouses may grant each other an implied mandate or power of attorney with respect to the moral and material direction of the family.*
- (5) Spouses must both contribute to the expenses of the marriage, recognizing however that the contribution may be made through activities in the home and should be according to each spouse's means.*
- (6) Spouses must choose the family residence together, but in the absence of an express choice the family residence is presumed to be the residence where the family carries on its principal activities.*
- (7) Spouses must be able to contract for the current needs of the family and to bind the other except where the other has given notice that he or she will not be bound.*
- (8) When a dispute arises, one or both of the spouses can apply to the court.*

2. Rights and Obligations in respect of the Family Residence: The property occupied by a married couple as their family residence and the contents of the residence, regardless of who has the right of ownership, is entitled to special legal protection in the interests of ensuring that no matter what happens, the family will have a home during the marriage, and, if separation or divorce occurs,

that one of the spouses and the children will have a home. That protection is not a right in property. Rather, it takes the form of a veto on disposition or encumbering the family residence during marriage without the assent of the other spouse and a right of the court to grant an exclusive right of use to one spouse after the parties have separated or a divorced.

Summary Recommendation #6: The rights and obligations of the spouses with respect to the family residence and its contents should be as follows, all of which rights and obligations should be binding on spouses and should not be capable of being modified by contract:

- (1) That only one family residence should be protected and that it should be the place where the members of the family live while carrying on their principal activities;*
- (2) That the family residence may be an immovable or a movable (chattel house or trailer), whether leased or owned. The family residence may be part of an immovable used for other purposes (a residence on farmland or in business premises). Even though the property on which the family residence is located is owned by a corporation in which a spouse has shares or by any other means including a trust, it will be a family residence.*
- (3) That neither spouse may, without the written consent of the other (or without having the other spouse join in the transaction if the property is co-owned), alienate, hypothecate or charge the family residence with a real right nor sublet the property or transfer or terminate the lease (where the lessor has been notified) of the property used as a family residence;*
- (4) That the court may, on application, authorize the alienation, hypothecation or charging of the family residence with a real right, or the subletting, transfer or termination of the lease if the spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent;*
- (5) That in the event of separation, dissolution or nullity of marriage, or the death of a spouse, the court may, upon such conditions as it considers appropriate, grant to either spouse or the surviving spouse a right of use of the family residence; or the lease of the family residence;*
- (6) That the protection of the family residence extend to the movable property used for household purposes.*

3. Rights in the Family Patrimony:

Increasingly modern marriage is viewed as a joint economic venture of equal partners in which the value of property acquired by the couple during marriage ought to be shared regardless of who holds legal title to it. At the same time, the law endeavours to strike a balance between the separate property of the individual spouses and property that is to be subject to sharing. The right to share is a personal right, which crystallizes on application for separation, divorce or a decree of nullity of marriage or on the death of a spouse. As has been recommended above, the only restriction on a spouse dealing with his or her property arises with respect to the family residence and the movables used for household purposes.

The Committee rejected the approach taken in the DA, which gives a discretion to the Court to determine how the property is to be shared. It also rejected a model that would allow the parties to make any agreement that they wish about sharing property. The Committee believed that the effect of that type of agreement can be very unequal because the economic power of spouses may be different. The Committee felt that the very legal equality that has been won by men and women can be undermined by the freedom to contract that is an important component of that equality. The economically dominant spouse may well pressure the economically weaker spouse to contract out of his or her rights. While doing so does not make much difference when a marriage is working well, it makes a great difference when it is not. At that point it is too late for the economically weaker spouse.

The Committee recommended the mandatory sharing of the core of family assets, the family residence, the moveable property which serves for the use of the household, the motor vehicles used in family travel and the benefits under a retirement plan (collectively referred to in the civil law as the “family patrimony”) after the exclusion or deduction of certain private property. An example of the application of this scheme of sharing is set out in the Schedule.

Summary Recommendation #7:

(1) *That the family patrimony be established consisting of the family residence (the principal family residence, if the family has more than one), the moveable property with which it is furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel, benefits under a retirement plan (including payments and accumulation of service) accrued during the marriage.*

(2) *That the family patrimony be mandatorily shared.*

(3) *That, subject to the right of the court to order an unequal division on specified grounds, on partition on separation or dissolution or nullity of the marriage, or on death, the value of the family patrimony be divided equally between the spouses after excluding or deducting*

(a) the value of property devolving on one of the spouses by succession or gift before or during the marriage and any property that replaces that property

(b) the value of death benefits payable under a retirement plan devolving on a surviving spouse where the marriage is dissolved by death

(c) the debts for the acquisition, improvement, maintenance or preservation of property in the family patrimony

(d) the net value at the time of marriage of the property owned by each of the spouses that is included in the family patrimony plus the appreciation on that net value during the marriage

(e) the net value of any contribution made by one of the spouses during the marriage for the acquisition or improvement of the property included in the family patrimony, where the contribution is made out of property devolved by succession or gift or its reinvestment plus the appreciation from the time of contribution to the dissolution of the marriage.

(4) *That the partition of the family patrimony be subject to rules to ensure fairness including*

- (a) *the right of the court to order an unequal division of the family patrimony where the marriage was brief, where one spouse has dissipated assets or there has been bad faith, and*
- (b) *a restriction on sharing more than 50% of the benefits under a retirement plan accrued during marriage..*

4. Rights in the Partnership of Shareable Property:

The spouses may before or at any time during marriage make a contract respecting any or all of the property not included in the family patrimony. They can choose a conventional separation of property or community of property or, by not exercising any option, let the default scheme in the reformed SLCC apply. In this way, business assets, for example, can be dealt with as the spouses determine. Property that is not identified as private is shareable.

Summary Recommendation #8: That the spouses have the option of choosing a conventional separation of property or community of property or, by not exercising any option, of letting the default scheme in the reformed SLCC apply.

Summary Recommendation # 9:

That the default scheme in the partnership of shareable property be as follows:

(1) That shareable property include all property not declared to be private property by law, and, in particular,

- (a) *the proceeds of that spouse's work during the regime; and*
- (b) *the fruits and income due or collected from all that spouse's private property or shareable property during the regime.*

(2) That the private property of each spouse consists of

- (a) *property owned or possessed by that spouse when the matrimonial regime comes into effect;*
- (b) *property which devolves to that spouse during the matrimonial regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;*
- (c). *property acquired by that spouse to replace private property and any insurance indemnity relating thereto;*
- (d). *the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or retirement plan, other annuity or insurance of persons;*
- (e) *that spouse's clothing and personal papers, wedding ring, decorations and diplomas;*
- (f) *the instruments required for that spouse's occupation, except to the extent that they were acquired with shareable property;*
- (g) *a damage award to a spouse for personal injury and other similar right.*

(3) That the regime of partnership of sharable property is dissolved by a conventional change of regime, a divorce, separation or death (including a declaration of death by absence) or decree of nullity of marriage where it produces effects;

5. Claim for Constructive Trust or Compensatory Allowance and Effect on Passing of Property on Death

The partition of property in the family patrimony or in the partnership of shareable property is subject to adjustment for claims based on constructive trusts or for a compensatory allowance, which is a statutory claim for restitution that is very similar to, but broader than, a constructive trust. A spouse cannot pass by will or on intestacy any part of the value of property that is included in the family patrimony or the partnership of shareable property.

Summary Recommendation #10:

(1) That in connection with the partition of the property a spouse can make a claim for a constructive trust or compensatory allowance or both after the partition based on ownership at law has been determined;

(2) That neither spouse be able to dispose of by will or pass on intestacy that portion of the value of property that he or she is obliged by law, in the case of the family patrimony, or by agreement, in the case of the partnership of shareable property, to share with his or her spouse.

Separation, Divorce and Spousal and Child Maintenance

The Committee recommended that all matters under this heading be, if possible, consolidated in the reformed SLCC.

Summary Recommendation #11:

That the law in relation to separation be reformed as follows:

(1) That

(a) all grounds for separation be replaced by a single ground, namely, that a separation be granted when the will of the spouses to live together has been gravely undermined as evidenced by the spouses living apart for a period of time, by one of the spouses (other than the spouse seeking the separation) failing to perform an obligation arising out of the marriage or by proof of facts that make living together almost intolerable; and

(b) these grounds be available without discrimination to the husband or the wife.

(2) That mandatory provisions be introduced in the reformed SLCC for the fostering of reconciliation of spouses by their attorneys and the court.

(3) That a period or periods of time during which the parties may cohabit without detriment to their grounds for separation from bed and board or to divorce should be introduced to encourage reconciliation and that the periods applicable to divorce should extend to separation.

(4) That there be one set of provisions for relief on separation, that they be in the SLCC and that the relief be available on an equal basis to a husband or wife.

(5) That in granting such relief on separation from bed and board the court consider, in addition to the circumstances specified in section 25(1) of the DA, previous orders made by the court, any agreements made between the spouses, the chances of finding employment and the time and resources required for a spouse to acquire autonomy.

(6) That, on separation of the parents, maintenance and custody of, and access to, a child in respect of a child be determined on the basis of his or her best interests.

(7) That, on separation, joint custody be provided for in the reformed SLCC where co-operation between the parents makes it an appropriate arrangement

(8) That the provisions of the SLCC respecting the effects of separation be reformed to reflect the full equality of the spouses.

Summary Recommendation #12:

That the law in relation to divorce be reformed as follows:

(1) That the time for bringing an action for divorce should be reduced to two years from 5 years and that the right to apply for leave to bring a petition before the expiration of two years continue on the same basis as in the present DA.

(2) That the qualification that the breakdown of the marriage be “irretrievable” should be removed from the ground of divorce and that breakdown of the marriage alone be the sole ground.

(3) That adultery which the petitioner finds intolerable under section 4(1)(a) of the DA be kept as a ground of breakdown and the provisions be reformed to provide that parties be able, on the same basis, to add a co-respondent when alleging adultery.

(4) That the second ground for divorce set out in section 4(1)(b) of the DA, namely, that the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, be kept.

(5) That the separation under section 4(1)(d) of the DA be reformed to provide that for a period of two years separation (instead of five years) as sufficient for divorce, and that desertion for two years under section 4(1)(c) be removed as a ground for divorce.

(6) That

(a) the provisions the in DA 8(1) and 8(2) regarding reconciliation be made mandatory in the SLCC;

(b) in the case of a person presenting his or her own petition for divorce, it should also be mandatory that the person state whether he or she has sought reconciliation or that it was impossible to do so;

(c) counselling services be established or identified to guide the spouses in their attempts to reconcile; and

- (d) *in order to promote reconciliation, cohabitation of the spouses for a period or periods together not exceeding 6 months, be disregarded in relation to all grounds of divorce as under the existing law.*

(7) *That in granting relief on divorce or nullity of marriage the court consider, in addition to the circumstances specified in section 25(1) of the DA, previous orders made by the court, any agreements made between the spouses, the chances of finding employment and the time and resources required for a spouse to acquire autonomy.*

Summary Recommendation #13:

That issues of relief in respect of children be reformed as follows:

(1) *That sections 23 and 40 to 44 of the DA needs to be reformed to reflect the rights and “best interests” of children as being of primary importance when orders for relief are being made.*

(2) *That definitions of “custody” and “access” for the purposes of divorce be set out separately.*

(3) *That section 40 of the DA be amended to give the husband and wife equal rights in providing provisional care to any child of the family.*

(4) *That on divorce joint custody be provided for in the reformed SLCC where co-operation between the parents makes it an appropriate arrangement.*

Summary Recommendation #14:

That ordinary residence of at least one spouse prior to an application for separation or for maintenance or other relief or for a petition for divorce or nullity of marriage should be sufficient to commence family proceedings in Saint Lucia and that section 18(1) of the DA be repealed along with the repeal of article 50 of the SLCC.

Summary Recommendation #15:

That a single set of provisions for relief on separation be set out in the reformed SLCC and that the inclusion of all matrimonial causes in the SLCC be considered in the drafting phase.

Rights and Obligations of Partners in Unions other than Marriage:

The recognition of the rights and responsibilities of partners in unions other than marriage is a regional and an international trend. The Committee confirmed the central role of the institution of marriage. They rejected same-sex unions and the concept of a civil union, even between persons of the opposite sex, as an alternative to marriage. Note that these recommendations relate to the role of the partners in relation to each other and are in addition to any rights and obligations that the partners have in relation to their children.

The Committee agreed that to be recognized there had to be some evidence of commitment in the union. Following the lead of several Caribbean jurisdictions, the Committee recommended that a union be entitled to recognition if the partners have cohabited continuously for 5 years. The Committee also recognized that cohabitation was often not monogamous and the Committee recommended that continuous cohabitation with one partner did not preclude continuous cohabitation with another partner or partners. The Committee also recommended the recognition of cohabitational unions from which a child is born, even though the union is less than five years.

The Committee recognized that in determining the rights of partners in unions other than marriage, there are some serious problems depending on the remedy chosen. If the policy maker considers the sharing of the property of the partner as a remedy, the policy maker has some difficult choices to make. Property is not easily divisible. It will be noted that the intent of the recommendation in respect of marital property is to secure the position of the spouse in the marriage in relation to the property acquired during the marriage. If a married person is involved and there are one or more unions other than marriage, the policy maker has the choice of excluding the union or unions other than marriage (and thereby cause injustice) or including all the unions and running the risk that there will be unseemly disputes (involving the legal spouse) over who is entitled to what property. The same situation will obtain in a contest over property rights even if all the partners in a union other than marriage are unmarried. If the remedy is a money claim, the claims of the spouse and partners can be more easily accommodated.

The Committee on Family Law recommended that all claims be maintenance claims, one of the main purposes of which is to foster the independence of the partner claiming maintenance. Maintenance claims of partners are designed to be self-limiting. The Committee on Family Law chose the maintenance claim as the primary remedy available to persons in unions other than marriage whether the claim arose during the union, when it ended or on the death of one of the partners.

The Committee decided, once a threshold commitment requirement has been met for legal recognition of the union, that the family residence of the partners and its contents ought to be entitled to protection on the same basis as the family residence and its contents would be if the partners were married.

For the reasons set out above, the Committee rejected the notion of a right to share in the property of the partner on the breakdown of the union or on the death of a partner.

Summary Recommendation #16:

(1) *The threshold requirement for one partner to apply for maintenance from the other is either*

- (a) *that the parties have been in a cohabitational relationship (in the sense of living together in a conjugal relationship) continuously for a period of not less than five years, whether or not one or both of the parties during that period has also been in such a cohabitational relationship continuously with another partner or partners; or*
- (b) *that the partners have lived continuously in a conjugal relationship for a sufficient period to constitute cohabitation (even though the period is less than five years and whether or not one or both of the parties during that period has also been in such a cohabitational relationship continuously with another partner or partners) and are the parents of a child (including an adopted child);*

(2) *For the purpose of claiming maintenance for him or herself, it is not relevant whether either of the partners in a union other marriage is married to someone else so long as either threshold requirement is met;*

(3) *That in awarding maintenance to a partner the court take into account the same criteria that would apply to a maintenance claim between spouses.*

(4) *That a partner who has satisfied either threshold requirement has the same rights in the family residence occupied as the place of cohabitation of the partners and their family and in its contents, regardless of who is the owner, as a spouse would have in his or her family residence and its contents.*

(5) *That during their relationship and on the breakdown of the relationship, one partner have a right to claim maintenance against a partner or former partner, but, apart from a claim to use the family residence of the partners, no partner will have a claim to the property of the other partner during the partner's lifetime, other than a claim arising under an agreement between the partners, a will or by reason of a constructive trust; and*

(6) *That on the death of a partner, the surviving partner have a right to claim maintenance against the estate of a former partner but, apart from a claim to use the family residence of the partners, no partner will have a claim to property in his or her partner's estate, other than a claim arising under the will of the deceased, an agreement between the partners or under a constructive trust.*

Right to Claim Maintenance against an Estate

Under the present law, the obligation to provide maintenance to a spouse or former spouse or to a child does not generally survive the death of the person obliged to pay. Behind this issue lies the law of freedom of testation, that is to say, the right of a person under the law of Saint Lucia to make a will disposing of his or her property as he or she chooses and the law governing the distribution of an estate on intestacy, that applies when a person does not make a will or makes a will without disposing of all his or her property. The law makes it quite legal for a testator to fail to provide, or fail to provide sufficiently, for persons he or she is obliged to maintain. If a person does not make a will, the law provides for a distribution that could result in the same failure to provide, or to provide sufficiently, for those persons. The Committee considered the impact of freedom of testation and the law relating to intestacy and felt that their effects ought to be mitigated. The Committee felt that a person who was maintained or was entitled to be maintained by the deceased should have a claim against the estate for maintenance, but that that claim should

take into account a number of factors to arrive at an equitable result for all persons making claims and all beneficiaries of the estate.

Summary Recommendation # 17:

(1) Subject to Recommendation (2), that the following persons be entitled to claim maintenance:

- (a) the spouse, if any, of the deceased*
- (b) the children of the deceased and that spouse*
- (c) a child, other than a child referred to in item (b), who was treated as a child of the family within the meaning of the DA, s. 2 if the deceased was maintaining or was under an obligation to maintain the child at the time of his death*
- (d) the ex-spouse, if any, of the deceased if the deceased maintained or was under an obligation to maintain the spouse at the time of his or her death but not if the spouse has remarried unless the remarriage was to the deceased*
- (e) all the children of the deceased and his or her ex-spouse*
- (f) a child, other than a child of the deceased and his or her ex-spouse, who was treated as a child of the family within the meaning of the DA, s. 2 if the deceased was maintaining the child or was under an obligation to maintain the child at the time of his death*
- (g) any partner or partners of the deceased in a union other than marriage if the partner or partners have satisfied either of the threshold requirements in Summary Recommendation 16(1)*
- (h) any former partner or partners of the deceased in a union other than marriage if the former partner has satisfied one of the threshold requirement and the deceased maintained or was under an obligation to maintain the former partner at the time of his or her death but not if the former partner has married*
- (i) any child of the deceased other than a child included in item (b),(c), (e) or (f);*
- (j) the ascendants of the deceased.*

(2) That the following persons be denied a right to claim maintenance:

- (a) unworthy persons; or*
- (b) a child who has attained the age of 18 years unless the child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (DA. S. 28(3)) or there are special circumstances which justify the court in making an order or provision for the benefit of the child.*

(3) That, in fixing the maintenance of a claimant, the following factors be considered:

- (a) the needs, means and capacities of the claimant, including any physical or mental disability of the claimant, and whether the claimant was receiving maintenance from the deceased at the time of his or her death,*
- (b) any orders made by the court for periodical or lump sum payments in relation to the claimant,*
- (c) any agreements with respect to maintenance and other relevant matters made by the claimant with the deceased,*
- (d) the value of the net assets of the estate;*
- (e) the needs, means and capacities of the beneficiaries of the estate;*

- (f) *the rights of other claimants for maintenance;*
 - (g) *the duration of the marriage or relationship in the case of a spouse, ex-spouse or partner.*
- (4) *That the court be given the power to determine how the payment of maintenance by the estate would affect the various gifts under the will of the deceased or the distribution on intestacy and to prorate the claims in appropriate cases.*
- (5) *That a claim be paid as a lump sum either all at once or by instalments.*
- (6) *That a claimant be entitled to make a claim within six months after the appointment of the personal representative of the person obliged to pay and that, after the expiration of that period, the court have a power to extend the time and to freeze the distribution of the estate in appropriate cases.*
- (7) *That the personal representative of the deceased not be liable for having distributed any part of the deceased's estate if no claim is made within six months of his or her appointment and after ascertaining that no application has been made to the court to extend the time and to freeze the distribution of the estate.*
- (8) *That there be no legislated ceiling on the contributions to maintenance from the estate of a deceased person and that the matter be left to be decided by the courts in individual cases.*

Miscellaneous Recommendations

Important recommendations are made in a number of other areas not set out above. The reader is referred in each case to the Chapter of the Report indicated below:

- (1) *Enjoyment and Exercise of Civil Rights (Chapter 2)*
- (2) *Records of Civil Status (Chapter 4)*
- (3) *Filiation (Chapter 5)*
- (4) *Domicile (Chapter 7)*
- (5) *Absence of a Person and Declaration of Absentee's Death (Chapter 8)*
- (6) *Capacity of Natural Persons (Chapter 9)*
- (7) *Solemnization of Marriage (Chapter 10)*
- (8) *Annulment of Marriage (Chapter 11)*
- (9) *Succession (Chapter 18).*

PART 2: REPORT AND RECOMMENDATIONS

1. Introduction

The Saint Lucia Civil Code Reform Project (the “CCRP”) is a joint project of the Canadian Government as represented by the Canadian International Development Agency (“CIDA”) and the Government of Saint Lucia.

Alone among the countries of the Commonwealth Caribbean, Saint Lucia has both a common law and a civil law tradition. In 1879, Saint Lucia adopted a Civil Code almost identical to the English version of the Civil Code of Lower Canada adopted in Quebec in 1866. The purpose of the CCRP is to reform the Civil Code of Saint Lucia (the “SLCC”) and related extra-codal legislation.

This document is the report of the Committee on Family Law, one of three Committees established by the Attorney General of Saint Lucia (the “Attorney General”) to review and consider the reform of the Civil Code of Saint Lucia (the “SLCC”) and extra-codal legislation.

Background

The Committee on Family Law (the “Committee”) consisted of the following persons:

Rumelia King, Director of the Family Court
Andra Gokol-Foster, Registrar of the High Court / Registrar of Civil Status
Dr. Urban Seraphine, Psychologist and Justice of the Peace
Clementia Eugene, Social Worker
Petra Nelson-Jeffrey, Attorney
Dwight Lay, Lawyer, Attorney General’s Chambers
Felicia Robinson, Director, Human Resources, Government of Saint Lucia

Ms. Robinson left Saint Lucia before the Committee began to meet. After making a valuable contribution but before all of the papers were considered, Mr. Lay left Committee.

Because of the heavy commitments of the above appointees, a number of Ad Hoc members were appointed on the authority of the Attorney General. Of those only Victoria Nathaniel, Ministry of Human resources, attended. Gillian Vidal-Jules, Crown Counsel in the Department of Legislative Drafting, who has been designated as the Saint Lucian Drafter by the Minister, attended the meetings of the Committee. Allison Isaac of the Department of Legislative Drafting acted as Secretary to many of the meetings and has since been designated as a Saint Lucian Drafter. All three freely contributed to the discussions.

The Project Team consisted of Gordon Carnegie who acted as Project Manager, and Karen Steven-Dalton, who was the Saint Lucian Lawyer Policy Analyst, and Veronique Joly, who was the Canadian Lawyer Policy Analyst.

Ten meetings of the Committee were held, nine between August and early October, 2003 and, after several meetings had to be cancelled because there was no quorum, the final meeting was held on April 8, 2004. In accordance with the Memorandum of Understanding between the Government of Saint Lucia and the Government of Canada and the Project Plan, the relationship

between the Project Team and the Committee members was highly interactive. Special care was taken by the Team and the Committee to put their personal biases aside and to try as faithfully as they could to make the sort of recommendations that would have the support of a majority of Saint Lucians.

Methodology

The Role of the Civil Code

In order for the Committee to understand its task of reforming the SLCC, it was important that it have some understanding of what function the Civil Code ought to play in the legal system of Saint Lucia. Among the materials provided to the Committee for their study and consideration was Alain Bisson's article entitled "A Comparison between Statutory Law and Civil Law"¹. Professor Bisson remarks:

"...the most characteristic feature of a civil code is its expression of principles that promote a broadly-based knowledge and a better appreciation of the civil law. This feature is frequently accompanied by an endeavour to produce some systemization of the law, but the dominant consideration in the first instance is the expression of some generality in the rules. This generality, which leads to simplicity and clarity – at least ideally speaking – should not be mistaken for vagueness. As Professors Herman and Hoskins excellently put it:

"The [codified] legal rule is designed to operate at an optimum level of abstraction. This level may be seen as a point of equilibrium.... This point of equilibrium is not fixed. It varies according to the substantive content of the rule itself and to the position the rule occupies in the overall legislative scheme.

Related to the aforementioned is the perception that a civil code is complete for the matters to which it relates or, more accurately, that it is deemed to be complete. Section [sic]11 of our *Civil Code* expressly provides; "A judge cannot refuse to adjudicate under pretext [pretext is the important word] of the silence, obscurity or insufficiency of the law." This is a clear invitation to examine the law, as codified in general terms, as an open and dynamic scheme, from which particular rules of law ...will have sometimes to be distilled." [References omitted] (p. 227-228)

He goes on to remark in contrasting the functions of statutory law and a civil code:

"Speaking very generally, it might be said that in a codified private law system, statutory law meets more the needs of immediate adaptation whereas a civil code meets more the needs of providing a fundamental legal framework." (p. 229)

On the subject of the continuing success of statute law in Quebec over the *Civil Code*, he remarks on the very regrettable fact that each ministry tends to want to have its own laws even to the detriment of the coherence of the system" and that it is easier to make limited and specialized changes in the system than it is to make fundamental changes. (p. 230)

The Project Team noted that that tendency is very strong in Saint Lucia. The SLCC has frequently been amended in a fundamental way by extra-codal statutes in a manner that has derogated from its role as a "fundamental legal framework" and that one of the recurrent themes

¹ Essays on the Civil Codes of Quebec and St. Lucia, Ed. by R. A. Landry and E. Caparros, University of Ottawa Press, 225.

of the review of the SLCC will be the consolidation of the law in the SLCC and the strengthening of the SLCC as the fundamental law of Saint Lucia. The objective of the reform of the SLCC was to provide a SLCC that is a statement of the fundamental law that is comprehensive in scope, coherent and without gaps.

Reform of the Substantive Law

The Project Team produced 20 policy papers covering the full spectrum of relevant subjects. The methodology was in large measure dictated by the particular subject areas and by the policy issues that had to be taken into account. Some papers considered by the Committee, especially the early papers, were expository and intended to set out certain information and policy considerations that would be helpful to the Committee. Some (like those on filiation and domicile) were highly technical legal studies. Others focussed on the analysis of aspects of the present law in the light of specific policy considerations. Still others laid out a framework for analysis, and the decisions were made by the Committee itself with the recommendations being drafted and refined by the Project Team in response to the Committee's wishes. In this group were the most important and controversial subjects, including the rights of spouses in the family residence, the division of matrimonial property, the rights of partners in unions other than marriage and the right of various persons to claim maintenance from a deceased's estate.

One of the most important tasks of the CCRP was to ensure that the SLCC and the related laws of Saint Lucia were brought into compliance with the Convention on the Elimination of all Forms of Discrimination Against Women 1979 (the "CEDAW") and the United Nations Convention on the Rights of the Child 1989 (the "CRC").²

The work of the Committee was greatly assisted by the policy work that had been done under the auspices of the Program for Family Law and Domestic Violence: Judicial and Legal Reform (the "FLP"), a program now managed by the OECS Secretariat. Foremost among these documents was the Summary of Research Reports (the "SRR") by Dr. Leighton Jackson.³

The SRR contrasted two policy approaches for family law reform in the OECS, which were adopted by the CCRP.

1. The Rights-Based Approach: As the SRR says, a rights based approach to family law involves the "modernization of family law through legislation as a first response aimed at the eradication of inequality between men and women, ensuring the human rights of children and protecting women from domestic violence." (SRR, 3) This approach reflects the globalisation of rights.

² Saint Lucia acceded to CEDAW on October 8, 1982 without reservations and Lucia signed the CRC on September 30, 1990 without reservations. The United Nations Declaration on Violence against Women 1993, G.A. Res. 48/104 (the "UNDAVW") and the United Nations Universal Declaration of Human Rights, G.A. Res. 217A (III) of December 10, 1948 ("UNUDHR") are morally binding on Saint Lucia and influenced the recommendations of the Committee.

³ This report was a summary of a number of research papers of Tracy Robinson and Barbara Pierre, Zanifa McDowell, Zoila Ellis, Hazel Thompson-Ahye, Roberta Clarke and Jacqueline Sealy-Burke. "Research Report on the Law of Domestic Relationships: Marriage, Divorce, Spousal Maintenance during Marriage, Matrimonial Property and Financial Provision on Breakdown, Unions other than Marriage", 9 June 2001 by Tracy Robinson and Barbara Pierre was particularly germane, though all the reports were helpful to Project Team and the Committee.

2. Cultural-Action Approach: In contrast to the rights-based approach, the cultural-action approach is based on the values underlying the development, existence and recognition of a society. The objective of this approach is to move away from externally generated legislative standards which, according to the SRR, have had the effect of cultural segmentation in the various Caribbean countries. Such standards have typically been adopted without regard for the cultural reality of the Caribbean and have excluded those who have not conformed to that legislative standard. The task is “the incorporation, for the first time, of the interests and concerns of all members of the society equally in the rules of family law.” (SRR, 7) The cultural-action approach requires extensive consultation and education.

An important part of the methodology for the CCRP was to move to a deeper level of analysis than that in the SRR.⁴ There are often several ways to implement a policy objective. In the area of the CEDAW, for example, it is not enough to abolish discrimination against women, or even to declare that men and women are equal. The task is to ensure that there is *real* equality and not just *legal* equality. There is a similar objective in the area of children’s rights, to ensure that rights are not just *legal* rights but *real* rights. As will be seen, the translation of general principles into legally enforceable rights is a considerable challenge. Furthermore, a moment’s reflection will show that legal rights are often of no effect unless administrative systems and government programs are put in place to make the exercise of those rights real. This is especially true of programs for women suffering domestic abuse and for children.

Furthermore, the methodology recognized that the choice of a policy option in one area of law is not an isolated choice, but may have a “ripple effect” on other aspects of family law that must be taken into account. For example, it is very difficult to isolate the questions respecting sharing of property within and on the breakdown of marriage from the law of succession.

In applying the two approaches highlighted by the SRR the methodology proposed by the Project Team emphasized that there were seven considerations to be taken into account to guide the discussions of the Committee. The first of these considerations looks back to the 1879 SLCC and summarizes the sorts of policy changes that have taken place in the last 125 years. The other six represent certain trends that the Committee were invited to consider in relation to the circumstances of Saint Lucia. Those considerations are summarized below.

(1) Changes in the Family: No area of society has changed more radically in the last century and a half than the family. The law has not kept pace. The SLCC as originally enacted in 1879 reflected a world that no longer exists.

- Marriage was the only recognized form of the family and was believed to be for life. Those who had conjugal relationships outside marriage fell outside the system and children born out of wedlock were largely deprived of rights and responsibilities.
- The family structure was profoundly patriarchal. A woman had almost no rights in relation to the family property and she lost most of her rights to deal with her own. The order of society was thought to depend on a woman deferring to her husband’s wishes. The children were essentially the property of the husband.
- Marriage was essentially an institution that recognized the blood relationships of the husband but only within the institution of marriage. For this reason, the SLCC made a distinction between illegitimate and legitimate children, it made no provision whatsoever

⁴ The formal Green Paper was completed too late to influence the CCRP, though early drafts were very helpful.

for adoption even if the child was a blood relative and originally provided that the wife had no right of inheritance at all from her husband.

- The primary function of the law of family property during the lifetime of the husband and on his death was to protect the property rights of the husband, his legitimate children and his blood relations.

Much has been done since 1879 to amend the law to respond to changing social conditions. Many of the patriarchal provisions of the SLCC have been amended or repealed and accordingly, many of the disabilities of women have been removed. A woman now has the right to hold and manage her separate property but is still considered legally incapable with respect to the administration of community property. She does not have equal rights in relation to the children of the marriage. Notwithstanding the progress made, the task of removing discriminatory provisions against women from the law is still far from complete.

Among the most radical changes in the family is the reality of separation and divorce and the large numbers of unions outside marriage. The cultural action approach dictates that such facts cannot be ignored. One of the compelling questions is this: how do the rights of persons in marriage compare to those of persons in relationships other than marriage?

While children are no longer viewed as virtually the property of the father, provisions that discriminate against children born out of wedlock are still in the SLCC especially in the area of succession.

The CEDAW establishes the equality of men and women and emphasizes the autonomy of women and their freedom to make decisions for themselves on the same basis as men. The difficulty is that *legal* equality does not necessarily mean *substantive* equality. It is not uncommon for a man and a woman to make an agreement before entering into marriage, often called an ante-nuptial agreement, that provides that “what’s his is his and what’s hers is hers” and that that principle applies to property acquired during the marriage. The agreement is made between legal equals and in that sense complies with CEDAW, but the fact remains that the effect of the agreement is very unequal because the economic power of men and women is usually different. While the situation is changing, typically men still earn more money and possess more property. In entering into an agreement, the very legal equality that has been won by women can be undermined by the freedom to contract, that is itself an important component of that equality. While the economic inequality does not make much difference when a marriage is working well, it makes a great difference when it is not. At that point it is too late for the economically weaker spouse.

(2) The Rights of Children:

The rights and responsibilities of the parents in relation to their child should be equal regardless of the circumstances of the child’s birth. The CRC goes well beyond the equality of the parents in relation to children. The CRC gives the child rights *independent* of the wishes of the parents. Children are considered persons in their own right and are granted special rights to achieve that objective.

(3) Enhancing the Security of the Family by Protecting the Family Home and Contents:

The property occupied by a married couple as their family home and the contents of the home ought, regardless of who has the right of ownership, to be given special legal protection in the interests of ensuring that no matter what happens, the family will have a home during the

marriage, and, if separation or divorce occurs, that one of the spouses and the children will have a home. To ensure that the right remains a reality, the law of jurisdictions with this sort of protection typically provides for a veto on the right of disposition (that is to say, the sale or encumbrance) of the home and contents by the spouse who owns them, except with the consent of the other spouse or by order of the court. The law of such jurisdictions generally provides for protection by registration of the claim to rights of the spouse who is not the owner. In addition the law of such jurisdictions typically provides that the court can order that, regardless of the ownership of the home or its contents, one spouse can be given the right of exclusive use.

(4) Marriage as a Joint Economic Venture:

Increasingly, marriage is being viewed as a joint economic venture in which the value of property acquired by the couple ought to be shared regardless of who holds legal title to it. The law endeavours here to strike a balance between property of the individual spouses that is separate and property that is to be subject to sharing. Since it is impractical and often inequitable to speak of the sharing of property, the law typically speaks of sharing the “value” of property. The schemes vary considerably in detail. Typically, certain property is excluded: (1) property owned by a spouse on marriage, (2) property acquired by gift or inheritance during the marriage, (3) damages for personal injury and related matters, (4) life insurance proceeds payable to one of the spouses, and (5) property that replaces property referred to in items (1) to (4). In addition the law generally makes pensions shareable.

(5) The Relevance of Fault in Family Matters:

There has been a marked movement internationally away from using the concept of fault in domestic matters as a consideration in determining the rights of spouses. There are several reasons for this:

(1) The act of proving fault may well worsen the already poisoned relations of the spouses and, when there are minor children, may detrimentally affect the need of the spouses to continue to deal with each other and the children.

(2) The legal notion of fault (adultery, desertion, etc.) is out of touch with the reality of what happens in most relationships. It is common knowledge that there is usually responsibility on both parties for marital problems. The problem is that the law has in the past identified some types of conduct (adultery, desertion, and so on) and, on proof of one of those types, impugned the conduct of the guilty party and exonerated the other as if he or she were completely innocent. Experience shows that complete innocence is exceedingly rare. When fault is linked to the payment of support to a spouse, the result is particularly out of accord with the idea of spousal responsibility. When a spouse seeking maintenance is found to be at fault, the court is entitled to reduce the amount of maintenance. If there is a reduction that puts that spouse in need, there is a negative effect not only on the spouse but also on the children.

(6) The Resolution of Family Disputes:

It is now generally recognized that the courts as they traditionally operate are not always the best forum for the settlement of disputes in family matters. In making use of the adversarial process, the effect of litigation may well be to exacerbate the conflict between the parties. That may have a very detrimental effect given that, where there are children, the spouses must continue to deal with each other. For these reasons internationally there has been a move away from litigation to mediation and alternative dispute resolution in family matters. The primary task of the legal

system is to resolve the dispute in accordance with the law. If that can be done in an atmosphere of relative harmony and in privacy, it will facilitate future dealings of the parties. Quite apart from the savings in money, time and stress, the detrimental effect on the children of the marriage will undoubtedly be less. The courts will remain necessary in those few cases where the parties are not able to resolve their disputes even with the assistance of mediation and alternative dispute resolution techniques.

(7) The Recognition of Rights and Responsibilities of Partners in Unions other than Marriage:

The recognition of the rights and responsibilities of partners in unions other than marriage is a regional and an international trend. It is an area in which the Rights-Based Approach and the Cultural Action Approach to policy come together. The Project Team suggested as a matter of strategy that the Committee deal first with the reform of the rights and responsibilities of persons in marriage to each other and then turn to the more complex and difficult issue of the rights and responsibilities of persons in unions other than marriage, where similar issues arise such as maintenance, the security of the family home and property rights during the union and on the death of a partner.

The Scope of the CCRP and the FLP

The Committee was advised of the scope of the CCRP as it relates to the FLP. The CCRP did not include all aspects of Family Law. Essentially the SLCC is concerned with private law, the relations between individuals. The CCRP does not include public law matters, such as child protection or new juvenile justice legislation, which are essential components of the overall reform of family law. Recommendations on public law matters as they relate to Saint Lucia and model legislation are the responsibility of the FLP. (The FLP is also responsible for the reform of the private law aspects of Family Law in the common law jurisdictions of the OECS.) The CCRP has, however, been concerned with interface between the regime of private law and existing and future public law. For example, the Committee recommends the creation of a new class of tutors by operation of law. When a child is taken into custody under the present law or into protection under future child protection legislation, the head of the agency responsible for the child will become the tutor and will be entitled to exercise the authority of the parents for so long as the child is in his or her custody. In this way the rights of parents under private law and those of public official administering public law will be explicitly and rationally reconciled and coordinated.

Drafting Implications of the Report

The purpose of this comment is to clarify the drafting implications of this Report. In the time available to study the Family Law provisions of the SLCC and the substantial body of extra-codal statutes that amend or supplement the SLCC, there was time to do an analysis of the existing SLCC and the extra-codal statutes in the area of Family Law to identify their deficiencies and to identify the general direction of reform. The detailed analyses have not been reproduced in this Report. Those wishing to review them are referred to the papers considered by the Committee. There was insufficient time to work out the immense amount of detail that will ultimately need to be done to draft the reformed SLCC, much less laying out the correlation between the existing and proposed law. The Committee did, however, indicate the intent of each of the reforms and in some cases the model they thought appropriate. The detail of the reform initiatives will in most cases be left to be worked out in the drafting phase.

The substance of some of the existing law is basically sound and could be reformed by making relatively simple changes, but for the practice of amending the Civil Code by extra-codal statutes (and sometimes by amending those extra codal statutes with other extra-codal statutes), a practice which has introduced conflicts and inconsistencies into the law. How serious this problem is can be seen in Chapter 15, where the tangle of legal provisions on spousal maintenance and on the maintenance of, and the custody and access to, children is dealt with. The law relating to separation from bed and board in Saint Lucia is found in three places, the SLCC, the SMO and the DA⁵. In an area like maintenance of spouses and children, for example, there are differing grounds for obtaining maintenance and differing criteria for awarding it set out in each of the pieces of legislation. The problem of overall consistency is made even more difficult in the case of illegitimate children, for whom other grounds and criteria are set out in the AO. Similar observations can be made with respect to custody of and access to children. One of the primary tasks of the reform is to make the law consistent. To that end, the Committee recommended that the major extra-codal family law statutes be folded into the reformed SLCC and that, in that process, the provisions be made consistent.

The Committee studied the existing SLCC by subject area. The papers prepared as a basis for their deliberations generally began with an analysis of the provisions of the existing SLCC and, using the methodology described in the introduction, considered certain reform initiatives. Because of the approach by subject area, there is a considerable amount of repetition in the recommendations especially in the area of the impact of spousal equality and the equality of all children. There is scarcely an area of the SLCC unaffected by these fundamental policy changes. It is important to recognize that such fundamental changes in the substantive law cannot be accommodated by technical amendments to existing provisions. Rather, they contemplate an overall reformulation of the law.

Inevitably the initiatives to reform the SLCC provisions on Family Law were strongly influenced by the CCQ. It is uniquely important in the reform of the SLCC for a number of reasons. It is the only Civil Code that has an authentic English version. It is the result of a 30 year reform process involving extensive study of all aspects of the civil law and many aspects of the common law. Unlike the unsystematic mix of statutes and common law in common law jurisdictions, a civil code is systematic and has as its purpose to state the fundamental law in a manner that is comprehensive, coherent and without gaps. It goes without saying that the approach of the CCQ in the quest for this goal is of the greatest interest to the reform of the SLCC. The CCQ and the SLCC have the same parent, the Civil Code of Lower Canada, 1866. Though by no means identical, the social forces at work in Quebec that affected the CCQ have many similarities to those in Saint Lucia. As will be seen, apart from introducing civil unions, the CCQ does not address the issue of unions outside marriage. In this respect the reformed SLCC will represent a considerable departure from and, it is submitted, an improvement on the CCQ. The CCQ reflects the CEDAW and the CRC, conventions to which the Committee was tasked to give effect in Saint Lucia and the Quebec response was very helpful as an example of how that task can be accomplished.

None of the above observations is intended to suggest that the provisions of the CCQ are a panacea in the reform of family law in Saint Lucia; far from it. The Cultural Action Approach discussed in the introduction cautions those engaged in law reform that the law must root itself firmly in the values underlying the development, existence and recognition of a society and to be

⁵ Note that the title of the UK Matrimonial Causes Act upon which the Saint Lucia Act is modelled is far more accurate, since both Acts deal with such matters as judicial separation and maintenance during marriage as well as Divorce.

cautious of externally generated legislative standards. The focus of the law reformer must be on the cultural reality of the Caribbean, and of Saint Lucia in particular, and to consider the recognition of those persons whose rights and responsibilities were excluded by previous legislative regimes. The Committee took this mission very seriously.

There was insufficient time to work out the numerous transitional provisions that will be necessary to permit the adjustment of the present law (and particularly of vested rights) to the dramatically different legal regime in the reformed SLCC. The transitional provisions will be prepared in the drafting phase and submitted for approval with the draft Bill.

2. ENJOYMENT AND EXERCISE OF CIVIL RIGHTS

Civil rights are the rights which attach to a person by reason of his or her legal personality and include the rights attaching to the legal status of a person. They are not “civil rights” in the sense in which that term is used in Constitutional law, though they are clearly closely related.

Articles 14 to 23 of the present SLCC entitled the “Enjoyment and Loss of Civil Rights” are concerned in the main with civil rights and the loss of civil rights by Saint Lucians in relation to their status as British subjects. This was typical of the laws in force in the colonial period. However in light of Saint Lucia’s independence from Britain in 1979 and its binding commitments under various international conventions, these provisions are obsolete and the people of Saint Lucia should have their own positive statements of civil rights as citizens of an independent country.

Civil rights attaching to legal status should provide for every human to have juridical personality and to have a patrimony. “Civil rights” are defined by the PLD as being the “aptitude to be a subject of law”. Legal personality means the extra-patrimonial right if a person relating to the physical and moral attributes of the person. Patrimonial rights are those rights “that in their very essence have a monetary value” and that “amount, in a word, to property (or *biens*) because they are alienable or marketable, transmissible to heirs, seizable by one’s creditors, and susceptible of extinction through non-use (prescription), at least in principle” (Brierley, 157). “Enjoyment of a right is the legal aptitude to acquire it, while its exercise is the application, or ‘putting-into-action’ of such right.” (Brierley, 213) A person should also have full enjoyment of civil rights and should be fully able to exercise his or her civil rights in his or her name except where the law provides for representation or assistance, for example, in the case of a minor or an adult under an incapacity. These civil rights are to be exercised in good faith⁶ and consistent with public order⁷ and without intention to injure another. Such civil rights should not be limited except by or under an Act of Parliament.

Recommendation

2-1 *That articles 13 to 23 of the existing SLCC be repealed and the reformed SLCC include:*

- (a) a provision that every human being possesses juridical personality and has full enjoyment of civil rights;*
- (b) a provision that every person has a patrimony;*
- (c) a statement of that every person has the full exercise of his or her civil rights except where the law provides for representation or assistance in the exercise of his or her civil rights;*
- (d) a statement that every person must exercise his civil rights in good faith and without the intention to harm or injure another person contrary to good faith or in an excessive or unreasonable manner; and*
- (e) a provision that the enjoyment of civil rights cannot be lost except by or under an Act of Parliament and that the right to exercise civil rights may not be renounced or derogated from where the exercise of those rights is a matter of public order.*

⁶ “Good faith” is defined as “integrity”. (PLD)

⁷ “Public order” is defined as the “global conception of a society expressed in its basic institutions, its general principles and imperative norms, the purpose of which is to protect and promote the basic values of the community.”

3. THE RIGHTS OF CHILDREN

Nothing short of a revolution has occurred in the area of the rights of children from 1879, when the SLCC became law, to the present time. From being virtually the property of the father and later being an extension of the parents' authority, children have gained a new recognition of their rights and responsibilities in various international conventions and declarations on the matter.⁸

The following provisions of the CRC are particularly relevant in the context of the reform of the family law provisions of the SLCC:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning the children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

⁸ See particularly Principles 2, 4 and 6 of the Declaration of the Rights of the Child Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959

Article 2 of the CRC recognizes *inter alia* that, notwithstanding their parents' or legal guardian's status, all children have the same rights. Article 3 emphasizes again the child's right to care and protection and the need for any decision affecting him or her to be made in his or her best interests. To this end, article 12 states that, if a child is capable of forming his or her own opinion, he or she should be provided with an opportunity to be heard on matters affecting him or her. Article 18 deals with the primary responsibility of parents and guardians for the upbringing and development of the child.

In the SLCC matters of legitimacy and illegitimacy are part of the law relating to filiation and detailed recommendations respecting the reform of the law respecting establishing filiation are under the heading "Proof of Filiation".

The Historical Context

From the beginning the SLCC favoured children who are born legitimate, that is to say, born the biological child of a man and a woman who were married to each other. As will be seen in the following analysis, the SLCC is strikingly at odds with the CRC in its treatment of illegitimate children. The present SLCC draws a clear distinction between children who are legitimate and those who are not. Illegitimate children are not in law subject to parental authority or responsibility. Those rights and responsibilities are the prerogatives of the parents of legitimate children (art.135). Furthermore, under the present law, (unless his parents subsequently marry and the child is properly legitimated) a child born out of wedlock can only inherit in the absence of legitimate heirs (art. 579(6) and particularly the definition of "single man").

The Effects of Illegitimacy on Parental and Filial Rights and Responsibilities and on Succession

Because the original social policy underlying the SLCC is to favour marriage and the children of marriage, it will not be surprising that the rights and obligations of illegitimate children and of their parents are dealt with only in part, largely by subsequent amendments to the SLCC. Article 18 of the CRC provides that parents and others have the same responsibilities, rights and duties to children irrespective of the circumstances of the child's birth.

Article 210 of the SLCC, enacted by Act 34 of 1956, provides that, subject to the powers of the court to order otherwise, a child remains subject to the authority of his father and mother until his majority or his marriage. This is an attempt to put legitimate and illegitimate children on the same basis. It is undermined by the discriminatory provisions in the rest of the SLCC and in extra-codal statutes. In the result illegitimate children are not subjected to the full regime of parental authority and responsibility like legitimate children even when they have been legally acknowledged by their father. The SLCC has since 1879 provided that the forced or voluntary acknowledgement by a father or mother of an illegitimate child gives the child a right to demand maintenance from each of his parents (art. 208). This is a rare recognition in the SLCC of the obligations arising from acknowledgement of an illegitimate child. Interestingly, acknowledgement gives rise to a right to *demand* maintenance only. In 1973, the Civil Status Ordinance (Cap 224) was amended by the Civil Status Registration of Births (Amendment) Regulation (SI No. 38 of 1973) to permit the name of the father of a child born to an unwed mother to be inserted in the record of the child's birth. Even here the right is quite circumscribed. The amendment is not retroactive and only the name of the father of an illegitimate child born after 1973 can be inserted. In addition to providing for a summary proceeding in the district court to determine whether a particular man is the father of an illegitimate child, the AO⁹ provides for

⁹ Note that, although the name of the Ordinance is Affiliation Ordinance, its purpose is merely to establish that the father of the illegitimate child is the father and that he is required to pay maintenance. The mother

the court to order the father of an illegitimate child to maintain that child and provides for the right of the putative father to obtain custody (s. 8). The rights and obligations under this Ordinance are well short of the rights and obligations of parents in respect of a legitimate child. The Committee recommended the repeal of that AO (see Recommendation 5-10 and the discussion preceding it).

The responsibility of parents to maintain and bring up (including having custody of and access to) their children and the reciprocal responsibility of children to maintain their parents and other ascendants are only provided for in the SLCC as a responsibility of married parents in relation to their legitimate children and legitimate children in relation to their married parents and other ascendants arising from marriage (arts. 135 and 136). Except to the limited extent described above, there is no corresponding responsibility in the SLCC for parents to maintain their illegitimate children or for illegitimate children to maintain their parents. This is certainly discriminatory against illegitimate children and contrary to the CRC.

The distinction between illegitimate and legitimate children has particularly important implications in establishing succession rights in Saint Lucia. Where a child is born out of wedlock and is not subsequently legitimated by the marriage of his father and mother, he or she can only inherit from either parent in the absence of legitimate heirs (arts. 557 to 582). This is manifestly discrimination against illegitimate children and is contrary to the CRC.

There appears to be no compelling reason why a child born out of wedlock or a person claiming through such a child should not have the same rights of succession in the estates of his or her father or mother and of a member of his or her father's or mother's family as if the child had been born in wedlock. The problem of succession usually occurs in the case of intestacy, that is, when a person dies without leaving a will or without leaving a will disposing of all his property.

It is important to recognize that the widening of all succession rights on a non-discriminatory basis might have undesirable practical consequences, as for example, in cases where the existence of the illegitimate child was unknown to the known legitimate or illegitimate members of the family of the deceased prior to the date of his death. The solutions to the legal problem of ascertaining whether there are illegitimate heirs unknown to the executor or administrator is to require the publication of a notice by the executor or administrator directed to the heirs and potential heirs of the deceased and published in the *Gazette* and in a newspaper of general circulation requiring them to give notice of their interest in the estate to the executor or administrator not later than six months after the date of the notice or such extension as the court may permit and that the court give a reasonable time to a claimant to prove his or her affiliation if it is put in issue. The injustice to illegitimate children far outweighs the difficulty in administering estates.

There may be objections to including illegitimate children as persons with rights on succession advanced on behalf of the legitimate children or the deceased spouse. Until recently, a cloud hung over many findings of filiation because the evidence was of necessity indirect. With the advent of DNA testing, biological filiation can be established almost to a certainty. What is more, samples for analysis and comparison can be taken not only from the parent but also from other members of the parent's family to establish filiation. With regard to legitimate children in particular, having to share with illegitimate children, it is manifestly unjust to punish a child for the moral faults of his or her parents. An illegitimate child is no less a child of a person than a

of the child also has to apply within twelve months of the child being born or within twelve months of the father returning to Saint Lucia if he left Saint Lucia within twelve months of the child's birth.

legitimate one. A spouse who complains of having to share the estate with the illegitimate children of a deceased partner has a better case. This objection is answered in large measure in Chapter 14, where it is recommended that a spouse have rights in the family patrimony (Recommendation 14-2).

All of the above injustices to illegitimate children can be corrected by allowing illegitimate children to establish filiation in the same way as legitimate children and the simple expedient of providing that, once filiation is established, an illegitimate child has the same rights and responsibilities as a legitimate child. The administrative problems discussed above with regard to the administration of estates must also be provided for.

Recommendation 3-1: That all children whose filiation is established should have the same rights and obligations, regardless of the circumstances of their birth and that any distinction between legitimate and illegitimate children be abolished in the reformed SLCC, that the reformed SLCC include the right of a child whose filiation is declared to have his or her record of civil status corrected and that extra-codal legislation be consequentially amended to be consistent with the reformed SLCC.

Recommendation 3-2: That the reformed SLCC provide that the executor or administrator be required to publish a notice directed to the heirs and potential heirs of the deceased in a newspaper of general circulation in Saint Lucia requiring them to give notice of their interest in the estate to the executor or administrator not later than six months after the date of publication of the notice.

Recommendation 3-3: That any claims not made within the six month period or such extension as may be granted by the court be extinguished and that the court give a claimant a reasonable time to establish his or her filiation if it is put in issue.

Right to Protection and Security, Decisions in the Child's Best Interests and the Right of a Child to be Heard

The substance of articles 2, 12 and 18 of the CRC should be embodied in the SLCC as positive rights. These are now the legal standard in most civil and common law jurisdictions and as a signatory to the CRC Saint Lucia has bound itself to give effect to those standards. If adopted and embodied in the reformed SLCC, these recommendations will have the effect of applying generally to all the statutes and regulations of Saint Lucia.

Recommendation 3-4: That the reformed SLCC recognize that a child is entitled:

- (1) to protection, security and attention from his or her parents or legal guardian;*
- (2) to have every decision concerning him or her taken with respect to his or her best interests and with respect to his or her rights; and*
- (3) to be heard in any court proceeding affecting his or her interests where his or her age and understanding permit.*

4. RECORDS OF CIVIL STATUS

This Chapter of the Report will make general recommendations with respect to the registration of records of civil status. Recommendations relating to specific aspects of the Register have been made in Chapter 3 on the Rights of Children and Chapter 5 on Filiation. In addition, recommendations have apparently been submitted to Cabinet for the reform of the law relating the registration of records of civil status. It is proposed to include them in the reformed SLCC if they can be approved in time.

Articles 24 to 47E of the present SLCC and the Civil Status Ordinance set out the law in relation to records of civil status. The events which give rise to civil status are officially recorded in duplicate by persons designated in the SLCC either as depositaries in the case of birth, religious marriages and deaths, and District Registrars in the case of births, civil marriages and deaths. Duplication is necessary in order for the records to be permanent and reliable sources of data that is on record. One copy is deposited annually to the Registrar of Civil Status who keeps it in the Registry of Civil Status. The depositaries are in all cases ministers of religion and can only make those records if the person referred to in the record is baptized by them in their denomination. The law gives preferences to certain Christian sects. The presence of clergy of other religions is not recognized. It is arguable that law relating to registration of marriages by certain Christian clergy only is unconstitutional in discriminating as between Christian sects and as between Christians and non-Christians. In addition, the current provisions of the SLCC are out of date and reflect a former time when life was slower and annual updates of the central registry were sufficient.

The Registrar of Civil Status and the status officers are bound to give extracts of their registers on demand and such extracts are authentic documents. Records of birth, records of marriage and records of death are each found in separate Chapters of Book Second of the SLCC. The Chapter on records of birth also contains a provision which deals with the re-registration of persons who are legitimated by the subsequent marriage of their parents. Rectification of the records of civil status, even to correct to a clerical error can only be authorized by the Court or a Judge by virtue of Chapter Fifth, articles 45-47 of the SLCC. By virtue of articles 47A-47E Cabinet may order the replacement of a register which is in decay or worn out by time or use but the original book of record must be carefully preserved and made available for consultation as required.

The Committee expressed concern about the number of false registrations, especially registrations of birth. It urged that the administration should be tightened up.

The system of registering records of civil status could be improved by the establishment of a single system of registration where a central register replaces all existing registers and by putting the system under the control of the Registrar of Civil Status without the assistance of religious persons. This central system will take into consideration the fact that most children are born in hospitals with the physician called to attend the delivery being under a duty to transmit an attestation of the events witnessed to the Registrar of Civil Status. It will also consider the requirement that a medical certificate of death is required prior to burial or cremation of any deceased person. The family of the child born or of the deceased person will be under a duty to declare the birth or death to the Registrar of Civil Status and the person performing a marriage would sign a declaration of marriage together with the married couple and forward it to the Registrar of Civil Status. On receipt of those declarations the Registrar of Civil Status would sign and convert them into records of civil status, would see to their conservation and would be entrusted with issuing copies and certificates.

Recommendation 4-1: That the system of registering records of civil status be replaced by the establishment of a single system of registration where a central register replaces all existing

registers and by putting the system under the control of the Registrar of Civil Status without the assistance of religious persons.

Recommendation 4-2: That in place of the present system, the physician or midwife who attends at the birth be required to draw up and transmit a copy of an attestation of birth in prescribed form to the person required to declare the birth and another copy to the Registrar of Civil Status together with the declaration in prescribed form.

Recommendation 4-3: That mother and father, or either of them, make a declaration of the birth of the child within 30 days and, where the parents are married, one of the parents may make the declaration on behalf of the other.

Recommendation 4-4: That, in consultation with the Registrar of Civil Status, provision be made for the attestation in prescribed form of the birth of a child of unknown parentage by a person having care or custody of the child and for transmission to the Registrar of Civil Status of the attestation and declaration.

Recommendation 4-5: That the physician who establishes that a death has occurred be required to draw up the attestation of the death in prescribed form and transmit a copy to the person required to declare the death and another copy to Registrar of Civil Status together with the declaration of death in prescribed form.

Recommendation 4-6: That, in consultation with the Registrar of Civil Status, provision be made for the attestation of death in prescribed form by others and transmission of the attestation and declaration when they are not or cannot be done by the physician.

Recommendation 4-7: That a declaration of marriage in prescribed form be signed by the spouses, the witnesses and the person solemnizing a marriage and that it be transmitted without delay to the Registrar of Civil Status by the person solemnizing the marriage.

Recommendation 4-8: That certificate of death in prescribed form be required prior to burial or cremation of any deceased person.

Recommendation 4-9: That, on receipt of the attestations and declarations the Registrar of Civil Status convert them into record of civil status and see to their conservation and be entrusted with issuing copies and certificates.

Recommendation 4-10: That the Registrar of Civil Status be entitled to correct clerical errors without a court order.

Recommendation 4-11: That, when resources permit, the system of registration of records of civil status be modernized and that information technology be used to produce faster and better records and indexes to the records. The registers should be kept in duplicate one copy of which should be computerized and the other hand written. The duplicate registers should be kept in different places so that one could be reconstituted from the other if necessary.

Recommendation 4-12: That article 26 of the SLCC be reformed so as to remove the preferences to the Christian sects referred to therein and to provide in all cases that approval must be received from Cabinet for the entitlement to perform religious marriages and that approval to officiate at weddings be granted without regard to religion or religious sect.

Recommendation 4-13: That the provisions of the Civil Status Ordinance should be incorporated in the reformed SLCC and made consistent with it.

5. FILIATION

Filiation means “the state and condition of a person considered as a child in relation to his or her father and mother”. It is important because “the establishment of this relationship is necessary for the general purposes of civil status and, more especially, for those holding filial rights and obligations” (Brierley, 253-254). Modern civil law recognized 3 types of filiation, filiation by blood, by adoption and by assisted procreation. The abolition of the discriminatory aspects of the law of illegitimacy is really a reform of the law of filiation by blood. It was more conveniently dealt with in connection with in the previous Chapter on the rights of children.

Filiation by Adoption

The 1879 SLCC did not recognize the existence of adoption at all. This will seem curious to a modern Saint Lucian. Speaking of Quebec, one recent commentator on adoption remarked:

The evolution of the law relating to adoption...is a microcosm of the major changes in social attitudes to children and the role of the family. In a little over 100 years, adoption has passed from being frowned on altogether, to a form of charity for orphaned children, and finally to a means of establishing a filiation that is in the best interests of the child. (Brierley, 257).

Those remarks appear to apply with equal force to Saint Lucia.

There are no provisions for filiation of an adopted child in the SLCC probably because adoption was viewed as undermining the integrity of the blood family. However, that situation was remedied in 1954 by the Adoption Ordinance (Cap. 19), which contains provisions which establish filiation by adoption. It provides that adoptive parents have the same rights, duties, obligations and liabilities to an adopted child as they have to a child born in wedlock, thereby assimilating the position of an adoptive parent and adopted child to that of a child born in wedlock.

The following are the relevant provisions of the Adoption Ordinance:

11. (1) Upon an adoption order being made, all rights, duties obligations and liabilities of the parents or tutors of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a tutor and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties and obligations, and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and in respect of the liability of a child to maintain his parents under the provisions of the Civil Code) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

(2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of the right of access to children, and in any other matter under the laws of this Colony, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them respectively in the same relation as to a lawful father and mother respectively.

(3) For the purpose of the law relating to the marriage, an adopter and the person whom he has been authorized to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorised by a subsequent order to adopt the same infant.

12. (1) Where an adoption order is made in respect of an infant who is illegitimate, then, subject to the provisions of this section, any affiliation order or decree of affiliation and aliment in force with respect to the infant and any agreement whereby the father of the infant has undertaken to make payments specifically for the benefit of the infant, shall cease to have effect, but without prejudice to the recovery of any arrears which are due under the order, decree or agreement at the date of the adoption order.

(2) Where an infant to whom any such order decree agreement as aforesaid relates is adopted by his mother, and the mother is a single woman, the order, decree or agreement shall not cease to have effect by virtue of the foregoing subsection upon the making of the adoption order, but shall cease to have effect if she subsequently marries.

13. (1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property, that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(2) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order –

- (a) any reference (expressed or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person.
- (b) any reference (expressed or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being or as not including, a reference to the adopted person; and
- (c) any reference (whether expressed or implied) to a person related to the adopted related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person.

(3) Where an adopted child or the spouse or issue of an adopted child takes any interest in real or personal property under a disposition by the adopter, or where an adopter takes any interest in real or personal property under a disposition by an adopted child or the spouse or issue of an adopted child, any succession, legacy or other duty which become leviable in respect thereof shall be payable at the same rate as if the adopted child had been a child born to the adopter in lawful wedlock.

14. (1) For the purposes of the application of the Articles in the Civil Code relating to successions, to the devolution of any property in accordance with the provisions of the last foregoing section, and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or (in the case of a joint adoption) of either of the adopters–

- (a) where he or she was adopted by two spouses jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood;
- (b) in any other case, as brother or sister of the half-blood.

(2) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated for the purposes of the last foregoing

section as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date.

(3) Notwithstanding anything in the last foregoing section, trustees or personal representatives may convey or distribute any real or personal property to or among the persons entitled thereto without having ascertained that no adoption order has been made by virtue of which any person is or may be entitled to any interest therein and shall not be liable to any such person of whose claim they have not had notice at the time of the conveyance or distribution; but nothing in this subsection shall prejudice the right of any such person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it.

(4) Where an adoption order is made in respect of a person who has been previously adopted, the previous adoption shall be disregarded for purposes of the last foregoing section in relation to the devolution of any property on the death of a person dying intestate after the date of the subsequent adoption order and in relation to any disposition of property made after that date.

It will be noted that the above provisions have as their purpose to assimilate the filiation of an adopted child to that of a child born in wedlock. The SLCC should be reformed to make the effect of this provision part of a comprehensive scheme of filiation.

Recommendation 5-1: That the provisions of the Adoption Ordinance respecting the civil status of persons who are adopted or provisions having the equivalent effect be placed in the reformed SLCC and should be framed as part of a comprehensive scheme of filiation.

Filiation of Children Born of Assisted Procreation

The technology now available to assist reproduction poses a whole new set of questions for the legal system. Although there are no facilities existing in Saint Lucia for such medical procedures, some persons go abroad for the benefit of these new techniques and it can be anticipated that the filiation of such children will become an issue.

Assisted procreation is the medical technique of bringing the egg and the spermatozoa together either by in vitro fertilization where fertilization takes place outside of the womb or by artificial insemination where the fertilization takes place by artificially inserting the spermatozoa into the womb. There are many different biological links between the child and his biological parents. They are as follows:

1. The child who is implanted into the mother after medically assisted fertilization may be:
 - (a) the biological child of both the mother and father;
 - (b) the biological child of the mother but not the father;
 - (c) the biological child of the father but not the mother;
 - (d) the biological child of neither the mother nor father; or
2. The child may also be implanted in a surrogate mother with any combination of 1(a)–(d).

The Committee considered assisted procreation and the fact that assisted procreation may be sought by single as well as married persons. The law needs to determine what the filiation of a child born of assisted procreation is. In the civil system, as has been seen, that is usually

determined by the all-important record of birth. The law needs to protect the third party donor of genetic material, if any, from having an unwanted filial bond with the child unless the donation is by way of sexual intercourse. The law needs to restrict the rights of husband or wife who is a party to an assisted procreation to contest filiation by assisted procreation. Furthermore it is generally against public policy to permit agreements to procreate or be a surrogate mother of another person. The Committee considered the issue of assisted procreation and rejected it as unnecessary in the present circumstances of Saint Lucia and as a practice with serious moral implications.

Recommendation 5-2: That assisted procreation not be recognized in the reformed SLCC.

Proof of Filiation

The law relating to filiation is set out in articles 186 to 209 of the SLCC and in the AO.

Arts. 186 to 195 of the present SLCC set out the general rules respecting who is considered legitimate and illegitimate and arts. 205 to 207 deal with the legitimation of a child by the subsequent marriage of his or her parents. Given the previous recommendation to abolish the distinction between legitimate and illegitimate children, these provisions are obsolete and will not be reviewed.

Arts. 196 to 204 and art 209 of the SLCC set out the Codal provisions respecting evidence of filiation. Art. 208 gives an illegitimate child the right to demand maintenance, which the SLCC treats as one of the primary effects of proving affiliation. As is often the case, that scheme as to proof and effects of proof is augmented by extra-codal legislation, in this case, the AO, which first came into force in 1955.

Filiation is proved by the record of birth inscribed in the register of civil status (art. 196). In the absence of such a record, “uninterrupted possession of status is sufficient” (art. 197) if it is established by a “sufficient concurrence of facts” indicating filiation (art 198). No one can claim or contest the status of a person in the record of civil status accompanied by possession of status conformable to that record (art. 199). Cases without a record of civil status or uninterrupted possession of the status of filiation may be proven by testimony if the evidence is commenced by proof in writing (art. 200), which may be title deeds to land or evidence from other registers or papers (art. 201). Disproof of maternity or paternity may be made by any means (art. 202). Such cases may brought in the Supreme Court at any time (arts. 203 and 209), but are always subject to the foregoing provisions. Heirs of persons have limited rights to bring an action for filiation that the person didn’t bring in his or her lifetime (art. 204). As has been noted, forced or voluntary acknowledgement by a father or mother of an illegitimate child gives the child a right to demand maintenance from his parents (art. 208).

The proof of filiation by the record of birth, if there is one, and by uninterrupted possession of status established by sufficient evidence, if there isn’t a record of birth, are essentially sound concepts. The key provision is art. 199, which provides that no one can claim or contest the status of a person in the record of civil status accompanied by possession of status conformable to that record. The effect of these provisions, if they are observed, is to make a child adopted by a couple in respect of whom a record of birth has been issued incontestably the child of the couple. Unfortunately, when the Adoption Ordinance was passed, appropriate amendments to the provisions of the SLCC respecting records of civil status were not made. Those amendments should now be made and appropriate validation and transitional provisions drafted to bring present and past administrative practices in respect of records of adoption into line with the

provisions of the SLCC respecting records of civil status, and so that new birth certificates with the names of the adoptive parents replace those with that of the natural parents.

Recommendation 5-3: That:

(a) the filiation of a child be proved by the child's record of birth irrespective of the circumstances of the child's birth and that no one be permitted to claim or contest the filiation of a person in the record of birth accompanied by possession of status conformable to that record; and

(b) the provisions of the SLCC be amended and appropriate validation and transitional provisions be drafted in respect of records of adoption to bring present and past administrative practices into line with the provisions of the SLCC respecting records of civil status and so that new birth certificates be issued on adoption with the names of the natural parents replaced with those of the adoptive parents.

The use of presumption as a mode of proof in art. 186 is basically sound and a more modern way to handle the issue of whether or not the child belongs to the father is to speak of the “rebuttal” of the presumption rather than of “disowning” a child. The original SLCC did not contemplate the effect of separation and reconciliation on the counting of time or subsequent remarriage of the mother. Those facts of modern life should be taken account of in the reformed SLCC.

Recommendation 5-4: If a child is born during a marriage, or within 300 days after its dissolution or annulment, the spouse of the child's mother is presumed to be the father.

Recommendation 5-5: The presumption of paternity is rebutted if the child is born more than 300 hundred days after the separation from bed and board of married spouses, unless the spouses have voluntarily resumed living together before the birth.

Recommendation 5-6: The presumption is also rebutted in respect of the former spouse if the child is born within 300 days of the dissolution or annulment of the marriage but after a subsequent marriage of the child's mother.

The present law seems particularly unjust where there has been a voluntary acknowledgement of filiation by a parent. As has been observed, at the present time, it is legally irrelevant except in the limited circumstances of creating a right on the part of the child to demand maintenance (art. 208). It is clearly evidence of the most important kind and should be given legal recognition, but it should not be used to undermine Recommendation 5-3(a).

Recommendation 5-7: That evidence of filiation by voluntary acknowledgement be permitted if the above provisions are insufficient to determine filiation.

With the removal of the consequences of illegitimacy, the 2 month period in art.191 of the SLCC is too short. A parent should have ample time to disavow a child. That time should have run before a reasonable period for the establishment of uninterrupted status has gone by. One year appears reasonable.

Recommendation 5-8: That a father have one year to disavow a child from the date he knew of the birth.

The procedure in a legal action should observe the above rules, should commence with a document and should join all the persons who are intended to be bound by the determination of the court.

One special evidentiary matter needs to be discussed. As has been previously mentioned, filiation is now capable of being proved to a virtual certainty using DNA testing of samples of the genetic material of the child and the parent or a near relative of the parent and a comparison of the genetic profile. Where a case has been made out that is sufficiently strong to warrant it, the court should be given the power to order that a person supply a sample for DNA testing so that the genetic profile of a person involved in an action can be determined. If the person is deceased, the court should be empowered to order that a sample be taken from the person's body. The court should be given power to set conditions with respect to what sample is taken, the use to be made of it and other matters. A difficult question arises if the person from whom the sample is to be taken refuses to provide it. Should he or she be compelled to provide the sample? It is to be remembered that the sample need not be a sample of blood; it may be a sample of saliva or any other bodily substance. The court should be given the power to determine whether reasonable force may be used to take a sample and by whom or whether a negative presumption should be drawn from an unjustified refusal to provide a sample.

The rules relating to filiation actions are set out in arts. 530 – 537 of the CCQ, which are in accord with the above recommendations, should be adapted to the circumstances of Saint Lucia. They read as follows:

ACTIONS RELATING TO FILIATION

530. No person may claim a filiation contrary to that assigned to him by his act of birth and the possession of status consistent with that act.

No person may contest the status of a person whose possession of status is consistent with his act of birth.

531. Any interested person, including the father or the mother, may, by any means, contest the filiation of a person whose possession of status is not consistent with his act of birth.

However, the presumed father may contest the filiation and disavow the child only within one year of the date on which the presumption of paternity takes effect, unless he is unaware of the birth, in which case the time limit begins to run on the day he becomes aware of it. The mother may contest the paternity of the presumed father within one year from the birth of the child.

532. A child whose filiation is not established by an act and by possession of status consistent therewith may claim his filiation before the court. Similarly, the father or the mother may claim paternity or maternity of a child whose filiation in their regard is not established by an act and by possession of status consistent therewith.

If the child already has another filiation established by an act of birth, by the possession of status, or by the effect of a presumption of paternity, an action to claim status may not be brought unless it is joined to an action contesting the status thus established.

The action for disavowal or for contestation of status is directed against the child and against the mother or the presumed father, as the case may be.

533. Proof of filiation may be made by any mode of proof. However, testimony is not admissible unless there is a commencement of proof, or unless the presumptions or indications resulting from already clearly established facts are sufficiently strong to permit its admission.

534. Commencement of proof results from the family documents, domestic records and papers, and all other public or private writings proceeding from a party engaged in the contestation or who would have an interest therein if he were alive.

535. Every mode of proof is admissible to contest an action concerning filiation.

Any mode of proof tending to establish that the husband or civil union spouse is not the father of the child is also admissible.

535.1. Where the court is seized of an action concerning filiation, it may, on the application of an interested person, order the analysis of a sample of a bodily substance so that the genetic profile of a person involved in the action may be established.

However, where the purpose of the action is to establish filiation, the court may not issue such an order unless a commencement of proof of filiation has been established by the person having brought the action or unless the presumptions or indications resulting from facts already clearly established by that person are sufficiently strong to warrant such an order.

The court determines conditions for the sample-taking and analysis that are as respectful as possible of the physical integrity of the person concerned or of the body of the deceased. These conditions include the nature and the date and place of the sample-taking, the identity of the expert charged with taking and analysing the sample, the use of any sample taken and the confidentiality of the analysis results.

The court may draw a negative presumption from an unjustified refusal to submit to the analysis ordered by the court.

536. In all cases where the law does not impose a shorter period, actions concerning filiation are prescribed by thirty years from the day the child is deprived of the claimed status or begins to enjoy the contested status.

If a child has died without having claimed his status but while he was still within the time limit to do so, his heirs may take action within three years of his death.

537. The death of the presumed father or of the mother before the expiry of the period for disavowal or for contestation of status does not extinguish the right of action.

The heirs may exercise this right, however, only within one year after the death.

Recommendation 5-9: That evidence of filiation observe the above-mentioned rules, commence with a document, join all persons intended to be bound and should in general adapt the rules set out in arts. 530 – 537 of the CCQ. In particular, when evidence has been led establishing a sufficiently strong case to warrant it, a judge should be permitted to make an order that a person be required to supply a body sample for DNA testing or that a sample be taken from the body of a deceased person so that the genetic profile of a person in the legal action may be determined and that the court should be given power to set conditions with respect to what sample is taken, the use to be made of it and other matters, which may include whether the sample may be taken by force.

As is often the case with extra-codal legislation, the relationship between the provisions of the SLCC and the legislation is not clear. The AO appears to be a piece of British legislation enacted without much regard for the existence of a different scheme in the SLCC. For example, are the restrictions on proof of filiation in the Code applicable in the case of proceedings under the AO? This Ordinance needs to be repealed. It provides that only putative fathers are liable to pay maintenance and therefore is unequal in its application as between men and women. It establishes a limitation period of 12 months after certain key dates for claiming maintenance. Such a limitation is more in the financial interests of the father anxious to avoid responsibility for his child than it is in accordance with the best interests of the child who needs to be maintained during the whole of his or her minority. All of these obligations are contrary to the principle that

parents have equal responsibilities for their children regardless of the circumstances of their birth. The obligation of a parent to maintain a child, for example, and the rights of custody of and access to the child should be the same for all children and the lower standards applicable to children whose parents are not married should be replaced by the higher standards applicable to children born in wedlock. The AO creates a category of person called a custodian, who may be given custody of a child. Rather than taking this common law term, the civil law terminology of “tutor” should be used.

Recommendation 5-10: That the AO be repealed and replaced by provisions that ensure all children are treated equally and that the lower standards of parental duties and rights as for example the obligation to maintain a child and the right to custody of and access to children whose parents are not married be replaced by the higher standards applicable to children born in wedlock as reformed by this Report.

6. ADOPTION

The filiation of an adopted child is dealt with in the preceding Chapter. The purpose of this Chapter is to make recommendations relating to the process of adoption generally and more particularly to bring the law of Saint Lucia into conformity with Article 21 of the CRC, which reads as follows:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Adoption was not part of the 1879 SLCC, for reasons described earlier. (See Chapter 5 Filiation.) As an essential part of a coherent scheme of family law, the Adoption Ordinance should be redrafted and placed in the reformed SLCC.

The Adoption Ordinance provides for an adoption order to be for the welfare of the child. This does not always amount to the best interests of the child and it is therefore recommended that the provisions relating to adoption be reformed to reflect the primacy of the best interests of the child and the consent of the child to the adoption depending on his or her age in accordance with article 21 of the CRC set out above.

The Adoption Ordinance does not set the criteria for the eligibility of a child for adoption except the age. It is recommended therefore that additional criteria should be set and should include, for example, that a child who is an orphan, or a child whose parents have been deprived of parental authority or a child who has no tutor is eligible for adoption.

The Adoption Ordinance permits inter-country adoptions. Two options are set out. One requires 6 month's residence in Saint Lucia and of that period 3 months residence with the child. In this respect it is equivalent to national standards except where the person is a relative of the child, in which event no residency is required. The other option allows transfer of the child out of the jurisdiction if a licence is issued. In this case there is no residency requirement and the adoption is made under the law of, and in the courts of, a foreign jurisdiction. Although the tutor *ad hoc* interviews the prospective adoptive parent or parents, there is no provision in the Adoption Ordinance for the investigation and screening of persons from outside Saint Lucia adopting children in Saint Lucia. It is therefore recommended that, in order to ensure the protection and

best interests of children adopted to persons who are not citizens, more stringent legal requirements should be put in place.

The Adoption Ordinance has no provision for confidentiality of administrative or judicial files relating to an adoption. In fact section 15 provides for any person to be able to search the index of the Adopted Children's Register and to request a copy of an entry in that Register subject to certain terms and conditions and payment of fees. It is therefore recommended that, to favour stability of filiation, the administrative and judicial files should be confidential so that, except in certain circumstances, only the child, the child's birth parents or adoptive parents can access those files and only if there is consent by the relevant parties.

Recommendation 6-1: That present law of adoption set out in the Adoption Ordinance be placed in the reformed SLCC and made consistent with the other reforms recommended in this Report.

Recommendation 6-2: That the provisions relating to adoption be reformed to reflect the primacy of the best interests of the child and the consent of the child to the adoption depending on his or her age in accordance with article 21 of the CRC and Recommendation 3-4(2) and (3).

Recommendation 6-3: That criteria be set for eligibility of children for adoption as for example, that a child is an orphan, or a child's parents have been deprived of parental authority or a child has no tutor or the parents consent to the adoption or the court dispenses with the consent of either or both parents.

Recommendation 6-4: That in order to allow those adoptions but to ensure the protection and welfare of children adopted to persons who are not citizens more stringent legal requirements should be put in place such as background checks, police reports and home study reports.

Recommendation 6-5: That, in order to favour stability of filiation, the administrative and judicial adoption files should be confidential except that the child and the child's birth parents or adoptive parents can access those files, with the consent of the other relevant parties.

7. DOMICILE

The law of domicile was originally developed by international law to fill the need to associate every individual with a specific legal system. That legal system that applied to a person was that of the person's permanent home. The PLD observes quite correctly that "a person may have but one domicile at any given time and moreover that he must always have a domicile". These principles are the foundation of the principles of law set out in the SLCC and in all civil and common law systems. Civil Law doctrine suggests that domicile is "a purely intellectual legal relationship between a person and the place where he has his principal establishment"¹⁰. Legal systems generally distinguish three types of domicile:

1. Domicile of Origin: This is generally the domicile of a person's parents.
2. Domicile of Dependence: The domicile of some persons such a child is dependent of that of the parents. If the domicile of the parent changes so does that of the child.
3. Domicile of Choice: Most legal systems recognize that certain persons who are legally independent, generally though not always based on their having attained a certain age, can acquire a domicile of choice.

The law relating to the domicile of a person has important consequences for family law particularly in relation to succession and the validity of marriages and matrimonial causes, including jurisdiction of the courts in divorce, separation and nullity and the recognition in Saint Lucia of foreign divorces, orders of legal separation or nullity decrees. Domicile is the key to determining the jurisdiction of the courts of Saint Lucia over family law cases involving a foreign element and in the choice of law that the courts make to decide these cases.

Analysis of the Existing Provisions of the Code

The relevant provisions of the existing Code are as follows:

48. The domicile of a person, for all civil purposes, is at the place where he has his principal residence.
49. A person holding a temporary or revocable public appointment retains his former domicile unless he manifests a contrary intention.
50. (Am. 34-1956). A married woman, not separated from bed and board, has no other domicile than that of her husband.

The domicile of an unmarried minor is with his father and mother, or with his tutor.

The domicile of a person of the age of majority interdicted for unsoundness of mind is with his curator.

51. The domicile of persons of the age of majority, who serve or work continuously for others, is at the residence of those whom they serve or for whom they work, if they reside in the same house.

¹⁰ P.B. Mignault, *Droit civil canadien*, tome 5, Montreal 1897, p 226.

The basic idea of principal residence as the key criterion as to what constitutes domicile for civil purposes has not changed since the enactment of the SLCC. If a person has more than one residence, then his domicile is his principal establishment, the place where the person has a fixed and settled intention to remain. Article 49 is sound and necessary to ensure that persons like diplomats do not lose their domicile by living abroad. Furthermore minors and adult persons who are under tutorship or curatorship ought to be treated as domiciled with the tutor or curator.

Recommendation 7-1: That the notion of residence or, where a person has more than one residence, the person's principal establishment be the key criterion for domicile, that the substance of art. 49 be carried over into the reformed SLCC and that a minor or an adult person under tutorship or curatorship be domiciled with his tutor or curator.

There following aspects of the law of domicile as set out in the SLCC require reform for the reasons set out.

1. Change of Domicile:

The SLCC reflects a period in Saint Lucia's development when travel was infrequent and a person rarely moved his principal residence off island. The provisions are out of touch with the modern increasingly mobile society of Saint Lucia where it is common for people to change their residences. The law needs to link domicile more closely to the concept of residence since people change residence frequently. A change in residence coupled with an intention to make the new principal residence his principal establishment is what should be required to effect the adoption of a new domicile of choice.

Recommendation 7-2: That the reformed SLCC provide that change of a person's domicile be effected by a change in residence of the person coupled with an intention on the part of the person to make the new residence his principal establishment.

2. Dependent Domicile of Women

CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect of or purpose of impairing or nullifying the recognition, enjoyment or exercise by women *irrespective of their marital status*, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, *civil* or any other field". Saint Lucia's obligations under CEDAW, and more specifically Part IV Article 15.4 of that Convention, require that a woman be free to choose her own residence and domicile.

There has been widespread compliance with CEDAW throughout the developed world including most states in the United States, the states of Australia, New Zealand, the provinces of Canada, and the United Kingdom. Certain Caribbean jurisdictions have already taken steps to comply with CEDAW. Provisions similar to those in the SLCC that make a woman's domicile dependent on her husband's have been repealed in Saint Vincent and the Grenadines and in the British Virgin Islands.

Recommendation 7-3: That the reformed SLCC provide that a woman be free to choose her own domicile.

3. Domicile of Children when the Parents have Different Domiciles:

Once the freedom of a woman to choose a domicile independent of her husband is accepted, a further problem arises with respect to the domicile of the child when the parents do not have the same domicile. In the civil system, the domicile of a minor is generally with his tutor or parents. Since it is possible for a child to reside with both parents for part of the time, it is proper to determine the domicile on the basis of the parent with whom the child “usually” resides. Since a court may well have made an order as to custody that is at variance with the usual residency of the child, the primacy of the court order needs to be recognized. This suggestion is consistent with the CDC, and more particularly art. 9 para. 1.

Recommendation 7-4: A minor is domiciled with his tutor, and when his or her parents exercise tutorship but do not have a common domicile, the child is presumed to be domiciled with the parent with whom he usually resides subject to an order of the court that provides that the child’s domicile is at another place.

4. Dependent Domicile of Domestic Servants

Article 51 of the SLCC creating a domicile of dependence for domestic servants resident with their employers is out of touch with modern realities. The domicile of such persons should be subject to the ordinary rules of domicile.

Recommendation 7-5: That art. 51 of the SLCC be repealed.

5. Uncertainty of domicile of persons without a residence:

Linking domicile to residence creates problems for persons whose residence is uncertain or who are without a residence. In the case of a person whose domicile is uncertain because his principal establishment cannot be ascertained, his domicile ought to be his residence. Sometimes a person in our modern highly mobile society does not have a residence. The domicile of such a person should be where he lives and, if that is not ascertainable with certainty, then his domicile should be his last known domicile. It would be useful for the Code to provide for these situations.

Recommendation 7-6: That the reformed SLCC provide that, where the person’s domicile is uncertain, it should be considered to be his residence and that a person who has no residence be deemed to be domiciled where he is and, if that cannot be ascertained, at his last known domicile.

6. Election of Domicile for Purposes of Legal Obligations

It is common for persons to elect a domicile for the purpose of establishing the law of the jurisdiction governing a particular legal obligation and the right to do so should be recognized. This domicile is entirely exceptional.

Recommendation 7-7: That the Code provide for the right of a person to elect a domicile for the purposes of a juridical act.

8. ABSENCE OF A PERSON AND DECLARATION OF ABSENTEE'S DEATH

This Chapter of the Report deals with the law relating to the absence of a person in cases where it is doubtful that a person is still alive, but where there is no conclusive proof that he or she is dead. The law provides for taking possession of the property of the absent person and for its administration and, in appropriate cases, for an application to be made for an order declaring the absentee dead. The law also sets out some of the effects of the absentee's presumed death as well as the rules respecting his or her rights and the rights of others on the absentee's return.

The current SLCC provisions are set out in arts. 52 to 80. Briefly summarized, these articles provide:

1. that an absentee is a person who was domiciled in Saint Lucia at the time of his or her disappearance and whose existence is unknown (art. 52);
2. that the property of the absentee is subject to administration and that a curator may be appointed to administer the absentee's property (art. 53 to 58);
3. that the persons who were the absentee's presumptive heirs at the time of his or her disappearance may enter into provisional possession of the absentee's property after five years (art. 59 to 63);
4. that the provisional possession becomes absolute after 30 years of absence and allows for the partition of the property in favour of the heirs and other persons entitled (art. 69);
5. that, if the absentee returns or his or her existence be proved, he or his descendants may claim the property in its then condition or the invested proceeds of the property (art. 66-69);
6. that the right of the absentee to inherit devolves to those who would have shared with him or to those who would have succeeded in his or her stead (art. 71 to 73);
7. that the community of property is provisionally dissolved from the day of the demand to that effect from the absentee's presumptive heirs after the lapse of time required for obtaining authority to take possession of the absentee's property, the covenants and rights dependent on the dissolution of the community become effective and the community of property may be subject to liquidation and partition (art. 75 to 78); and
8. that minor children of an absentee father will be taken care of by the mother until a tutor is appointed (art. 79).

The following areas for reform have been identified.

1. The Period of Absence for Final Possession and Provisional Possession

Article 64 of the SLCC provides that the time frame for presuming the death and taking final possession of the property of an absent person is 30 years. The SLCC also provides for a period of 5 years for provisional possession of the absentee's property or a lesser delay where there are "strong presumptions that the absentee is dead." Interestingly, the lesser period for provisional administration has no parallel in the case of final possession. The modern reader is struck by the

very long time frames before the property of an absent person can be dealt with either finally or provisionally. These time frames reflect a bygone era when the pace of life was much slower than it is now. In particular, it reflects a society in which travel off island could take months and even years and where communications were slow and unreliable. Enormous changes in transportation and communication technology have taken place rendering these time frames obsolete. It is almost impossible for an aircraft to crash or for a disaster to occur without their being notice in St Lucia usually on the same day. Where a person has simply disappeared, it is possible, given modern information systems and techniques, to investigate the whereabouts of a missing person effectively. The time frames should be shortened to reflect the modern world.

A consensus has developed that the appropriate time between the disappearance of the person and the application for an order of presumption of death is seven years.¹¹ If that consensus is accepted, then one year appears to be a reasonable time for the liquidation of the absentee's property.

Furthermore, the level of doubt as to whether a person is in fact dead can vary considerable. If one takes the example of the attack on the World Trade Center in New York City, it is clear that, if the presence of the person in one of the towers is established at the time of its collapse and it is further established that that person was not among the small number of survivors who were rescued in the immediate aftermath of the disaster, the death of the person can be presumed almost to a certainty. If that is the case, there seems to be no good reason why any period should elapse before the affairs of an absent person can be wound up.

The policy interest underlying the existing provisions is the protection of the property rights of the absentee from disposition by third persons and relatives at the expense of the absentee's other responsibilities to his or her spouse and children.

Recommendation 8-1: That the death of a person domiciled in Saint Lucia be presumed after a person has been absent from Saint Lucia for 7 years without it being known whether he is still alive and that proof of death be permitted when it is certain that the person has died but no record of civil status can be drawn up.

Recommendation 8-2: That court may order the administration of the property of the absentee after one year.

2. Administration of the Absentee's Property

The general rules respecting administration of property of third persons should apply to the administration of the property of an absentee. In the case of an absentee who was married or has family responsibilities, these provisions do not reflect the evolution of responsibilities under family law. From the moment the absentee's property comes under administration, it should be available to pay the expenses of the marriage and to pay the person's maintenance obligations and other support obligations. In the long run, the spouse and children of the absentee should be entitled to get on with their lives at the earliest time.

Recommendation 8-3: The administration of the absentee's property should be subject to the general rules for the administration of property and the court should be empowered to permit the

¹¹ Seven years is the rule in England (*Matrimonial Causes Act*, s. 19(3)) and in most Canadian jurisdictions. Many jurisdictions provide for a shorter period or no period at all where death can be established on evidence.

curator to discharge the financial responsibilities of the absentee in relation to his or her spouse and children.

3. The Effects of Presumption and Declaration of Death

One of the most interesting aspects of the present SLCC provisions is that the effect of a presumption of death is not incomplete. Certain effects are set out in the SLCC. The effect on rights claimed through the absentee and rights of succession are set out in articles 70 to 73. What these effects will be will have to be determined in the light of all the other reforms of the SLCC and will be simplified when the effect of the present provisions is fully articulated.

Read carefully as a whole articles 75 to 78 of the SLCC as they now stand appear to give the presumption of death the effect of actual death. That was not expressly done in the original SLCC because of art. 74 (now repealed), which provided by way of exception that the presumption of death did not have the effect of death in relation to the dissolution of the marriage of the absentee. Notwithstanding such a presumption, a spouse was not free to remarry. As has been observed, one of the policy assumptions underlying the 1879 Code is that marriage is permanent. It appears that there was a fear by the original policy makers that a court order declaring an absentee dead might be seen as dissolving a bond of matrimony when there was no absolute certainty that the absentee was in fact dead. The original SLCC did not contemplate divorce. This appears to be the reason why the existing SLCC does not provide for a declaration of death. Such a declaration might have been seen as the equivalent of divorce.

It is submitted here that the effect of the repeal of article 74 in 1956 was, subject to the rights of a returning absentee who has been declared dead, to make the consequences equivalent to actual death. Accordingly, in the reformed SLCC, there should be provision made for a court order declaring an absentee dead so as to be certain as to the point in time the presumed death is to be treated the equivalent of death.

It will be noted that articles 79, which provides that a surviving mother has rights to have the care of the minor children and to exercise the “rights of her husband” with respect to the children *only* until a tutor is appointed, reflects the discriminatory treatment of women. This provision is obsolete given the recommendations in this Report in respect of the equality of men and women and more particularly those set out in Chapter 12 on the Rights and Obligations of Spouses.

Recommendation 8-4: That, subject to the rules respecting what is to happen on the return of an absentee, a declaration of death of an absentee be provided for and in the reformed SLCC and that the declaration have the same effects as actual death for all purposes, including the dissolution of his or her marriage.

4. Return of an Absentee Declared Dead

Correction of Register of Civil Status: The declaratory judgment should cease upon the return of the absentee so far as is reasonable. A returned absentee should be obliged to apply to the court to cancel the declaration of death and to correct the register of civil status. Provision should be made for an application to rectify or cancel various other entries consequent upon his or her return. Third party rights should in all cases be protected.

Recommendation 8-5: That a returned absentee be required to apply to the court to cancel the declaration of death and to correct the register of civil status and that, subject to third party rights, the returned absentee should have the right to make an application to rectify or cancel various other entries consequent upon his or her return.

Effect of Return on a Subsequent Marriage by Spouse of Absentee: Since the original provisions of the SLCC did not contemplate the dissolution of marriage, they do not make provisions for the situation that occurs when an absentee returns home and finds that his or her spouse has remarried. Here the policy maker is faced with a choice between two bona fide marriages. Should the first or second marriage be valid? On balance, the rule that will work justice in the majority of such cases is that the second marriage should be treated as valid and the first marriage should remain dissolved.

Recommendation 8-6: That the effect of a declaration of death should cease upon the return of an absentee but the marriage of the absentee remains dissolved.

Custody and Support of Children of Remarried Spouse of Absentee: In a related vein, how is the issue of custody, access and support of any children of the absentee's former marriage to be decided? Since there is no decree absolute of divorce, the rules respecting custody, access and support of children on separation would appear to be the most appropriate model. These are dealt with in Chapter 15.

Recommendation 8-7: That the provisions of the Code respecting separation apply, or be modified to apply, in relation to matters of custody, access and support of the children of a remarried spouse of an absentee.

Return of Property and Money and Effect of Discharge of Obligations of Absentee:

There are a number of difficult problem areas that need to be addressed in relation to the property and obligations in relation to the property or money of the absentee, and more particularly the following:

1. The restitution of property of the absentee needs to be balanced against vested third party rights and the rights of persons who believed they were rightful possessors and owners. This is a task for the courts.
2. The rights and responsibilities of a person in possession of property of the absentee who discharges obligations in respect of the property or of a person who makes payments out of money of the absentee between the time the continued existence of the absentee becomes known and before the absentee assumes his or her rights needs to be provided for. The general rule ought to protect from loss a person who is in possession of property in good faith or who makes payments in good faith.

Recommendation 8-8: That appropriate provisions be included in the reformed SLCC to provide:

(a) for the court to balance the absentees right to the restitution of property of the absentee against the vested third party rights and the rights of persons who believed they were rightful possessors and owners; and

(b) for the protection of the property from loss, between the time the continued existence of the absentee becomes known and before the absentee assumes his or her rights, by persons who are in possession of property of the absentee who discharges obligations in respect of the property or of a person who makes payments out of money of the absentee.

9. CAPACITY OF NATURAL PERSONS

The purpose of this Chapter is to discuss the law relating to the capacity of natural persons generally, to discuss the law of capacity of natural persons and the appointment of tutors and curators and related matters in the SLCC and to make proposals for reform. The first part of the Chapter will set out a general account of the law of capacity and discuss some of the reasons why it is important that it be reformed. The second part of this Chapter will deal with the basic provisions of the law of majority and minority. The third part will present a basis for rationalizing and updating the law relating to the representation of minors and adults by tutors and curators. Under this heading a number of important matters will be identified and proposals for reform made.

What the law of capacity is and why it is important to reform it

Capacity is related to the place of physical persons (as opposed to corporations) in civil society. It is closely associated with status and the enjoyment of civil rights. The civil status of a person is the condition of that person in society, whether an adult or a minor, whether a person of full capacity or under an incapacity or whether married or single. Thus the civil status of a person is the source of most of his or her rights, entitlements, liabilities and obligations which arise according to the person's relationship with others within the institutions of marriage and the family (Brierley, p. 213). Civil rights, the rights of a person as a member of society,¹² in turn, provide for every human to have a juridical personality and to have a patrimony. The fundamental principle following from these concepts, with respect to capacity, is that physical persons have the full enjoyment of civil rights and are able to exercise them unless the law provides for representation or assistance, as in the case of what are now called "interdicted persons". In modern law these are referred to as "persons in need of protection". Persons may be in need of protection because of their age or because of their incapacity to express their will and to understand the meaning of their acts. The law therefore makes a distinction between the enjoyment of a right, on the one hand, and its exercise, on the other:

A person vested with a right has, in principle, its enjoyment, although the ability to exercise it may be limited. Enjoyment of a right is the legal aptitude to acquire it, while its exercise is the application, or the "putting-into-action" of such right. (Brierley, p. 213)

For instance, the incapacity of a minor of less than 16 years of age to marry is an incapacity related to the enjoyment of the right to marry. The incapacity of a minor to institute an action without being represented is an incapacity related to the exercise of a right. In the former case, the law forbids marriage altogether unless the minor is 16 years of age, whereas in the latter the law simply forbids the minor the autonomous exercise of the right to sue. The distinction between an incapacity related to the enjoyment of a right and an incapacity related to the exercise of a right lies in the sanction attached to the breach of the rule related to each type of right. In the former case, the act done in contravention of the right of enjoyment will be an absolute nullity whereas, in the latter case, the act done in contravention to the right of exercise will be a relative nullity, *i.e.* only the person in need of protection will be entitled to raise his or her incapacity.

As has been observed in several contexts, the primary rationale of the current SLCC is the protection of the property of minors and of interdicted persons (or persons of full age in need of protection, as they are now generally called.) These are persons suffering from a mental disorder or disability or who are developmentally delayed. The existing SLCC lumps them together without distinction. Under the SLCC, the interests of these persons were considered to be protected if their property was protected from exploitation. The regimes of protection were thus

¹² The term "civil rights" should not to be confused with the use of that term in human rights and constitutional law.

crafted in terms of the rights and obligations of the tutor or curator to an interdicted person in relation to their property. The regimes of protection were not primarily focussed on the personal needs and interests of interdicted persons. The regimes paid very little attention to the fact that different types or levels of incapacity could call for different regimes of protection to better meet the special care and needs of people in need of protection. The current regimes of protection in the SLCC are typical of a time when societies hid mentally disordered, disabled or developmentally delayed people (often by institutionalisation), typically stigmatising them with permanent judgmental labels (like “interdicted persons”) that did not allow any distinction as to whether the incapacity was partial or total and whether it was temporary or permanent. Such distinctions call for different scenarios of protection responsive to the interests of the person in need of protection.

Such regimes as those set out in the SLCC cannot stand in their current form, given the focus put on the rights of the physical person in today’s modern society. In the case of minors, children are being viewed as persons in their own rights; their incapacity as minors will need to operate in their interests as persons.¹³ The governing principle today is that, to the extent that protected persons are deprived of their rights, whether in relation to their persons or their property or to their civil rights in general, the protective regime that is established must be in their interest and foster their autonomy as much as possible (Brierley, p. 220-221).

In the case of children, such a principle is in keeping with the CRC which recognizes that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, but must also be offered an appropriate environment to gradually prepare themselves to live individual lives and become autonomous citizens who are capable of playing a meaningful role in society.

In the case of persons of full age in need of protection, the same values of respect and autonomy apply. While protection of property will still be an important feature of any regime of protection, the dominant characteristic will be to recognize the very personal interests of each person subject to a regime of protection. It may very well mean that, for persons of full age in need of protection, different regimes of protection will need to be put in place as “one size will not fit all”. In some cases, it will be sufficient to provide for the protection of the patrimony of the person in need of protection whereas in other cases it will be necessary to protect both the patrimony and the person himself or herself. In any event, protection should not depend on arbitrary and judgmental decisions but should take into account the possibility that incapacity may be partial or total, or temporary or permanent.

In both cases, however, the regimes put into place, whether for the minor or for the person of full age in need of protection, should be established to provide as much but no more assistance than necessary to foster the person’s autonomy as much as possible and should therefore circumscribe the authority of those vested with the power to make decisions affecting the individual rights of the person.

Recommendation 9-1: That the law relating to minors and person of full age in need of protective supervision be reformed to establish a protective regime of tutorship and curatorship that is established in their best interests and with a view to fostering their autonomy including their exercise of their civil rights as fully as possible.

¹³ See Chapter 3 The Rights of Children.

If follows from what has been said above that a wholesale reform of the law relating to minority and of persons of full age in need of protection is necessary. To understand the effect of what is recommended, it is necessary to glance back at history. In 1956, the Legislature passed the Civil Code (Amendment) Ordinance, 1956, (the “1956 Act”) which was the culmination of a movement, the purpose of which was to bring the Code closer to English law. As the most important commentator on the Civil Code, Dr. Liverpool, remarked:

Although most of the provisions of the original Code had been adopted from the Quebec Code, it is true to say that the majority of amendments have tended to bring the St. Lucia Civil Code closer to English Law. In the early years of the Code’s evidence [sic][existence] this was done by “gentle degrees” but the sweeping changes of 1956 have greatly accelerated the process. In fact the Laws of St. Lucia (Reform and Revision) Ordinance, 1954, specifically empowered the Commissioner appointed for the purpose “to assimilate the Code to the Law of England where they differ, in the light of the present needs of the Colony and to prepare draft measures suitable for enactment ... to give effect thereto.”

Many of the provisions of the 1956 Act relating to the capacity of minors and particularly articles 215 and 216 are measures of that kind. Article 215 refers to provisions of the third part of the SLCC, where various 1956 amendments introduced the English Law of minority into the SLCC. Article 216 provides as follows:

215. Save as is otherwise provided in this Code or in any other law which now is or may hereinafter be in force in the Colony the law of England for the time being relating to the custody of infants, guardianship and the appointment of guardians, and the rights powers and duties of guardians, shall *mutatus mutandis* apply to the custody of minors, tutorship and the appointment of tutors, and the rights, powers and duties of tutors.

The provision is ambulatory, that is to say, it makes English law apply to Saint Lucia in the specified areas as it is amended or replaced from time to time. Such a provision is of uncertain effect and undermines the Code as a source of law. One Saint Lucian lawyer recommended that article 216 “should be reviewed” and “that we Saint Lucians should formulate our own laws with regard to tutorship”.¹⁴

Recommendation 9-2: That SLCC should be reformed so as to lay out the whole of the law respecting minority and the representation of minors in the reformed SLCC without depending on the incorporation by reference of the English law respecting the custody of infants, guardianship and the appointment of guardians, and the rights, powers and duties of guardians.

Against the background of these general recommendations, the Committee considered a number of aspects of the law relating to capacity.

¹⁴ Report of Canvas of Lawyers, Item 9.

Minority and Majority: Basic Provisions

(1) Age of Majority:

Articles 213 and 284 of the SLCC express the basic idea of the capacity of persons of the full age of 18 years and the incapacity of persons under that age. Article 213 refers to “either sex” remaining in minority and as such has sexist overtones:

Recommendation 9-3:

That minority and majority should be stated in the following gender neutral terms:

Full age or the age of majority is 18 years.

On attaining full age, a person ceases to be a minor and has full exercise of all his civil rights.

(2) General rules regarding Capacity of Minors and Persons of Full Age:

For conceptual clarity, the general rules applicable to the capacity of minors and of persons of full age should be expressly stated.

Recommendation 9-4: That a minor is permitted to exercise his civil rights only to the extent provided by law.

Recommendation 9-5: That the capacity of a person of full age shall not be limited except by express provision of law or by judgment of the court ordering the institution of protective supervision.

(3) The Concept of the Evolving Capacity of Children:

Article 5 of the CRC establishes the principle of fostering the evolution of the capacity of children. The CCQ has adopted an elaborate formal scheme for the evolution of the child’s capacity, which, greatly simplified, recognizes the following stages in ascending order:

- the exercise by a child of those civil rights that he or she can enjoy without representation,
- simple emancipation, which frees a child from parental authority, allows him or her, without representation, to do simple administration (including signing leases for not more than 3 years, but not the alienation of immoveable property), permits him to make gifts that do not deplete his or her capital, and allows him to establish his own domicile, etc.,
- full emancipation which permits him or her to enjoy almost full civil rights, some with the assistance of his or her tutor (though not for example the right to make a will).

The picture is complex. The result of the civil system is that a child enjoys and exercises differing capacity at different levels of development. In 1956, the SLCC was amended to introduce the English law applicable to the capacity of minors in place of the civil notion of emancipation of the minor in certain circumstances. In the view of the Project Team and the

Committee the simpler scheme in the English law of capacity in 1956 has taken firm root and the reintroduction of a complicated scheme of gradual emancipation is inadvisable.

Recommendation 9-6: That the civil system of evolving capacity adopted in Quebec not be adopted in Saint Lucia.

(4) The Civil Rights that a Minor May Enjoy and Exercise Alone:

There are civil rights that the law allows a minor to enjoy and to exercise alone, without representation. Article 283 allows a person engaged in a trade to be considered of full age and article 264 allows him to bring an action alone to recover wages. Those provisions should be reformed to include minors engaged in any employment, craft or profession.

There is one important omission: the power to enter into contracts within the limits imposed by his age or powers of discernment to meet his ordinary and usual needs, such as food and housing. These are referred to as “necessaries” in English law. It would be highly inconvenient to commerce not to be able to rely on the enforceability of such transactions where the minor is of an appropriate age and has appropriate powers of discernment.

Recommendation 9-7: That the only contracts for which a minor can act without representation are the following:

(1) a minor 14 years of age or over (or the minimum age for a minor to work) be deemed to be of full age for all acts pertaining to his employment or to the practice of his or her craft or profession; and

(2) a minor within the limits imposed by his age or powers of discernment be entitled to enter into contracts without representation to meet his ordinary and usual needs.

Time did not permit the Committee to rationalize in the light of modern conditions the scheme relating to all the acts and proceedings that minors can

- exercise alone;
- exercise with the consent of the tutor alone;
- exercise only with the consent of the court.

Nor was there sufficient time to consider the effect of marriage on the above. Subject to the above recommendation, that scheme will be left to be dealt with in the drafting phase.

Examples that will be reviewed in that phase are as follows: A married minor requires the aid of his tutor in entering into agreements, but article 279 allows married minors to grant leases for 9 years and to administer them on the same basis as persons of full age. The rationale for this exception is unclear.

Rationalizing and Updating the Scheme of Representation for Minors and Adults under an Incapacity

The appointment of tutors under the present SLCC provided for as follows:

217. (1) Tutorships are of three kinds, namely:

- (a) those appointed by the Court,
- (b) those appointed by the father or mother in accordance with article 219 [appointment by notarial deed or by will], and
- (c) the legal tutorship of the surviving father or mother.

(2) The Court may on the petition of any person including the minor himself in certain cases appoint a tutor to any minor, whether such minor is entitled to property or not.

The appointment of curators under the present SLCC provided for as follows:

- 297. There are two sorts of curatorship, one to the person the other to property.
- 298. The persons to whom curators are given are:—
 - (1) Interdicted persons.
 - (2) Children conceived but not yet born.
 - (3) Persons judicially condemned to imprisonment for any term exceeding six months.
- 299. Curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors. They are sworn before entering upon their duties.
- 307. Curators to property are those appointed:
 - 1. To the property of absentees;
 - 2. In cases of substitution;
 - 3. To property of extinct corporations;
 - 4. To property abandoned by arrested or imprisoned debtors. (Amended by Act 34 of 1956)

A number of observations should be made with regard to these provisions.

1. The Overall Scheme: It will be observed that there is an apparent inconsistency in the categorization as between tutorship and curatorship. Minors get tutors but the unborn get curators. It has been observed that the current SLCC places emphasis on the preservation of property and much less on the objectives of tutorship or curatorship as they relate to the minor or adult under an incapacity. It is submitted that a more rational scheme is set out in the CCQ, whereby tutors are given to persons who are under a partial or temporary incapacity and curators are appointed for those whose incapacity is total and permanent. On the issue of the unborn, it is more rational to treat parents as the tutors of their unborn child.

Recommendation 9-8: That

(a) tutors be given to persons who are under a partial or temporary incapacity and curators be appointed for those whose incapacity is total and permanent; and

(b) parents be tutors of their unborn child.

2. Tutorships by Law and Tutorships by Appointment: With regard to tutorships, the reformed SLCC should make it clear that the father and the mother are tutors of their children by fiat of

law. Common experience tells us that this is appropriate. Recognition of this fundamental notion before now was impeded by the existence of provisions in the SLCC that placed women under certain disabilities. Note that the “*surviving* mother or father” are tutors under article 217(1)(c). With the institution of substantive equality between men and women, the concept of parents as tutors by law becomes obviously appropriate. It will be noted that there is no requirement for the parents to be married. Parents should have the right to appoint tutors for their children.

The court has long been responsible for appointing tutors for children. It is obviously appropriate that that continue. The present SLCC reflects a time before government intervened in society to protect minors or persons of full age under an incapacity. Increasingly governments have found it necessary to intervene to protect persons in need of protection and particularly when they are involved in the juvenile justice system. In the case of minors, child protection legislation often contemplates that parents be deprived in whole or in part of parental authority over a child and a public official assume that parental authority. Such legislation therefore requires that tutorship by a government official in such circumstances be recognized.

In this regard, modern civil law divides tutorships into

- tutorships that arise under the law, which may be called “tutorships by operation of law”; there are two classes, the tutorship of parents and the tutorship by a public official charged with the protection of children; and
- tutorships conferred by the mother and father by deed or by the court, which may be called “tutorships by appointment”,

The above distinction permits the rights and duties of these two classes of tutors to be set out in more orderly and rational manner.

Recommendation 9-9: That

(a) that parents be tutors by operation of law;

(b) the public official charged with the protection of children be a tutor by operation of law and shall as such be entitled to exercise parental authority in place of the parents;

(b) the court continue to be entitled to appoint tutors and that parents be entitled to appoint tutors for their children.

3. The Obligations of the Tutor or Curator: The emphasis in the provisions of the present SLCC is on the protection of the persons and, as has been observed, especially the preservation of his or her property, both of which are of central but by no means of exclusive importance. The CRC makes it clear that tutorship in the case of minors has other purposes as well, more particularly securing the best interests of the child (See Recommendation 3-4(b)). The principle of the best interests of the person is now generally extended to persons of full age in need of protection. Under the influence of conventions like the CRC and other human rights declarations, modern law requires the tutor and curator alike to act in the best interests and to take a more proactive role to secure the exercise of the civil rights of the person for whom he or she was appointed. Amendments to the SLCC in 1956 required that the court in any proceeding for the “custody or upbringing of a minor, or the administration of any property belonging to or held in trust for a minor, or the application of the income thereof” have regard for the “welfare of the minor as the first and paramount consideration” and shall not take into consideration the competing claims of

either of the parents (art. 210A). This is a substantial step toward what is mandated by the CRC. The final step is that a tutorship or curatorship ought:

- To be established in the best interests of the child or adult under an incapacity
- To ensure the protection of his or her person
- To ensure the administration of his or her patrimony
- To secure the exercise of his or her civil rights

Recommendation 9-10: That tutorship or curatorship ought:

- (a) to be established in the best interests of the child or adult under an incapacity*
- (b) to ensure the protection of his or her person*
- (c) to ensure the administration of his or her patrimony*
- (d) to secure the exercise of his or her civil rights*

4. Reform of Curatorships: A number of observations must be made about the above curatorship provisions.

- First, with regard to article 298(1), it will be observed that “interdicted persons” is a highly judgemental term for mentally disordered persons, the developmentally delayed and other adults who for one reason or another cannot care for themselves or manage their affairs. A variety of less judgmental terms are now used. A “person in need of protective supervision” is a generally accepted term.
- Second, as has been observed above, in the case of the unborn under article 298(2), it is a wiser practice to treat the parents as tutors of their unborn child.
- Third, with regard to Article 298(3), it is no longer thought necessary to appoint curators to persons who are imprisoned for a term exceeding six months. This practice (paralleled in the common law by the incapacity of a convicted felon and the appointment of a curator for his or her property) was part of the punishment meted out to such persons. It is now generally recognized that prisoners ought to have the free exercise of all their civil rights except insofar as they are not capable of doing so by reason of imprisonment.

Recommendation 9-11: That

(1) curatorship be abolished with respect to persons who are sentenced to imprisonment;

(2) curatorship of the unborn be replaced by tutorship of the parents;

(3) subject to the Companies Act, curatorship of property that is unowned or abandoned or whose owner has disappeared (as in the case of an absentee) or for substitutions be replaced by tutorship or curatorship, as appropriate;

(4) curatorship for interdicted persons (who are adults) be replaced by tutorship or curatorship, as appropriate, by reason of the inability of a person to care for him or herself or to administer his or her property by reason of illness, mental deficiency or debility due to age and that the person who is the subject of the application be called a “person in need of protective supervision”.

5. Accountability of Tutors and Curators: The Committee was concerned about the lack of accountability for the discharge under the present law by tutors and curators of their duties after their appointment. A tutor is accountable for his administration at the end of the tutorship (art. 268) or during the tutorship may be compelled to provide an account of his or her administration (art. 269). Mechanisms are necessary to be sure that tutors and curators discharge their duties with due diligence. In the case of tutors to minors annual reporting to the court and to a person in the Social Services Department is reasonable. In the case of tutorships and curatorships to persons in need of protective supervision, periodic review by the court or an official of the court is necessary to be sure that the tutor or curator are performing their responsibilities and that that a tutor or curator is still needed.

If a curator fails to discharge his responsibilities or dies, there is often no one to step in to act as curator to the adult in need of protective supervision or to arrange for the appointment of another curator. In many developed countries these tasks are performed by a public official variously called a public guardian or public trustee or, in civil jurisdictions, a Public Curator. No such official exists in Saint Lucia. To provide greater assurance that the curator will discharge his duties, it is recommended that the court have the authority to appoint an alternate curator who, without further proceedings of the court, would be authorized to assume the office of curator on the death of the curator or if authorized by the curator. The alternate curator would have the obligation of notifying the court of the death of the previous curator and providing a death certificate.

Recommendation 9-12: That:

(1) mechanisms to ensure accountability of tutors and curators be put in place, which may include the obligations of a tutor to report annually to the Social Services Department and in the case of tutorships and, periodic review by the court or an official of the court to be sure that the tutor or curator are performing their responsibilities and that that a tutor or curator is still necessary; and

(2) the court have the authority to appoint an alternate curator who, without further proceedings of the court, be authorized to assume the office of curator on the death of the curator or if authorized by the curator for a specified period; the alternate curator would have the obligation of notifying the court of the death of the previous curator and providing a death certificate.

The Committee approved the adaptation of articles 177 to 297 of the CCQ to the circumstances of Saint Lucia. Those adaptations will exclude the civil law concept of simple and full emancipation, the tutorship council and the provisions relating to the Public Curator.

10. SOLEMNIZATION OF MARRIAGE

In the present SLCC, the solemnization of marriage falls into two areas, the formalities to be observed in the celebration of marriage and related matters (arts. 94-122) and the conditions necessary for contracting a marriage (arts. 81-93). It has already been recommended that marriage be capable of being solemnized by an officiant of any religion who is duly appointed to do so. (See Recommendation 4-12.)

Formalities to be observed in the Celebration of Marriage

The committee found that the formalities to be observed in the celebration of marriage were satisfactory except for article 106 which requires marriages to be celebrated between sunrise and sunset.

Recommendation 10-1: That the limitation that marriages be solemnized between sunset and sunrise be removed so that a marriage could be solemnized at any time.

Conditions Necessary for Contracting a Marriage

The SLCC stipulates that a person under the age of 16 cannot be married in Saint Lucia (art. 81) and provides that a child between the ages of 16 and 18 may marry only with consent. Article 85 draws a distinction between the consent necessary in the case of legitimate or illegitimate children. Furthermore, that article puts the father of a legitimate child in a superior position to the mother when there is disagreement (item 1(a) under art. 85). The SLCC should be reformed to remove the distinction between legitimate and illegitimate children and to reflect the equality of the parents in giving consent. That equality will presume that, in relation to third parties, the parents are acting for each other in giving consent. Disagreements between the parents should be determined by the court. (See Chapter 16, Parental Authority.)

Recommendation 10-2: That the provisions relating to the consent of the parents to a marriage of a minor should be reformed to remove the distinction between legitimate and illegitimate children and to reflect the equality of the parents exercising parental responsibility and to provide that in cases of disagreement the issue of consent to marriage should be determined by the court.

The moral conditions relating to marriage are rooted in socially developed notions of propriety, in concerns about clarity of successions, in biologically rooted fear of physically or mentally incapacitated children resulting from children born of parents who are too closely related and in the concern for family stability and harmony (Brierley, 231). The relevant provisions of the SLCC are found in articles 90-92.

In Saint Lucia, therefore, marriage is prohibited in the direct line between ascendants and descendants, in the collateral line between brother and sister and persons connected in the same degree by alliance (that is to say, marriage) whether the connection is legitimate or natural. Marriage is also prohibited between uncle and niece, aunt and nephew, and between persons connected in the same degree by marriage. These prohibited degrees seem to be appropriate except for the following matters:

1. In spite of the prohibition on marriage of persons connected in the same degree by alliance, a man may, by virtue of art. 91A, marry his deceased wife's sister. While the provision in fact permits a woman to marry her deceased husband's brother, its expression is discriminatory. It is recommended that the exception

should be expressed to reflect the fact that a woman may marry her deceased husband's brother in the same way that a man may marry his deceased wife's sister. Furthermore, if a man may marry his deceased wife's sister or a woman may marry her deceased husband's brother, after the death of the wife or husband, there is no reason why such a marriage may not take place after the dissolution of their marriage by divorce or a decree of nullity.

2. As has been observed, at the time these provisions were introduced in 1879, adoption was not recognized in Saint Lucia and, when the Adoption Ordinance was enacted much later, all the consequential amendments necessary to fit the concept into the scheme of the SLCC were not made. An adopted child should be considered to be a biological child of the family for purposes of establishing prohibited degrees of relationship in much the same way as they are so considered for all other reasons in family law. In addition an adopted child does not lose his or her consanguinity with his biological relatives, and it will be necessary to prohibit the marriage of an adopted child to his or her biological ascendants or to his or her brothers or sisters, whether by the whole or half blood.
3. The provisions relating to prohibited degrees of relationship for the purposes of marriage are remarkable for their lack of clarity. It is therefore recommended that these provisions be simplified and clarified to define how a degree of relationship is established together with definitions of direct line and collateral line. The degree of relationship should be established by the number of generations, each forming one degree with the series forming the direct line or the collateral line. The direct line is the series of degrees between persons descended from one another and the collateral line is the series of degrees between persons descended not from one another but from a common ancestor.
4. Although the intention of articles 81-84 of the SLCC is to set the conditions necessary for contracting marriage, the language of those articles actually sets the grounds for nullity of a marriage. These provisions should be reworded to limit them to setting out the conditions for marriage and all the grounds for nullity should be found in the provisions which deal with nullity. A model for layout of these provisions is found in article 373 of the CCQ.

Recommendation 10-3: That the reformed SLCC permit a man to marry his wife's sister or a woman to marry her husband's brother, after the dissolution of their marriage by divorce or a decree of nullity or by death.

Recommendation 10-4: That under the reformed SLCC an adopted child should be considered to be child of the family for purposes of establishing prohibited degrees in the same way as they are considered for other reasons in family law but that, in addition, an adopted child be prohibited from marrying his or her biological ascendants or any biological brother or sister, whether by the whole or half blood.

Recommendation 10-5: That the provisions relating to prohibited degrees of relationship for the purposes of marriage be simplified and clarified by introducing into the reformed SLCC provisions defining how a degree of relationship is established together with definitions of direct line and collateral line. The degree of relationship should be established by the number of generations, each forming one degree with the series forming the direct line or the collateral line. The direct line is the series of degrees between persons descended from one another and the collateral line is the series of degrees between persons descended not from one another but from a common ancestor.

Recommendation 10-6: That in the reformed SLCC articles 81-84 of the present SLCC be reworded to limit them to setting out the conditions for marriage and that all the grounds for nullity should be found in the provisions which deal with nullity.

11. ANNULMENT OF MARRIAGE

Annulment can be contrasted with divorce. A divorce ends a valid marriage. Annulment of marriage has the effect of rectifying the status of the persons in a marriage because of some defect or incapacity at the time the marriage was celebrated. The law distinguishes between void and voidable marriages. When the ground of annulment has the effect of making the marriage void *ab initio*, the decree of nullity declares that there never was a marriage. When the ground of annulment is one that has the effect of making the marriage voidable, the decree annuls the marriage. In modern law a decree of nullity does not affect the status of the children and the same relief is available to a party as would have been available in the case of a divorce if the party acted in good faith. An annulment of marriage although it invalidates a marriage still has consequences with respect to a party to the marriage who acted in good faith and with respect to children of the marriage. The law relating to annulment of marriage in Saint Lucia is found in two places, namely, the SLCC and the DA. Maintenance of the spouse and children and custody of and access to the children on annulment are the same as in divorce and will be dealt with in Chapter 15.

Grounds of Nullity

The grounds are set out in articles 81 to 84 and 123 of the SLCC and section 19 of the DA.

The provisions of the SLCC which set out the grounds for annulment of marriage are characteristic of civil law in that they provide for absolute nullity and relative nullity. Thus a marriage that is absolutely null is invalid for reasons of public policy as set out in article 81 (being under the age of 16), article 84 (the person has contracted a previous marriage) or paragraph 1 of article 123 of the SLCC (which refers to the provisions forbidding marriages between person who are within forbidden degrees of relationship). A marriage that is relatively null is invalid for reasons as set out in articles 82 and 83 and paragraphs 2 to 6 of article 123, which reasons are for the benefit of a party who acted in good faith and only that party can invalidate it.

Articles 81 -84 and 123 of the SLCC states as follows:

81. (Subst. 34-1956). A marriage solemnized between persons either of whom is under the age of sixteen years is null and void.

82. There is no marriage when there is no consent.

83. Impotency, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotency be apparent and manifest.

This nullity cannot be claimed by any one but the party who has contracted with the impotent person, nor at any time after three years from the marriage.

84. A second marriage cannot be contracted before the dissolution of the first.

123. Marriage once celebrated can be impugned only for the following reasons:

1 For contraventions of articles 90, 91, 92;

- 2 Because without free consent of one of the parties;
- 3 For error of one party as to the person of the other;
- 4 Because one of the parties at the time of the marriage was of unsound mind;
- 5 Because celebrated by an incompetent officer;
- 6 For non-publication of banns or notice as prescribed in the last Chapter.

Section 13 (1) of the DA states as follows:

- 13.(1) In addition to any other ground on which a marriage is by law void or voidable, a marriage shall subject to subsection (2) be voidable on the ground that—
 - (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it; or
 - (b) that at the time of the marriage, either party to the marriage—
 - (i) was suffering from mental disorder of such a kind or to such an extent as to be unfitted for marriage and the procreation of the children; or
 - (ii) was subject to recurrent attacks of insanity or epilepsy; or
 - (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
 - (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

The criticisms of these provisions are as follows:

- (1) The Provisions overlap: There is some overlap, for example, between article 83 of the SLCC and section 13(1)(a) of the DA on non-consummation, and paragraph 4 of article 123 of the SLCC and section 13(1)(b)(i) and (ii) of DA, which refer to persons of unsound mind and a person suffering from mental disorder respectively. This overlap causes confusion as to what the law is and the provisions need to be reconciled and a single set of grounds set out. It is recommended that all the grounds for annulment of marriage be set out in the SLCC.
- (2) Outdated Values: One of the provisions is outdated and does not reflect the changes in attitude which have taken place in society. Section 13(1)(b)(ii) of the DA makes epilepsy a ground for nullity. The disease is now treatable and many people live normal married lives even though they are epileptic.
- (3) Grounds that are Appropriate for Divorce rather than Annulment: In providing grounds for annulment, the DA also sets out grounds that relate to whether the marriage is functioning or will likely function properly rather than grounds which relate to whether a marriage exists. Such grounds are found in section 13 of the DA (other than subsection 13(1)(a)) set out above. All of these grounds can be subsumed under marriage breakdown, which is the sole ground for divorce (see sections 3 and 4 of the DA.)

The grounds for annulment of marriage should therefore be as follows and they should be classed into grounds which make a marriage void or voidable.

Grounds which make a marriage void and therefore absolutely null are:

1. That the marriage contravenes the articles in the reformed SLCC relating to prohibited degrees of relationship in relation to the marriage of persons connected by blood or adoption (see Chapter 10 Solemnization of Marriage).
2. That one party to the marriage already had a subsisting marriage at the time of solemnization.
3. That a party to the marriage was at the time of the marriage under the age of 16 (see Chapter 10 Solemnization of Marriage).

Grounds which make a marriage voidable and therefore capable of being annulled are:

1. That the marriage was solemnized without the free consent of one of the parties.
2. That there was impotency by one party, whether the impotency is natural or accidental, at the time of the solemnization of the marriage.
3. That there was error of one party as to the identity of the other.
4. That at the time of solemnization of the marriage one party was of unsound mind.
5. That the marriage was solemnized by an incompetent officer.
6. That there was a failure to comply with required publication of banns or notice.
7. That, in the case of a minor 16 years or over, the marriage was solemnized without the relevant consent of the parents or tutor of that minor.
8. That the marriage has not been consummated, the reason for the non-consummation being irrelevant.

It will be observed that certain of the above grounds go to the matter of the existence of the marriage and in theory at least could be treated as rendering the marriage void. They are classed as grounds that make the marriage voidable because there will be recommended a specified time for applying to annul the marriage after the expiration of which the marriage will be treated as valid. The defects in question are more appropriately dealt with in this classification.

There is another ground of nullity, that the marriage was solemnized after the hours specified during which a marriage may be solemnized (see Recommendation 10-1, where it is recommended that this limitation be abolished).

Recommendation 11-1: That all the provisions relating to grounds for annulment of marriage should be set out in the SLCC.

Recommendation 11-2: That recurrent attacks of epilepsy be removed as a ground for nullity.

Recommendation 11-3: That the grounds that make a marriage void and therefore absolutely null should be as follows:

- (1) *That the marriage contravenes the articles in the reformed SLCC relating to prohibited degrees of relationship in relation to the marriage of persons connected by blood or adoption.*
- (2) *That one party to the marriage already had a subsisting marriage at the time of solemnization.*
- (3) *That a party to the marriage was at the time of the marriage under the age of 16.*

Recommendation 11-4: That the grounds that make a marriage voidable and therefore capable of being annulled are as follows:

- (1) That the marriage was solemnized without the free consent of one of the parties.*
- (2) That there was impotency by one party, whether the impotency is natural or accidental, at the time of the solemnization of the marriage.*
- (3) That there was error of one party as to the identity of the other.*
- (4) That at the time of solemnization of the marriage one party was of unsound mind.*
- (5) That the marriage was solemnized by an incompetent officer.*
- (6) That there was a failure to comply with required publication of banns or notice.*
- (7) That, in the case of a minor 16 years or over, the marriage was solemnized without the relevant consent of the parents or tutor of that minor.*
- (8) That the marriage has not been consummated, the reason for the non-consummation being irrelevant.*

Recommendation 11-5: That section 13 of the DA (other than subsection 13(1)(a), the substance of which will remain a ground of nullity) be subsumed under the existing grounds of marriage breakdown, which is the sole ground for divorce (see sections 3 and 4 of the DA.)

Time limit for bringing an action

A marriage that is void is void from the beginning and cannot be validated. An action to declare the marriage a nullity can be brought at any time. When a marriage is voidable, it is in the public interest that proceedings be brought within a specified time to nullify it, otherwise it is valid. Under the present SLCC, there is a 6 month time limit for certain grounds (art. 124). This short time limit was influenced by the desire in the 1879 SLCC to uphold marriages wherever possible. In relation to the additional grounds of nullity in the DA, the time limit is one year. It is recommended that the time limit for bringing an action for the annulment of a voidable marriage should be one year, which is a fair length of time applicable to all grounds of nullity that make a marriage voidable.

Recommendation 11-6: That the time limit for bringing an action for the annulment of a voidable marriage be one year.

Civil Effects of Nullity on Spouses and Children

Even though declared null, a marriage produces civil effects with regard to the husband and wife and the children (art. 133). The present SLCC makes those effects depend on the good faith or bad faith of the parties to the marriage (art. 134). A spouse in good faith can rely on the effects. It appears that the fate of a child's legal rights under the SLCC depends on the good faith of at least one of their parents. However, section 14 of the DA deems the relationship of a child to a party to a null marriage to be "such as if at the date of the decree [of nullity] it had been dissolved instead of being annulled." The DA therefore has the effect of treating the null marriage as valid in relation to the status of the children, thereby remedying the harsh effect of the present SLCC in the case of bad faith by both parents. The DA is silent on the matter of the good faith of the parties in relation to the civil effects of the divorce. These conflicts between the SLCC and the DA on whether the good faith of either of the parties to the marriage makes a difference and the effect of the declaration of nullity on the rights and responsibilities children should be remedied. The good faith of a husband or wife ought to be a precondition to claiming rights such as those in property or maintenance. Where both spouses act in bad faith, they should be allowed to take

back their property and, where only one spouse acted in good faith, that spouse should be entitled to take back his or her property or to apply for patrimonial rights resulting to him or her from the marriage. The rights of children should not be affected by the good or bad faith of the parents, nor should the rights and responsibilities of the parents and children.

The reformed SLCC should provide that parties are presumed to have acted in good faith unless declared otherwise by the court. The law should also be reformed to state what the scope of the civil effects of the marriage is and to provide, in addition to property and maintenance rights, for significant protection to be afforded to the spouse who acted in good faith, as for example, to keep gifts *inter vivos* or *mortis causa* made during marriage.

Recommendation 11-7: That the conflicts between the SLCC and the DA on whether the good faith of either of the parties to the marriage makes a difference and the effect of the declaration of nullity on the rights and responsibilities with regard to children should be remedied as follows:

- (a) the good faith of a husband or wife should be a precondition to claiming rights to property or maintenance.*
- (b) where both spouses acted in bad faith, they should be limited to taking back their property and should be denied the right to share matrimonial property.*
- (c) where only one spouse acted in good faith that spouse should be entitled to take back his or her property or to apply for patrimonial rights resulting to him or her from the marriage.*
- (d) the rights of children should not be affected by the good or bad faith of the parents, nor should the respective rights and responsibilities of the parents and children.*

Recommendation 11-8: That the law should be reformed to provide

- (a) that the parties to a marriage are presumed to have acted in good faith unless declared otherwise by the court.*
- (b) in addition to property and maintenance rights, for significant protection to be afforded to the spouse who acted in good faith, as for example, to keep gifts *inter vivos* or *mortis causa* which fall with the marriage.*

12. RIGHTS AND OBLIGATIONS OF SPOUSES

The rights and obligations of spouses is part of a comprehensive integrated legal scheme for the protection of the spouses and the family which includes the next two chapters on the protection of the family residence and the sharing of matrimonial property. To see the full picture, this chapter and chapters 13 and 14 should be read as enunciating a single scheme. Together these chapters give effect to the principle that marriage is an equal partnership. Unlike statutes in common law jurisdictions, which are often viewed as supplementing or to a degree displacing common law, the civil law articulates the whole of a legal scheme, including in some cases unenforceable obligations, in a manner quite foreign to the common law.

The Committee considered the matter of a comprehensive statement of the rights and obligations of spouses, such as respect for and assistance to each other, the choice of matrimonial home, the direction of the family, the exercise of parental authority, the payment of expenses relating to the marriage including the ability of one spouse to bind the other as well as their rights and obligations with respect to the family residence and matrimonial property.

It is not proposed here to review in detail, as the Committee has done, the provisions of the SLCC respecting the rights and obligations of spouses. (See 135 to 154A and 1211 of the SLCC in particular.) Notwithstanding innumerable amendments over the years to correct the inequality of men and women, the provisions still evidence the paternalistic rights of the men and the corresponding inequality of women. They certainly do not reflect the fact that marriage should be seen as an equal partnership between husband and wife with identical reciprocal rights and obligations as between spouses. Furthermore, it currently does not meet the objectives of such international conventions as the CEDAW, the purpose of which is to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

It will therefore be necessary for the reformed SLLC to recognize that spouses must have the same rights and obligations in marriage and to enumerate those rights. Because both spouses have the same rights, there must be a mechanism to settle disputes. That mechanism is the courts, whose reformed functions will include such means of dispute resolution as mediation.

Recommendation 12-1: That the SLCC be reformed to provide that the rights and obligations of spouses should include the following, all of which should be binding on spouses and should not be capable of being modified by contract:

- (1) Each spouse has the same rights and obligations in relation to the marriage.*
- (2) Spouses owe each other fidelity, succour, assistance and respect and have the obligation to live together, but cannot be compelled to do so.*
- (3) Spouses must share the responsibilities associated with the moral and material direction of the family unit and exercise parental authority together.*
- (4) Spouses may grant each other an implied mandate or power of attorney with respect to the moral and material direction of the family.*
- (5) Spouses must both contribute to the expenses of the marriage, recognizing however that the contribution may be made through activities in the home and should be according to each spouse's means.*

(6) *Spouses must choose the family residence together, but in the absence of an express choice the family residence is presumed to be the residence where the family carries on its principal activities.*

(7) *Spouses must be able to contract for the current needs of the family and to bind the other except where the other has given notice that he or she will not be bound.*

(8) *When a dispute arises, one or both of the spouses can apply to the court.*

13. PROTECTION OF THE FAMILY RESIDENCE

Since there is no real equivalent in the Commonwealth Caribbean to what is being recommended here, the Committee studied models outside the Caribbean, most notably in Canada. Though the details of the schemes differ, the general scheme of the law in jurisdictions that have chosen to provide protection to the family residence is remarkably consistent. It should be noted that the Committee elected to extend the protection of the family residence to partners in certain unions other than marriage. (See Chapter 17.)

The property occupied by a married couple as their family residence and the contents of the residence ought, regardless of who has the right of ownership, to be given special legal protection in the interests of ensuring that, no matter what happens, the family will have a home during the marriage, and, if the spouses separate or divorce or the marriage is declared a nullity or one spouse dies, one of the spouses, or the surviving spouse, and the children will have a home. It is not a right in the property but rather a right of use. It is mandatory and the spouses cannot contract out of it.

The SLCC contains only two provisions that deal with the family residence. Article 145 provides among other things that the spouses shall live wherever both of them agree to reside. It adds that a spouse cannot compel the other one to reside with him or with her nor order that a spouse be put into the custody of the other. The SLCC does not confer any special status on the family home.

The basic protection of the family residence takes four main forms:

- the equal right of the spouses to use of the family residence during the marriage irrespective of which spouse owns the property;
- the veto on the alienation, hypothecation or charging of the residence or an interest in it, which entails the duty of the spouse who is the owner to obtain the consent of the other to the alienation, hypothecation or charging of the property or, if both of the spouses are owners, the right of each to determine whether to join in the alienation, hypothecation or charging of the property;
- the power of the court to grant exclusive occupancy to one spouse subject to conditions;
- the protection of the movables used by the family in the family residence.

The following recommendations are similar, but by no means identical to, art. 401 to 413 of the CCQ. They differ in 2 primary respects. First, they permit a spouse who has not consented to a disposition to apply for an order to substitute other immovable property or leased property for the family residence or direct the person to set aside money or security to stand in place of it. Second, in the CCQ the right to annul the alienation of a real right in an immoveable is linked to the filing of a declaration against the property giving notice of the right. The substantial question here is whether the spouse wishing to assert a right ought to be required to register a claim to protect his or her right or whether the right will be protected by the system even if the spouse does not register his or her claim. The former relies upon a well-informed and vigilant public. The latter recognizes that some spouses will assert their rights but that for those who do not, the system will protect them. The latter regime requires every person transferring a real right in an immoveable under the Registered Land Act to provide evidence under oath as to whether the immoveable is a family residence and, where appropriate, the identity of the persons joining in or consenting to the conveyance. It was felt that the latter system was more appropriate to the circumstances of Saint Lucia than the system in the CCQ.

Recommendation 13-1:

(1) That only one family residence should be protected and that it should be the place where the members of the family live while carrying on their principal activities;

(2) That the family residence may be an immovable or a movable (chattel house or trailer), whether leased or owned. The family residence may be part of an immovable used for other purposes (a residence on farmland or in business premises). Even though the property on which the family residence is located is owned by a corporation in which a spouse has shares or by any other means including a trust, it will be a family residence.

(3) That neither spouse may, without the written consent of the other (or without having the other spouse join in the transaction if the property is co-owned), alienate, hypothecate or charge the family residence with a real right nor sublet the property or transfer or terminate the lease (where the lessor has been notified) of the property used as a family residence;

(4) That in the event of failure to obtain the consent of both spouses to alienate, hypothecate or charge the family residence with a real right, or sublet the property or transfer or terminate the lease of property (where the lessor has been notified) used as a family residence, the court may, on application by the spouse who has not consented nor ratified such an act and on such conditions as it considers appropriate have the transaction annulled, except against a third party purchaser for value in good faith (an “act by onerous title” in the civil system); and

(5) That the spouse not having given consent may claim damages from the other spouse or any person who through his fault caused and may apply for an order to substitute other immovable property or leased property for the family residence or direct the person to set aside money or security to stand in place of it;

(6) That the court may, on application, authorize the alienation, hypothecation or charging of the family residence with a real right, or the subletting, transfer or termination of the lease if the spouse whose consent is required:

(a) cannot be found or is not available,

(b) is not capable of giving or withholding consent, or

(c) is unreasonably withholding consent;

(7) That a declaration of family residence can be made by either one of the spouses and filed in the Land Registry;

(8) That, to protect the family residence where no declaration is filed, the land registration system require that every transfer contain evidence in prescribed form indicating whether the property is a family residence and as to the identity of the person joining in or consenting to the transfer;

(9) That in the event of separation, dissolution or nullity of marriage, or the death of a spouse, the court may, upon such conditions as it considers appropriate, grant to either spouse or the surviving spouse:

- (a) a right of use of the family residence; or*
 - (b) the lease of the family residence;*
- (10) That the protection of the family residence extend to the movable property used for household purposes, which will include decorations like pictures and works of art but not collections or property owned by a spouse for personal purposes such diplomas, jewellery, tools for carrying on one's profession, and so on;*
- (11) That in the event of separation, dissolution or nullity of marriage or the death of a spouse, the court may, on such conditions as it considers appropriate, grant to either spouse or the surviving spouse a right of use or ownership of the movable property of the other which is used for household purposes;*
- (12) That the protection of the family residence set out above be mandatory and that any agreement to diminish or forego these rights be null.*

14. MATRIMONIAL PROPERTY

As was noted in Chapter 1, increasingly modern marriage is viewed as a joint economic venture of equal partners in which the value of property acquired by the couple during marriage ought to be shared regardless of who holds legal title to it. In jurisdictions where this principle has been given effect to, the law endeavours to strike a balance between the separate property of the individual spouses and property that is to be subject to sharing. The striking of the balance was a major concern of the Committee. Since it is impractical and often inequitable to speak of the sharing of property, the law speaks of sharing the “value” of property.

The right to share is a personal right, which crystallizes on application for separation, divorce or a decree of nullity of marriage or on the death of a spouse. Subject to the protection of the family residence as described in Chapter 13, the owner of the property is free during the marriage to alienate, hypothecate or charge his or her property as he or she wishes and, subject to the courts decision on partition, after the property has been divided on separation, dissolution or nullity of the marriage.

The Committee rejected the existing regime of community of property in Saint Lucia on the basis that it is far more interested in keeping property separate (the predominant view in the 19th century when the existing Code was first enacted) than it is in the sharing of property by spouses. The Project Team developed a fact situation that was representative of the situation in Saint Lucia and applied the existing Civil Code provisions. There was nothing to share. Greatly simplified, the basic problem with the existing scheme is that that income and earnings of a spouse (art. 1192(2)(b)) and fruits, revenues and interest derived from separate property (art. 1192(2)(e)) are separate property. Since income and earnings and fruits, revenues and interest from property are all that most people have, it is not surprising that there is often nothing to share.

The Committee also rejected the approach taken in the DA, which gives a discretion to the Court to determine the distribution. (It is perhaps an indication of the unsatisfactory character of the community of property regime that a discretionary power to override the SLCC was given to the courts in the DA.) Although much more complicated, the Committee favoured a regime of community of property with an objective scheme of sharing. The Committee was influenced by the likelihood that an objective scheme of sharing would make litigation less necessary. The Committee also recommended that all provisions respecting property be located in the reformed SLCC.

Recommendation 14-1: That section 24 of the DA be repealed and that all provisions respecting matrimonial property be located in the reformed SLCC.

One of the most important objectives underlying the reform of family law in Saint Lucia is to give effect to the CEDAW. The translation of equality into reality is far from easy. The CEDAW establishes the equality of men and women and emphasizes the autonomy of women and their freedom to make decisions for themselves on the same basis as men. The difficulty is that *legal* equality does not necessarily mean *substantive* equality. In many legal systems, it is not uncommon for a man and a woman to make an ante-nuptial agreement that provides that “what’s his is his and what’s hers is hers” and that that principle will apply to property acquired during the marriage. The agreement is made between legal equals and in that sense complies with CEDAW, but the fact remains that the effect of the agreement can be very unequal because the economic power of men and women is different. Typically men earn more money and possess more property. In entering into an agreement, the very legal equality that has been won by women can be undermined by the freedom to contract that is an important component of that

equality. While the economic inequality does not make much difference when a marriage is working well, it makes a great difference when it is not. At that point it is too late for the economically weaker spouse. In other words, the right to contract out of the sharing of property is a crucial consideration in determining the appropriateness of any regime of matrimonial property.

In the quest for substantive equality, the Committee on Family Law looked at two models:

1. The right of spouses to make any agreement they wish about the sharing of property with a statutory scheme requiring the sharing of all property in default of an agreement.
2. A mandatory sharing by the spouses of the core family property (family residence, furniture, motor vehicle and benefits accrued under a retirement plan) with a right of the spouses to make any agreement they wish about the sharing of the remainder of their property coupled with a statutory scheme for sharing the remaining property in default of an agreement.

The Committee rejected the first model because they felt that complete freedom to contract could undermine the principle of equal sharing. The effect of that model could be that there might easily be nothing to share. The second model of sharing was approved by the Committee on Family Law because it balanced the mandatory obligation to share with a respect for private property. The model is based on articles 414 to 492 of the CCQ. It is by no means identical.

To assist the reader in making his or her way through the model approved by the Committee, an example of the application of the CCQ to a representative fact situation is set out in the Schedule. The reader is urged to study that example in conjunction with the following analysis.

The approved regime has four components:

1. The Mandatory Sharing and Partition of the Family Patrimony

The term family patrimony is the consecrated term in the civil law system to describe this core of family property of a married couple regardless of which of them holds the right of ownership in the property. It includes

- the family residence (the principal family residence, if the family has more than one)
- the moveable property with which it is furnished or decorated and which serves for the use of the household
- the motor vehicles used for family travel,
- benefits under a retirement plan (including payments and accumulation of service) accrued during the marriage.

These constitute the property that an average family accumulates so it guarantees mandatory sharing of the assets used by the family.

There are certain exclusions and deductions. The property excluded from the family patrimony consists of

- the value of property devolving on one of the spouses by succession or gift before or during the marriage and any property that replaces that property

- the value of death benefits payable under a retirement plan devolving on a surviving spouse where the marriage is dissolved by death.

On partition on separation or dissolution or nullity of the marriage or on death the following deductions are made:

- the debts for the acquisition, improvement, maintenance or preservation of property in the family patrimony
- the net value at the time of marriage of the property owned by each of the spouses that is included in the family patrimony plus the appreciation on that net value during the marriage
- the net value of any contribution made by one of the spouses during the marriage for the acquisition or improvement of the property included in the family patrimony, where the contribution is made out of property devolved by succession or gift or its reinvestment plus the appreciation from the time of contribution until the partition proceedings take place.

After these deductions are made, subject to the adjustments, the value of the family patrimony is divided equally. The above treats every contribution (from whatever source) to property that is part of the family patrimony as belonging to the patrimony unless it is excluded or deductible. The above inclusive approach should be contrasted with the approach of the existing SLCC commented on earlier in this chapter.

The partition of the family patrimony is subject to a number of rules.

1. The court may order an unequal division of the family patrimony where the marriage was brief, where one spouse has dissipated assets or there has been bad faith. Equality is not always equity. This is one of the most important adjustments that the court is permitted to make to achieve equity between the spouses. As will be seen under the heading “Compensatory Allowance and Constructive Trusts”, there are other adjustments possible.
2. If a partition is effected on separation, no new partition is to be effected on divorce or nullity of the marriage unless the parties resume living together, in which case the date the spouses resumed living together will be the date of the resumption of the new family patrimony.
3. The net value of the family patrimony and the debts is the market value normally determined at the time of death or on the date of institution of the action in which separation, dissolution or nullity of marriage is decided but the court may on application decide that the net value of the family patrimony and debts will be determined on the date the parties ceased living together. Such flexibility is necessary to take account of events taking place between the time the parties ceased living together and the normal date of valuation.
4. The same deductions apply with such modifications as are appropriate to the reinvestment of property included in the family patrimony.
5. The partition can be effected by the transfer of property (including property other than property composing the family patrimony) or by payment in money.

6. The court may order instalment payments in order to avoid damage to one party and may make other orders including the provision of security to guarantee the performance of the party's obligations.

7. Where property was alienated or misappropriated in the year preceding the death of one of the spouses or the institution of proceedings for separation or divorce or annulment of marriage and was not replaced, the court may order that a compensatory allowance be paid to a spouse who would have benefited from the inclusion of that property in the family patrimony. The court may also make such an order when property is alienated over one year from those events if it was done for the purpose of decreasing the share of the spouse who would have benefited from the inclusion of that property in the family patrimony.

8. Neither spouse can, by marriage contract or otherwise, renounce his or her rights in the patrimony but may from the death of the other spouse or from the pronouncement of the separation, divorce or nullity of marriage by notarial deed or by judicial declaration renounce his or her rights in whole or in part. Such a provision will allow the partition of the patrimony by agreement.

9. The partition of the accrued benefits of one of the spouses in a retirement plan may be determined by the court seized of the application unless an Act provides for its valuation and devolution of the accrued benefits. The Cabinet may make regulations respecting the partition of accrued benefits of one of the spouses in a retirement plan.

10. In no event will the sharing with a spouse of the accrued benefits in a retirement plan during marriage exceed 50%.

11. Notwithstanding any law, the accrued benefits in a retirement plan are transferable or seizable by or on account of the spouses.

2. The Optional Sharing of other Property, to be called the "Partnership of Shareable Property", and the Partition of that Property:

The property:

- (a) that the spouses possess individually when the family patrimony comes into effect; or
- (b) that they subsequently acquire;

is shareable (in the civil system called by the ancient term "acquêts" and in this report called "shareable property") or is not sharable (private property) as discussed below.

The spouses have three options with respect to the property not included in the family patrimony:

1. They can declare in a marriage contract made at any time that they have a conventional (i.e. agreed) separation as to property. They are free to administer, enjoy and dispose of this property without restriction, but if there is property over which a spouse is unable to establish an exclusive right, then the property will be presumed to be held in undivided co-ownership one-half by each spouse.

2. They can elect a community matrimonial regime. If that regime does not cover all the property, then the rules respecting partnership of shareable property (discussed below) will apply, adapted as required.

3. If they do not exercise either of the two options above, they will share in accordance with the default scheme set out in the reformed SLCC, namely, the partnership of shareable property. The default scheme provides that all property that is acquired is shareable property except for the property declared by law to be private. (In theory, the spouses could agree to the partnership of shareable property as their conventional regime. The result would be the same.)

Shareable property of each spouse includes all property not declared to be private property by law, and, in particular,

- (1) the proceeds of that spouse's work during the regime; and
- (2) the fruits and income due or collected from all that spouse's private property or shareable property during the regime.

Once again, it should be noted how this inclusive approach differs from the present scheme of community of property in the existing SLCC.

The private property of each spouse consists of

- (1) property owned or possessed by that spouse when the matrimonial regime comes into effect;
- (2) property which devolves to that spouse during the matrimonial regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;
- (3) property acquired by that spouse to replace private property and any insurance indemnity relating thereto;
- (4) the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, other annuity or insurance of persons;
- (5) that spouse's clothing and personal papers, wedding ring, decorations and diplomas;
- (6) the instruments required for that spouse's occupation, except to the extent that they were acquired with shareable property.

In the normal marriage, private property is not actually kept separate from shareable property. Once again, it is the value of property that needs to be separated. It will be necessary for the reformed SLCC to set out some rules as to how value of the intermingled property is to be separated when it comes time for partition. The value of the property is determined in accordance with its condition at the time of dissolution of the regime and its value on liquidation.

On partition, the property needs to be divided into two pots, sharable property and private property. These rules are set out in articles 451 to 484 of the CCQ, which will be adapted to the circumstances of Saint Lucia.

The following is a summary of the main rules.

The basic rule for dividing the value of the property is as follows. Property acquired with private property and shareable property is also private property, if the value of the private property used to acquire it is more than one-half the total cost of acquisition. When this is the case then the pot of shareable property is compensated. Otherwise it is shareable property and the pot of private property is compensated.

There are many special cases of the characterization and valuation of property on dissolution that must be dealt with. Some examples will suffice. It is necessary to presume all property to be shared unless it is established that it is private property. The right of a spouse to maintenance, to disability allowance, to damages for personal or other injury is private property. Income from an enterprise that is reinvested in the enterprise remains private property, subject to compensation to the pot of shareable property. The aggregate cost of the premiums on contracts of life insurance would be subject to the basic rule above unless they are premiums for term life insurance, in which event only the latest premium may be claimed.

The regime of partnership of shared property is dissolved by:

1. a conventional change of regime;
2. divorce, separation or death (including a declaration of death by absence);
3. nullity of marriage where it produces effects.

The court may, on application, decide that the effects of dissolution may be made retroactive to the date the spouses ceased to live together. Such a provision is necessary to ensure that justice is done when there has been a significant fluctuation of value between the date the spouses ceased to live together and the date of dissolution that would otherwise apply.

3. Compensatory Allowance and a Claim for a Constructive Trust:

The compensatory allowance or a claim for a constructive is the second adjustment to the partition of matrimonial property. (The first adjustment is the right of the court to order an unequal division in connection with the partition of the family patrimony.) The claims are very similar but by no means identical. It is a fact of common experience that without regard to who holds legal ownership to property, one spouse will often contribute directly or indirectly to the acquisition of property by the other spouse. On partition it is important to take account of these contributions so that justice is done between the spouses. The compensatory allowance has its origin in the constructive trust. There is, of course, no concept of constructive trust in the civil system. The concept of compensatory allowance is framed in terms of the nearest equivalent in the civil law to the constructive trust, namely, unjust enrichment. It is a claim *in personam* and is not limited to a claim *in rem* as the traditional constructive trust is. In the common law provinces of Canada, the Supreme Court of Canada has refashioned the notion of constructive trust to turn it into a remedy for unjust enrichment¹⁵ and Quebec codified it in article 427 of the CCQ. It permits a claim by one spouse for the unjust enrichment of the property of the other spouse. Since a constructive trust may lie on the same facts as a compensatory allowance, it is necessary to provide that the spouse asserting the claim can only recover once. The introduction of the notion of a compensatory allowance is a response to the reluctance of the Caribbean courts to extend the remedy of constructive trust as the Supreme Court of Canada has done. Typical examples of the operation of this right are as follows:

¹⁵ See the summary of the case law in Family Law Reference Materials, Law Society of Upper Canada Bar Admission Course Materials, 2002, 6-5-6-10.

- A spouse helps pay for a property of which the other spouse is the sole owner.
- One spouse establishes a business and the other leaves his or her employment to work in the business without any salary.
- Both spouses earn similar salaries but one of them pays for all the family expenses while the other invests his or her earnings in commercial businesses or immovables, or simply uses his or her salary for his or her own personal needs.

It should be noted that to prove unjust enrichment a claimant must prove that he or she suffered an element of injustice, i.e. prejudice. That is a major limitation on the remedy. That limitation has a great deal to do with the approach taken to the family patrimony: it does not take account of contributions to the acquisition of the property but only to deductions. The provision of the CCQ on compensatory allowances is set out in article 427, which reads as follows:

(1) The court, in declaring separation from bed and board, divorce or nullity of marriage, may order either spouse to pay to the other, as compensation for the latter's contribution, in property or services, to the enrichment of the patrimony of the former, an allowance payable in cash or by instalments, taking into account, in particular, the advantages of the matrimonial regime and of the marriage contract. The same rule applies in case of death; in such a case the advantages of the succession to the surviving spouse are also taken into account.

(2) Where the right to the compensatory allowance is founded on the regular cooperation of the spouse in an enterprise, whether the enterprise deals in property or in services and whether or not it is a commercial enterprise, it may be applied for from the time the cooperation ends, if this results from the alienation, dissolution or voluntary or forced liquidation of the enterprise.

(3) Where a claim for a compensatory allowance and a claim for a constructive trust lie on the same facts, the claimant may only recover once in respect of those facts.

Articles 428 to 430 of the CCQ deal with ancillary matters of evidence and payment.

A second aspect of the application of the law of constructive trusts needs to be dealt with. It is not part of the law of Quebec as has been noted. It is, however, a part of the law of Saint Lucia. In the course of studying the law of Ontario, which has an objective regime of matrimonial property not unlike that of Quebec, the Project Team noted that the division of property based on ownership has been interpreted to mean, not ownership in the sense of what a title or other instrument respecting property would evidence, but rather that title as adjusted by the law of constructive trusts. Since that law is the equivalent of unjust enrichment, matrimonial litigation has become a very complex matter indeed. It is submitted that it is a better practice to apply the principles of the compensatory allowance or constructive trusts *after* the ownership has been determined.

4. The Effect on Succession of Making Property Shareable:

The effect of sharing property during the lifetime of spouses is to restrict the passing, by will or on intestacy, of property owned by a spouse. Neither spouse can pass by will or on intestacy that portion of the value of property that he or she is obliged by law, in the case of the family

patrimony, or, in the case of the Partnership of Shareable Property, by agreement or in default of an agreement, as the case may be, to share with his or her spouse.

Recommendation 14-2:

- (1) That the family patrimony be established consisting of*
 - 1. the family residence (the principal family residence, if the family has more than one)*
 - 2. the moveable property with which it is furnished or decorated and which serves for the use of the household*
 - 3. the motor vehicles used for family travel,*
 - 4. benefits under a retirement plan (including payments and accumulation of service) accrued during the marriage.*
- (2) That the family patrimony be mandatorily shared;*
- (3) That, subject to recommendation 14-2(4)(on unequal division), on partition on separation or dissolution or nullity of the marriage, or on death, the value of the family patrimony be divided equally between the spouses after*
 - 1. the following exclusions are made:*
 - a. the value of property devolving on one of the spouses by succession or gift before or during the marriage and any property that replaces that property*
 - b. the value of death benefits payable under a retirement plan devolving on a surviving spouse where the marriage is dissolved by death.*
 - 2. the following deductions are made:*
 - a. the debts for the acquisition, improvement, maintenance or preservation of property in the family patrimony*
 - b. the net value at the time of marriage of the property owned by each of the spouses that is included in the family patrimony plus the appreciation on that net value during the marriage*
 - c. the net value of any contribution made by one of the spouses during the marriage for the acquisition or improvement of the property included in the family patrimony, where the contribution is made out of property devolved by succession or gift or its reinvestment plus the appreciation from the time of contribution to the dissolution of the marriage.*
- (4) That the partition of the family patrimony be subject to the following rules:*
 - 1. The court may order an unequal division of the family patrimony where the marriage was brief, where one spouse has dissipated assets or there has been bad faith.*

2. *If a partition is effected on separation, no new partition is to be effected on divorce or nullity of the marriage unless the parties resume living together, in which case the date the spouses resumed living together will be the date of the resumption of the new family patrimony.*
3. *The net value of the family patrimony and the debts is the market value normally determined at the time of death or on the date of institution of the action in which separation, dissolution or nullity of marriage is decided but the court may on application decide that the net value of the family patrimony and debts will be determined on the date the parties ceased living together.*
4. *The same deductions apply with such modifications as are appropriate to the reinvestment of property included in the family patrimony.*
5. *The partition can be effected by the transfer of property (including property other than property composing the family patrimony) or by payment in money.*
6. *The court may order instalment payments in order to avoid damage to one party and may make other orders including the provision of security to guarantee the performance of the party's obligations.*
7. *Where property was alienated or misappropriated in the year preceding the death of one of the spouses or the institution of proceedings for separation or divorce or annulment of marriage and was not replaced, the court may order that a compensatory allowance be paid to a spouse who would have benefited from the inclusion of that property in the family patrimony. The court may also make such an order when property is alienated over one year from those events if it was done for the purpose of decreasing the share of the spouse who would have benefited from the inclusion of that property in the family patrimony.*
8. *Neither spouse can, by marriage contract or otherwise, renounce his or her rights in the patrimony but may from the death of the other spouse or from the pronouncement of the separation, divorce or nullity of marriage by notarial deed or by judicial declaration renounce his or her rights in whole or in part. Such a provision will allow the partition of the patrimony by agreement.*
9. *The partition of the accrued benefits of one of the spouses in a retirement plan may be determined by the court seized of the application unless an Act provides for its valuation and devolution of the accrued benefits. The Cabinet may make regulations respecting the partition of accrued benefits of one of the spouses in a retirement plan.*
10. *In no event will the sharing with a spouse of the accrued benefits in a retirement plan during marriage exceed 50%.*
11. *Notwithstanding any law, the accrued benefits in a retirement plan are transferable or seizable by or on account of the spouses.*

Recommendation 14-3:

- (1) *That this Recommendation cover the property:*

1. *that the spouses possess individually when the family patrimony comes into effect; or*
 2. *that they subsequently acquire;*
- (2) *That the spouses have three options with respect to the property not included in the family patrimony:*
1. *They can declare in a marriage contract made at any time that they have a conventional (i.e. agreed) separation as to property. They are free to administer, enjoy and dispose of this property without restriction, but if there is property over which a spouse is unable to establish an exclusive right, then the property will be presumed to be held in undivided co-ownership one-half by each.*
 2. *They can elect a community matrimonial regime. If that regime does not cover all the property, then the rules respected partnership of shareable property discussed below) will apply, adapted as required.*
 3. *If they do not do exercise either of the two above options, they will share in accordance with the default scheme, the partnership of shareable property. The regime provides that all property that is acquired is shareable except for the property declared by law to be private.*
- (3) *That shareable property of each spouse include all property not declared to be private property by law, and, in particular,*
1. *the proceeds of that spouse's work during the regime; and*
 2. *the fruits and income due or collected from all that spouse's private property or shareable property during the regime.*
- (4) *That the private property of each spouse consists of*
1. *property owned or possessed by that spouse when the matrimonial regime comes into effect;*
 2. *property which devolves to that spouse during the matrimonial regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;*
 3. *property acquired by that spouse to replace private property and any insurance indemnity relating thereto;*
 4. *the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, other annuity or insurance of persons;*
 5. *that spouse's clothing and personal papers, wedding ring, decorations and diplomas;*
 6. *the instruments required for that spouse's occupation, except to the extent that they were acquired with shareable property;*

7. *a damage award to a spouse for personal injury and other similar rights.*

(5) *That on partition, the property be divided into two pots, sharable property and private property and that the rules set out in articles 451 to 484 of the CCQ be adapted to the circumstances of Saint Lucia;*

(6) *That the regime of partnership of sharable property is dissolved by:*

1. *a conventional change of regime;*
2. *divorce, separation or death (including a declaration of death by absence);*
3. *a decree of nullity of marriage where it produces effects;*

The court may, on application, decide that the effects of dissolution may be made retroactive to the date the spouses ceased to live together.

Recommendation 14-4:

(1) *That in connection with the partition of the property*

(a) a spouse can make a claim for a constructive trust or compensatory allowance or both after the partition based on ownership at law has been determined;

(b) the compensatory allowance be a claim for compensation for unjust enrichment of the patrimony of one spouse by contributions in property or services by the other spouse and be modelled on articles 427 to 430 of the CCQ; and

(c) where a claim for a compensatory allowance and a claim for a constructive trust lie on the same facts, the claimant may only recover once in respect of those facts.

(2) *That neither spouse be able to dispose of by will or pass on intestacy that portion of the value of property that he or she is obliged by law, in the case of the family patrimony, or by agreement, in the case of the partnership of shareable property, to share with his or her spouse.*

15. SEPARATION, DIVORCE, SPOUSAL MAINTENANCE ON ANNULMENT AND THE MAINTENANCE AND CUSTODY OF, AND ACCESS TO, CHILDREN BORN IN AND OUTSIDE WEDLOCK IN ALL CIRCUMSTANCES

This Chapter deals with all aspects of law of separation and divorce, spousal maintenance obligations on annulment and the maintenance and custody of, and access to, children born in and outside wedlock in all circumstances. (In Chapter 11, it was convenient to deal with the grounds and effects of annulment other than maintenance of the spouse and the maintenance and custody of, and access to, children, which are essentially identical when there is a divorce.) The several subjects identified in the title to this chapter are dealt with together in this Chapter because many of the same issues arise, because the extraordinary complexity of the present law can be seen and because the way forward to the development of a consistent and simplified law can be readily demonstrated.

As one might expect, the law in the areas discussed in this chapter is riddled with instances of discriminatory provisions that fail to comply with the CEDAW and the CRC. These provisions will be discussed in detail. Furthermore, the sharp distinction between the rights of legitimate and illegitimate children has greatly affected the presentation of the law. Once all children are treated equally under the law (see Recommendation 3-1), the same provisions in respect of maintenance, custody and access will apply to all parents and all children, whether or not the children are born in or outside wedlock and irrespective of the proceedings in which the issues arise. For this reason alone, the reformed law will need to be reorganized.

The law in the areas discussed in this chapter is a bewildering patchwork of overlapping and inconsistent provisions set out in the SLCC and in a number of extra-codal statutes. When the SMO and the DA became part of the law of Saint Lucia insufficient regard was taken to making them consistent with each other and with the SLCC. The law of any jurisdiction should form a rational and consistent whole and one of the objectives of the CCRP is to achieve that goal.

This Chapter will be organized into four sections. Section 1 will deal with separation issues. Section 2 will deal with divorce and spousal relief on annulment. Section 3 will deal with the maintenance and custody of, and access to, children born in and outside wedlock. Section 4 will deal with general issues of reform affecting matters arising under the first three sections.

SECTION 1: SEPARATION

The following matters will be discussed in this section:

- the fault based grounds for separation, bars to relief, the place of judicial discretion and fostering reconciliation;
- relief on separation;
- effects of separation on the child and the best interests of the child;
- the effect of separation on the parties to the marriage;
- termination of separation.

Fault Based Grounds in Separation, Bars to Relief, Judicial Discretion and Fostering Reconciliation

Separation from bed and board may only be obtained by proving fault on certain legal grounds in adversarial proceedings in the High Court under the SLCC or in the Family Court under SMO. The SLCC and the SMO also provide bars to the granting of orders for separation and give the court discretion to refuse to make the order in certain cases. Analysis demonstrates a considerable number of inconsistencies as between the SLCC and the SMO and instances of inequality between husbands and wives contrary to CEDAW.

The Committee discussed at length the relevance of the concept of fault to separation and the fact that there has been a movement away internationally from using the concept of fault in domestic matters as a consideration in determining the rights of spouses. As has been noted in Chapter 1, there are several reasons for this:

- (1) The act of proving fault may well worsen the already poisoned relations of the spouses and, when there are minor children, may detrimentally affect the need of the spouses to continue to deal with each other and the children.
- (2) The legal notion of fault is out of touch with the reality of what happens in most relationships. Responsibility for the breakdown of marriages usually rests with both parties. The problem is that generally the law identified some types of offending conduct (adultery, desertion, and so on) and, on proof of one of those grounds, impugns the conduct of the guilty party and exonerates the other. Experience shows that complete innocence is exceedingly rare. When there is responsibility of both sides, the law sometimes denies relief to a spouse who is not completely innocent. When fault is linked to the payment of support to a spouse, the result is particularly out of accord with the idea of spousal responsibility. Under the present law, when a spouse seeking maintenance is found to be at fault, the court is entitled to deny maintenance all together. There is a negative effect not only on the spouse but also on the children. In addition, denying a spouse a separation and relief such as maintenance can force spouses to stay in a situation that does not encourage resolution of the problems and may even make them worse or it can lead to the hardship of a *de facto* separation without relief. Denying persons the right to separate legally does not heal broken marriages.

These fault-based proceedings ignore the complexities of family relationships and fail to achieve the family law objectives of:

- saving salvageable marriages,
- making separation easier where there is no chance of reconciliation, and
- promoting, as much as possible, a harmonious relationship between the spouses and between the spouses and the children of the family even if the marriage has broken down.

Under articles 156 to 160A of the SLCC an application for separation from bed and board may be brought on the grounds of the adultery, cruelty or desertion without cause of the respondent. The words “adultery”, “cruelty” and “desertion” are given the meanings assigned to them in English common law. Two interesting points should be noticed. First, if the desertion is *with* cause, separation cannot be granted. Second, article 156 specifically states that separation from bed and board cannot be based on the mutual consent of the parties.

Under article 160B of the SLCC the court is barred from granting an order for separation from bed and board if:

- the applicant who is relying on the adultery has connived at or condoned it;
- the applicant who relies on cruelty has condoned it; or
- the action is brought through the collusion of the defendant.

Under article 160B of the SLCC the court has the discretion to refuse to make an order for separation from bed and board:

- where there has been unreasonable delay in bringing the action;
- where there has been cruelty by the applicant;
- where the applicant relies on adultery or cruelty, wilfully separated himself or herself from the other party before the commission of the adultery or cruelty complained of; or
- if the applicant who relies on adultery or desertion is guilty of such wilful neglect or misconduct as has conducted to the adultery or cruelty.

Sections 3 and 5 of the SMO augments the number of grounds for separation from bed and board. The grounds upon which a wife may bring an action for separation are different from those upon which a husband can bring an action for separation. There is marked inequality of treatment.

Section 3 of the SMO specifies that the grounds on which a married woman can bring an action for separation, maintenance or custody of the children of the marriage under the age of 18 years are where the husband:

- has been convicted summarily of an aggravated assault upon her;
- has been convicted on indictment of assault upon her;
- has deserted her;
- has been guilty of persistent cruelty of her or her children of the wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain;
- while suffering from a venereal disease and knowing that he is so suffering insisted on having sexual intercourse with her;
- has compelled her to submitting herself to prostitution;
- has been guilty of adultery; or
- is a habitual drunkard.

Section 5 of the SMO specifies that the grounds on which a married man may bring an action for separation, legal custody of the children and maintenance by himself of the children of the marriage who are under 18 years of age, are where the wife:

- is a habitual drunkard;
- has been guilty of persistent cruelty to his children; or
- has been guilty of adultery.

Interestingly the husband can never obtain maintenance from the wife even if she is the one at fault.

The court's power to grant an order is barred by section 6 of the SMO in circumstances similar to those in the SLCC. Section 6(1) provides that an order shall not be granted unless the court is satisfied that the applicant has not condoned or connived at, or by his or her wilful neglect or misconduct, condoned to the adultery and that the application is not prosecuted in collusion with the other party to the marriage or with any person with whom it is alleged that the adultery has been committed. Section 6(2) provides that an order for maintenance of a married woman shall not be made if it is proved that she has committed adultery, provided that the husband has not condoned, or connived at or by his wilful neglect or misconduct condoned to such an act of adultery.

From the above it is clear that there is unnecessary overlap of the grounds of cruelty, adultery and desertion in the SLCC and in the SMO. In fact the majority of the grounds in section 3 the SMO would amount to cruelty within the meaning given to it in the SLCC. The overlap of the bars to granting an order for separation is also apparent in relation to adultery. There are no bars to granting an order on the basis of cruelty in the SMO. This is clearly an unsatisfactory situation.

Section 3 and 5 of the SMO provide grounds which are different in the case of a husband to those in the case of a wife. These sections presume that a wife cannot assault, desert or be cruel to her husband. They fly in the face of fact and of the principle of equality before the law and are contrary to CEDAW.

The grounds for bringing an action for separation from bed and board and the bars and discretion to grant a separation in the SLCC and SMO are all fault based. They do not achieve the policy of the modern law set out above. The presence of fault grounds in the law does not save marriages. They may well have the opposite effect of reducing the chance of reconciliation and the chance of a relatively harmonious relationship between the spouses and with the children of the family after the marriage has broken down. By their very nature, adversarial proceedings for the proof of fault pit the spouses against each other and tend to exacerbate the conflict already existing. Also, if fault is not proved, the spouses are condemned to live together or in the alternative, to the hardship and uncertainty of living apart without relief. Spouses who are forced to continue to live together or to live apart without relief may well suffer themselves, but more importantly the children of the family may suffer as well. In many cases proof of fault ultimately causes increased suffering to children of the family and to that extent contradicts the recognition in the preamble to the CRC "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

The Committee felt that the existing grounds based exclusively on fault should be replaced by grounds that permit a separation to be obtained without fault or upon proof of fault at the option of the spouse. A separation may be granted when the will to live together has been gravely undermined as evidenced by the spouses living apart for a period of time, by one of the spouses (other than the spouse seeking the separation) failing to perform an obligation arising out of the marriage or by proof of facts that make living together almost intolerable.

The Committee recommended that reconciliation be fostered by the courts and by attorneys in order to ensure that the following objectives are achieved, namely—

- saving salvable marriages,
- making separation easier where there is no chance of reconciliation, and
- promoting, as much as possible, a harmonious relationship between the spouses and between the spouses and the children of the family even if the marriage has broken down.

In addition, a period or period of time during which the parties may cohabit without detriment to their grounds for separation from bed and board or from divorce should be introduced to encourage reconciliation. It is convenient to discuss the period or periods of time in connection with the DA, where such time limits already exist and to extend the application of those times to separation (see Recommendation 15-15(4)).

Recommendation 15-1:

(1) *That*

(a) all grounds for separation be replaced by a single ground, namely, that a separation be granted when the will of the spouses to live together has been gravely undermined as evidenced by the spouses living apart for a period of time, by one of the spouses (other than the spouse seeking the separation) failing to perform an obligation arising out of the marriage or by proof of facts that make living together almost intolerable; and

(b) these grounds be available without discrimination to the husband or the wife.

(2) *That mandatory provisions be introduced in the reformed SLCC for the fostering of reconciliation of spouses by their attorneys and the court.*

(3) *That a period or periods of time during which the parties may cohabit without detriment to their grounds for separation from bed and board or to divorce should be introduced to encourage reconciliation and that the periods applicable to divorce should extend to separation.*

Relief on Separation

Relief in actions for separation from bed and board includes

- orders for separation from bed and board,
- orders for maintenance of a spouse or the children of the family,
- orders for custody of and access to the children of the family, and
- orders for transfer and settlement of property.

(Orders for the transfer and settlement of property have been dealt with in Recommendation 14-1, where an objective scheme for sharing matrimonial property with certain adjustments is recommended.)

Orders granting relief are made provisionally before the determination of the action or at the time of determination.

Provisional relief

Provisional measures for separation from bed and board are found in the SLCC in articles 161-173 and section 4(2) of the SMO. Most of these provisions contravene CEDAW or the CRC or both.

Article 168 of the SLCC gives provisional care of the children to the father regardless of who brings the action unless the court otherwise decides “for the greater advantage” of the children. Not only is this provision contrary to CEDAW in discriminating against women but it is contrary to the principle of the best interests of the child in article 3(1) of the CRC and also to article 18 of

the CRC, which provides that: “State parties shall use their efforts to ensure recognition of the principle that *both parents have common responsibilities* for the upbringing and the development of the child...”.

Article 169 of the SLCC allows a wife sued in separation from bed and board to leave the domicile of her husband. This provision contemplates the wife having a domicile of dependence. Under the reformed SLCC, the wife will be entitled to have her own domicile (see Recommendation 7-3).

In article 170 of the SLCC, only the wife is entitled to apply for an alimentary pension. This reflects a previous state of affairs in which the husband alone was an income earner and ought to be reformed to remove the inequality of treatment of the spouses.

Also articles 172 (which allows a wife, but not the husband, in community to attach the movables in the community) and 173 (which declares all contracts affecting the community by the husband after the commencement of an action for separation to be declared null if contracted in fraud of the wife’s rights) reflect the dominant position of the husband and are contrary to the CEDAW.

Section 4(2) of the SMO has a single provisional measure which allows the court to award maintenance to the wife and any children in her custody prior to determination of an action for separation. It is contrary to the CEDAW because the right is not available for the husband.

Recommendation 15-2:

That provisional measures be available to the husband or the wife on the same basis.

Relief when Separation is Granted

Relief on separation from bed and board may be granted by the High Court under the SLCC and the DA and by the Family Court under the SMO. These provisions for relief on separation are complicated and are inconveniently placed in the DA. They should be simplified and relocated to the SLCC.

(1) High Court Relief

Article 181(1) of the SLCC provides that either party who is separated may apply for and obtain an alimentary pension if he or she has insufficient means of subsistence but the right to relief in the court is given only to a wife when her husband fails to pay the alimentary pension. This again reflects inequality before the law contrary to the CEDAW and needs to be reformed.

Article 182 provides that the children shall be entrusted to the party who has obtained the separation unless the Court orders, for the greater advantage of the children, that all or any of them be entrusted to the care of the other party. This provision is contrary the principle that the custody of the children be determined according to their best interests.

Article 183 of the SLCC states that whoever is entrusted with the care of the children the father and mother respectively retain the right of watching over their maintenance and education, and are bound to contribute thereto in proportion to their means.

(2) Summary Relief

In its summary jurisdiction the Family Court has the power pursuant to sections 4 and 5 of the SMO to make orders for relief.

By virtue of section 4 of the SMO, where the applicant is a married woman, the court may grant any one of the following orders:

- an order that applicant is no longer bound to cohabit with her husband (which provision has the same effect of a judicial separation on grounds of cruelty);
- an order that the legal custody of any children of the marriage between the applicant and her husband, while under the age of eighteen years be committed to the applicant;
- an order for periodic payments by the husband to the applicant for her use having regard to his and her means;
- an order, notwithstanding the wife's own adultery prior to the application, for periodic payments for the benefit of a child of the applicant whom the husband is legally liable to maintain and a further provision for the legal custody of the children under the age of eighteen be committed to a relative of the applicant or the husband or a third party having regard primarily to the interest of the child;
- an order for legal costs.

By virtue of section 5 of the SMO, where the applicant is a married man, the court may grant any one of the following orders:

- an order that applicant is no longer bound to cohabit with his wife (which provision has the same effect of a judicial separation on grounds of cruelty);
- an order for the legal custody of any children of the marriage;
- an order for periodic payments by the husband to the wife for her use having regard to his and her means;
- an order for legal costs.

In the above-mentioned provisions of the SMO, some of the orders that are granted to the wife are different from those granted to the husband, in that, orders for maintenance are granted only against the husband in favour of the wife and or the children even where the wife commits an offence prior to her application for separation or where the husband is the one making the application against her. These provisions are contrary to the CEDAW and the CRC and should be reformed. Also these provisions should be repealed and replaced by up-to-date relief located to the SLCC.

Circumstances to be considered by court

Circumstances to which the Court must have regard in deciding whether to grant relief to a spouse or a child in an action for separation from bed and board are found only in section 25 of the DA as follows:

25(1) It shall be the duty of the Court in deciding whether to exercise its powers under sections 22, 23 or 24 in relation to a party to the marriage and if so in what manner, to have regard to all the circumstances of the case including the following matters, that is to say-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;

- (e) any physical or mental disability of either of the parties to the marriage;
- (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3), it shall be the duty of the Court in deciding whether to exercise its powers under section 23 or 24 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say –

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him or her.

(3) It shall be the duty of the Court in deciding whether to exercise its powers under section 23 or 24 against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)-

- (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of the time for which that party discharged such responsibility;
- (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- (c) to the liability of any other person to maintain the child.

There is no provision in the SMO requiring the District Court in granting a separation and other relief in summary proceedings under that Ordinance to consider factors such as those enumerated above. Nor are such facts required to be taken into account under the SLCC.

There are certain circumstances, which are not mentioned in section 25(1) of the DA, that the court should take into consideration in deciding whether to grant relief. The circumstances are as follows:

- previous orders made by the court;
- agreements made between the spouses;

- a spouse's chances of finding employment;
- the time and resources required for a spouse to acquire sufficient autonomy.

The last three items provide an incentive in appropriate cases to the spouse receiving maintenance to take steps to gain economic independence.

Recommendation 15-3: That there be one set of provisions for relief on separation, that they be in the SLCC and that the relief be available on an equal basis to a husband or wife.

Recommendation 15-4: That in granting such relief on separation from bed and board the court consider, in addition to the circumstances specified in section 25(1) of the DA, previous orders made by the court, any agreements made between the spouses, the chances of finding employment and the time and resources required for a spouse to acquire autonomy.

Effects of Separation on the Child and the Best Interests of the Child

Recommendation 3-4(2) recognizes that a child is entitled “to have every decision concerning him or her taken with respect to his or her best interests and with respect to his or her rights.” It has been observed that insofar as provision is made for relief in respect of children, the SLCC, SMO and DA do not place primary importance on the child's best interests. Rather, the emphasis is on parental rights. In all three pieces of legislation, orders for custody and maintenance of the child depends on whether or not the fault grounds are proved against one of his or her parents. In the provisional measures in article 168 of the SLCC the child remains under the authority of the father unless the court orders otherwise for the greater advantage of the child. Under article 182 of the SLCC, the child is on separation of the parents entrusted to the one who is granted the separation unless the court orders otherwise for the greater advantage of the child. Thus, the interest of the child is regarded as being secondary to the entitlement of the parents in each case. To comply with the CRC these provisions need to be amended to reflect the rights and “best interests” of children as being of primary importance when a separation from bed and board is sought by either party to a marriage. Thus the child would be placed with the party who would best be able to serve his or her best interests whether it is his or her father or mother, or a third party, irrespective of the grounds upon which separation was granted. Joint custody should also be an option where co-operation between the parents makes it an appropriate arrangement in the best interests of the child.

It will be noted that this Report recommends that the court be able to exercise other new powers at the time it grants separation from bed and board, namely, an order that the spouse with custody of the children have the use of the family home (see Recommendation 13-1(12)). Such an order is an integral part of giving effect to the best interests of the child. (See Chapter 13.)

Recommendation 15-5: That on separation of the parents maintenance and custody of, and access to, a child in respect of a child be determined on the basis of his or her best interests.

Recommendation 15-6: That on separation joint custody be provided for in the reformed SLCC where co-operation between the parents makes it an appropriate arrangement

Effects of Separation on Parties to the Marriage

Various provisions of the SLCC provide that the effects of an order for separation from bed and board on the parties to a marriage are as follows:

- That the parties are no longer bound to live together but the marriage tie is not broken and thus neither party can contract a new marriage while the other is living. (art. 155)
- That the spouses are relieved from the obligation of mutual protection and assistance. (art. 175)

- That separation of property is effected, and, if the parties are married in community the community is dissolved (art.176).
- that the wife has the right to claim all the benefits conferred on her by the marriage contract except the rights of survivorship to which separation does not give rise (art. 176).
- That the wife has the full capacity to act without the need for marital or judicial authorization where the disability still exists (arts. 1210 and 1214).
- That the party against whom separation has been obtained loses all the advantages granted by the other party and the party who has obtained the separation retains all the advantages granted by order although they may have been stipulated to be reciprocal and reciprocity does not take place (arts. 179-180).
- That an alimentary pension may be granted in favour of either party if they have insufficient means of subsistence but it is only if the husband does not pay that he is liable for the necessities of the wife (art. 181).

These provisions still reflect the inequality of men and women in the eyes of the law and should be reformed to reflect the equality of spouses under CEDAW and the recommendations in this Report.

Recommendation 15-7: That the provisions of the SLCC respecting the effects of separation be reformed to reflect the full equality of the spouses.

Termination of Separation

Article 185 of the SLCC provides as follows:

185. (Subst. 34-1956). Husband and wife thus separated, for any cause whatever, may at any time reunite and thereby put an end to the effects of the separation, but the spouses nevertheless remain separate as to property.

The effect of this article is that, if the spouses simply reunite without actually resuming cohabitation, the separation will be terminated and the effects of separation except the separation of property will also be terminated. The question is: what constitutes the husband and wife reuniting? Subject to Recommendation 15-1(3), the resumption of cohabitation should be required. Merely living under the same roof should not be sufficient. The spouses should be also free to choose their matrimonial property regime when separation is terminated.

Recommendation 15-8: That, subject to Recommendation 15-1(3), voluntary resumption of cohabitation be made a pre-condition of terminating separation.

Recommendation 15-9: That the spouses be given the choice of matrimonial property regime at the termination of separation.

SECTION 2: DISSOLUTION OF MARRIAGE BY DIVORCE OR ANNULMENT

The law relating to Divorce in Saint Lucia is found mainly in the Divorce Act, which is closely modelled on the UK Matrimonial Causes Act 1973. (Though not so titled, the DA of Saint Lucia is in substance a matrimonial causes Act since it deals with annulment, judicial separation and maintenance during marriage as well as divorce.) There are also some supporting provisions found in the SLCC (arts. 5 and 50 relating to domicile and 155 declaring marriage to be dissolved by divorce). Grounds of annulment are dealt with primarily in the SLCC (see Chapter 11) with supplementary provisions in the DA (s.13) whereas the primary provisions respecting relief are

set out in the DA. In respect of issues of relief, the recommendations with respect to divorce will apply with respect to a marriage that is annulled.

There are a number of criticisms of the present state of the law in Saint Lucia that must be addressed. As was the case with separation and the other issues discussed in Sections 1 and 2, some of the DA and the SLCC provisions previously referred to do not comply with the CEDAW and the CRC. Furthermore, the emphasis on fault fails to achieve the family law objectives of:

- saving salvable marriages,
- making separation easier where there is no chance of reconciliation, and
- promoting, as much as possible, a harmonious relationship between the spouses and between the spouses and the children of the family after even if the marriage has broken down.

Having regard to the issues identified above, this discussion will focus on the following main topics:

- Time for bringing a petition for divorce
- Grounds for and bars to divorce
- Reconciliation
- Relief

Time for Bringing a Petition for Divorce

Under section 5 of the DA, a petition for divorce in Saint Lucia may not usually be brought before the expiration of five years from the date of the marriage. A person may obtain leave to present a petition before the expiration of five years if he or she can show that his or her case is one of exceptional hardship suffered by the petitioner or is a case of exceptional depravity on the part of the respondent. This restriction causes hardship, for example, where a marriage has irretrievably broken down but five years have not passed and the subsistence of the marriage causes hostility, resentment and bitterness and in some cases domestic violence, which makes the situation worse for the children of the family who suffer when their parents are in conflict with each other. The period of five years is the longest in the OECS Territories.

The recommendation made by the Project Team was to abolish this requirement to enable divorce proceedings to begin as soon as the grounds exist. The Committee debated the matter. The issue was how best to protect a person from an impulsive decision to seek a divorce. The Committee concluded that the time should be reduced to two years and that the right to apply for leave to bring a petition before the expiration of two years continue on the same basis as in the present DA. The UK Matrimonial Causes Act, 1973, upon which the DA is based, was amended in 1984 to reduce the period to one year without any right to present a petition earlier than that.

Recommendation 15-10: That the time for bringing an action for divorce should be reduced to two years and that the right to apply for leave to bring a petition before the expiration of two years continue on the same basis as in the present DA.

Grounds for Divorce

Under section 3 of the DA, there is only one ground for divorce, namely, the irretrievable breakdown of marriage but under section 4 the court must be satisfied that one or more of four facts is evidence of that breakdown. Those provisions read as follows:

3. The sole ground on which a petition for divorce may be presented to the Court by either party to a marriage shall be that the marriage has broken down irretrievably.

4. (1) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say—

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) that the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

It will be observed that paragraphs 4(1)(a) to (c) are based on fault and paragraph 4(1)(d) is not.

The court has to be satisfied that the marriage has broken down “irretrievably”. This test is unnecessarily stringent and is not in accord with the family law objectives set out at the beginning of this Chapter and elsewhere in this Report. This qualification should be removed to allow a spouse to petition for divorce with minimum distress and bitterness.

Recommendation 15-11: That qualification that the breakdown of the marriage be “irretrievable” should be removed from the ground of divorce and that breakdown of the marriage alone be the sole ground.

Adultery that the Respondent Finds Intolerable

The provision relating to adultery in the DA states that the petitioner must prove that the respondent has in fact committed adultery and that the petitioner finds it intolerable to live with the respondent. Under 8(3) of the DA, it is a bar to a divorce that, after learning of the adultery, the parties have lived with each other for a period or periods together exceeding six months (section 8(3)).

By virtue of section 7(1) of the DA, if a petition is brought by the husband, he must make the alleged adulterer a co-respondent unless excused by the Court, on special grounds, from so doing. If, however, the petition is brought by the wife the Court may, if it thinks fit, direct that the alleged adulteress be a made respondent (section 7(2)). These provisions clearly reflect the unequal treatment of women and men under the law and need to be amended to remove such bias.

Recommendation 15-12: That adultery which the petitioner finds intolerable under section 4(1)(a) of the DA be kept as a ground of breakdown and the provisions be reformed to provide that parties be able, on the same basis, to add a co-respondent when alleging adultery.

Respondent has Behaved in such a Way that the Petitioner Cannot Reasonably be Expected to live with the Respondent

The second ground for divorce set out in 4(1)(b) of the DA comprises two elements:

- that the respondent behaved in a particular way; and
- that because of that behaviour the petitioner cannot reasonably be expected to live with him or her.¹⁶

Under 8(4) of the DA, cohabitation for more than 6 months shall be disregarded. This ground remains satisfactory.

Recommendation 15-13: That the second ground for divorce set out in section 4(1)(b) of the DA, namely, that the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, be kept.

Desertion and Five Year Separation

The third and fourth grounds, set out in sections 4(1)(c) and (d) of the DA, are related and it is convenient to deal with them together.

The third ground for divorce is that the respondent has deserted the petitioner at least two years immediately preceding presentation of the petition. The court may treat a period of desertion as having continued at a time when the deserter was incapable of continuing the necessary intention, if the evidence before the Court is such that, had the party not been so incapable, the Court would have inferred that his or her desertion continued at the time (section 4(4)).

Only the fourth ground for divorce, separation for five years under section 4(1)(d) of the DA, is a no-fault ground. The petition may therefore be presented by either spouse. It allows a husband or wife to divorce the other without the other's consent even if the other spouse has committed no matrimonial offence. Under section 9, the respondent may oppose the petition, after a decree nisi of divorce has been granted, on the ground that it would result in grave financial or other hardship and that, in all the circumstances, it would be wrong to dissolve the marriage. The cases establish that both a physical and mental element are present in separation as a ground for divorce and that living apart can only be established when one party recognizes that the marriage is at an end (*Santos v Santos* [1987] 2 All ER 246). The cases also establish that the spouses may be living apart in the same house, if they are not living in the same household. Separation requires that there be no sharing of domestic life and that neither of the spouses continue to provide matrimonial services to each other (*Santos v Santos*, referred to above, and *Mouncer v Mouncer* [1972] 1 WLR 321). Under section 8(5) of the DA permits cohabitation for less than 6 months without affecting the grounds.

¹⁶ In the English case *Livingston-Stallard V Livingston-Stallard* [1974] Fam Law 47, at 54, the concept of reasonableness was taken to mean whether a right thinking person would come to the conclusion that the husband behaved in such a way that his wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties. In the case *Katz V Katz*, [1972] 1 WLR 955, it was held that the respondent's behaviour need not be morally culpable; he or she may be suffering from mental or physical illness. The behaviour of the spouse may also be negative or passive, for example, where a spouse is so incapable of managing his or her affairs that the other spouse suffers immense stress or unhappiness, *Carte-Fea V Carter-Fea* [1987] Fam Law 131.

The Committee considered whether 5 years' separation is too long. That time limit seems to have been affected by the length of time for bringing a petition discussed above. With the reduction of that time, it follows that the period of separation should also be reduced. The Committee considered that separation for two years is a sufficient evidence of breakdown to recognize that a marriage is at an end. If it is reduced to two years, it will have the effect of subsuming the ground of desertion.

Recommendation 15-14: That the separation under section 4(1)(d) of the DA be reformed to provide that for a period of two years separation as sufficient for divorce, and that desertion for two years be removed as a ground for divorce.

Reconciliation

Section 8(1) of the DA makes provision that the rules of court may provide for the attorney acting for the petitioner to certify whether he or she has discussed the possibility of reconciliation with their clients and has given the petitioner names and addresses of persons qualified to help effect reconciliation. It should be noted that these provisions do not apply to a person who presents his or her own petition for divorce. It is recommended that this provision be made mandatory and that, in the case of a person presenting his or her own petition for divorce, it should also be mandatory that the person state that he or she has sought reconciliation or that it was impossible to do so. This certification or statement could be on the petition for divorce in the court forms.

Section 8(2) of the DA further provides that, if at any time during proceedings for divorce, it appears to the court that there is a reasonable possibility of reconciliation between the spouses, the Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such reconciliation. It is submitted that this provision should be made mandatory and also that counselling services be established or identified to guide the spouses in their attempts to reconcile.

Sections 8(3), (4) and (5) of the DA encourage reconciliation by specifying that a period or periods together not exceeding six months of cohabitation be disregarded in determining whether to grant the divorce or not, whether the period takes place after the petitioner finds out about the adultery, after the unreasonable behaviour complained of or during a continuous period of desertion or living apart.

Recommended 15-15: That

(1) the provisions in 8(1) and 8(2) regarding reconciliation be made mandatory in the SLCC;

(2) in the case of a person presenting his or her own petition for divorce, it should also be mandatory that the person state whether he or she has sought reconciliation or that it was impossible to do so;

(3) counselling services be established or identified to guide the spouses in their attempts to reconcile; and

(4) in order to promote reconciliation, cohabitation of the spouses for a period or periods together not exceeding 6 months, be disregarded in relation to all grounds of divorce as under the existing law.

Relief

Relief granted under the DA applies equally to cases of decrees of nullity of marriage and the following provisions apply to decrees of nullity of marriage except to the extent that they are made inapplicable by Recommendation 11-7(a).

Provisional maintenance

By virtue of section 21, on a petition for divorce the court may order either party to make to the other such periodical payments for his or her maintenance and for such term, being a term not earlier than the date of presentation of the petition and ending on the date of determination of the suit, as the court thinks reasonable.

Maintenance on divorce

Section 22 and 23 of the DA make provision for the court to provide for maintenance of the spouse or children. Under section 22 the court may on granting decree of divorce make an order that either spouse:

- make periodical payments to the other;
- secure periodic payments to the other; or
- pay to the other a lump sum.

Sections 23 of the DA provides that, before or on granting a divorce or on dismissal after the beginning of the trial, the court may order that either spouse

- make periodical payments to a person for the benefit of the child or to the child,
- secure the periodical payments to a person for the benefit of the child or to the child,
- pay a lump sum to a person for the benefit of the child or to the child.

Circumstances to be Considered by the Court

The circumstances to be considered by the court in relation to section 22 and 23 are set out in section 25, which has already been discussed in connection with separation. The observations and recommendation made with respect to section 25(1) in relation to separation apply with equal force here (see Recommendation 15-4).

Recommendation 15-16: That in granting relief on divorce or nullity of marriage the court consider, in addition to the circumstances specified in section 25(1) of the DA, previous orders made by the court, any agreements made between the spouses, the chances of finding employment and the time and resources required for a spouse to acquire autonomy.

Relief in relation to Children

In making financial provision for the children under sections 23, primary importance is not placed on the “best interests” of the children the interest of the child. The interests of the child are regarded as being secondary to the entitlement of the parents in each case. To comply with the CRC these provisions need to be amended to reflect the rights and “best interests” of children as being of primary importance when orders for relief are being made.

Section 2 defines custody and sections 40 to 44 deal with custody of and access to children and related matters in actions for divorce and nullity of marriage. The following criticisms of these provisions can be made:

(1) The definition of custody in relation to a child includes access to the child. Access should be referred to separately from custody because the rights are quite separate and it is in the interests of the clarity of the law to distinguish between them.

(2) Section 40 of the DA provides that the provisional care of children until a decree of divorce is made absolute remains with the father, unless the court orders otherwise for the greater advantage of the children remains with their mother. This is contrary to the CEDAW and needs to be reformed because it discriminates against women. That section is also contrary to article 3(1) of the CRC because the best interests of the child is not given primacy and to article 18 of the CRC which provides that: “State parties shall use their efforts to ensure recognition of the principle that *both parents have common responsibilities* for the upbringing and development of the child.” One such option not provided for in the DA is joint custody, where the relations of the parties make it appropriate.

(3) In sections 41 to 44, primary importance is not placed on the best interests of the child.

Recommendation: 15-17: That sections 23 and 40 to 44 of the DA needs to be reformed to reflect the rights and “best interests” of children as being of primary importance when orders for relief are being made.

Recommendation 15-18: That definitions of “custody” and “access” for the purposes of divorce be set out separately.

Recommendation 15-19: That section 40 of the DA be amended to give the husband and wife equal rights in providing provisional care to any child of the family.

Recommendation 15-20: That on divorce joint custody be provided for in the reformed SLCC where co-operation between the parents makes it an appropriate arrangement

SECTION 3: MAINTENANCE AND CUSTODY OF AND ACCESS TO CHILDREN BORN OUT OF WEDLOCK

As was noted in the introduction to this chapter, the recommendations made earlier in this Paper in relation to children of spouses need to be made applicable to children outside wedlock. The repeal of the AO has already been recommended (Recommendation 5-10). It provided for a highly discriminatory and inadequate scheme of maintenance, custody and access. Recommendation 3-1 proposes that the rights and obligations of parents in relation to children, whether born in or out of wedlock, be the same. Once that recommendation is given effect to the issues of maintenance, custody and access will be decided on the same basis for all children.

SECTION 4: GENERAL CONSIDERATIONS

The topics dealt with in this Section are:

- Jurisdiction of the Courts in matrimonial causes
- Consolidating the Law in the SLCC

Jurisdiction of the Court in Matrimonial Causes

Under the SLCC the courts have jurisdiction in cases of separation, divorce, nullity of marriage and other matrimonial causes (“matrimonial causes”) over persons domiciled in Saint Lucia even though they are absent from Saint Lucia (art. 5). However, article 50 provides that a “*married woman not separate from bed and board has no other domicile than that of her husband*” thereby making the wife’s domicile dependent on her husband’s (art. 50). The Committee recommended that this provision be repealed and that the wife have her own domicile (Recommendation 7-3). Section 18(1) of the DA which mitigates the severity of article 50 is therefore unnecessary. (Section 18(1)(a) provides limited relief to a wife whose husband is not domiciled in Saint Lucia where he has deserted her or has been deported and before the desertion or deportation he was domiciled in Saint Lucia. Section 18(1)(b) provides that in cases of divorce or nullity the court has jurisdiction if the wife is resident in Saint Lucia and has been ordinarily resident for 3 years immediately preceding the presentation of the petition.) It is noted that similar provisions previously in the laws of the British Virgin Islands and Saint Vincent and the Grenadines and the United Kingdom have been repealed.

Instead of domicile, however, *ordinary residence* of at least one spouse is an easier and sufficient precondition for jurisdiction of the courts in a divorce case. Canada’s Divorce Act has already made this change in respect of divorce and the UK has made such a change in respect of all matrimonial matters in the Domicile and Matrimonial Proceedings Act 1973, section 1.

Recommendation 15-21: That ordinary residence of at least one spouse prior to an application for separation or for maintenance or other relief or for a petition for divorce or nullity should be sufficient to commence family proceedings in Saint Lucia and that section 18(1) of the DA be repealed along with the repeal of article 50 of the SLCC.

Consolidating the Law in the SLCC:

The law relating to separation from bed and board in Saint Lucia is found in three places, namely, the SLCC, the SMO and the DA¹⁷. The practice of amending the Civil Code by extra-codal statutes is contrary to the civil law tradition, which favours codification of all the fundamental substantive provisions in a single comprehensive law. Having three separate documents which deal with matters which are within the scope of the SLCC diminishes the status of the SLCC as a primary source of law. Furthermore, the three pieces of legislation overlap at points or introduce inconsistencies resulting in uncertainty as to what the law is. Earlier in this Chapter it was recommended that there be one set of provisions for relief on separation (recommendation 15-3). In general, the recommendations made in this Section have focussed on the DA provisions as the standard for matters of relief on separation, divorce and nullity. The Committee recommended that the law of separation be simplified and consolidated and set out in the reformed SLCC. The 1879 SLCC was modelled on the Civil Code of Lower Canada, 1866. Canada is a federal state and in the constitutional division of powers divorce falls to the federal Government whereas most other family law matters fall to the provinces. Saint Lucia is a unitary state and there is consequently no restriction on what can be placed in the SLCC. Given the recommendation that there be one set of provisions for relief on separation, it may be desirable to move the balance of the provisions of the DA into the reformed SLCC. That decision will be taken in drafting phase.

Recommendation 15-22: That the single set of provisions for relief on separation be set out in the reformed SLCC and that the inclusion of all matrimonial causes in the SLCC be considered in the drafting phase.

¹⁷ Note that the title of the UK Matrimonial Causes Act upon which the Saint Lucia Act is modelled is far more accurate, since both Acts deal with such matters as judicial separation and maintenance during marriage as well as Divorce.

16. PARENTAL AUTHORITY

Parental authority is described in the PLD as being the totality of rights and duties of a father and mother in respect of their child until the latter reaches full age. As a concept it replaces the now obsolete notion of “paternal authority” in the SLCC. As will be seen, the scope of the concept is broad. Parental authority contains the notion of parental responsibility, including the rights and responsibilities of the parents between themselves and in relation to persons to whom they delegate rights and responsibilities. It also includes the obligation of respect owed by the child to his or her parents and such matters as the settlement of disputes over the exercise of parental authority, the deprivation of parental authority, the extent and effect of that deprivation and the restoration of that authority. It is a matter of public order which cannot be modified by private act or agreement.

The law relating to parental authority therefore needs to emphasize protection for the child by imposing duties on parents as well as emphasizing the rights of the parents over the child or the child’s duty to show honour and respect and to obey his or her parents. It also needs to reflect the principles in the CRC and the CEDAW respectively that the best interests of the child is a primary concern in all matters relating to the child, that all children are equal and that the parents of a child are to enjoy and exercise parental authority together and on the basis of their equality as parents.

The present law relating to parental authority is found in articles 135 and 136 and 210 to 212 of the SLCC. These provisions are analysed in Chapter 3 under the heading “The Effects of Illegitimacy on Parental and Filial Rights and Responsibilities and on Succession”, to which the reader is referred.¹⁸ Articles 210 to 212 set out many of the provisions necessary to the scheme of parental authority. The introduction of the principles of equality of men and women and the rights of children, irrespective of the status of their parents, makes a comprehensive universally applicable reformulation of parental authority possible and necessary.

The components of that statement of parental authority that conform to the CRC and CEDAW are set out below. It will be noted that, in keeping with the approach of the civil law, these are a mix of moral obligations and legal rights, obligations and powers.

Recommendation 16-1: That the provisions relating to parental authority in the SLCC be reformed to provide for the following:

- 1. every child, regardless of age, owes respect to his father and mother.*
- 2. every child is subject to the authority of his father and mother until he reaches the age of majority.*
- 3. the father and mother have the rights and duties of custody, supervision and education of their children and are obliged to maintain them.*
- 4. The father and mother shall exercise parental authority together unless a parent dies, is deprived of parental authority, is unable or refuses or neglects to express his or her will or is not available to express his or her will, in which event the remaining parent shall exercise parental authority.*

¹⁸ See p. 29.

5. *A father or mother who performing any act of authority concerning their child alone is presumed, in relation to third parties acting in good faith, to be acting with the consent of the other parent.*
6. *The person having parental authority may delegate the custody, supervision and education of a child to another person.*
7. *A person having parental authority may refer a matter of difficulty in the exercise of parental authority to the court; the court may decide the matter in the best interests of the child after fostering conciliation of the parties.*
8. *When the custody of a child is entrusted to one parent or to a third party, the mother and father retain the right to supervise the maintenance and education of their child and are bound to contribute thereto in proportion to their means.*
9. *The court may, on application by any interested person, for a sufficient reason declare that the father or mother or a third person with parental authority is deprived of parental authority or may, where appropriate, declare the withdrawal of an attribute of parental authority or its exercise.*
10. *Where the court deprives the father or mother or a third person with parental authority or withdraws an attribute, or the exercise an attribute, of parental authority, the court may designate the person who is to exercise that parental authority or attribute of parental authority.*
11. *Deprivation exempts the child from his or her obligation to provide support to the deprived parent, unless the court otherwise decides, but the exemption may be lifted after the child reaches full age.*
12. *A father or mother or other person who has been deprived of parental authority or from whom an attribute of parental authority has been withdrawn may have the parental authority or the attribute or its exercise restored if he or she proves new circumstances in an application to the court.*
13. *The father or mother should not interfere with the relationship of a child with his or her grandparents. If the parties cannot agree, the court may decide the terms and conditions of the relationship.*
14. *The court may review any decision it has made.*

17. UNIONS OTHER THAN MARRIAGE

The Project Team made no recommendations to the Committee with respect to unions other than marriage; rather, it provided a framework for analysis of the problem on the basis of which the Committee could find its way through the labyrinth of issues to be considered and make the recommendations itself. The framework identified such unions in the broadest context to include conjugal unions that are monogamous, multi-partner unions in which one or more married persons are involved, multi-partner unions in which single persons are involved as well as unions of persons of the same sex. They considered whether to address a range of issues affecting persons in unions other than marriage and whether an institutional alternative such as the civil union might be appropriate in the circumstances. The conceptual structure of this chapter is very like an inverted triangle. At the top are all types of unions that theoretically are candidates for legal recognition. As the framework unfolds, certain classes of unions are eliminated leaving a core of unions as suitable for recognition. Once that core is reached, the question of the nature of the rights is then addressed.

The framework for analysis disposed of two preliminary issues.

(1) It made a fundamental distinction between the definition of “family” for the purposes of domestic violence legislation and the definition of family for the purposes of unions other than marriage. What constitutes a domestic relationship for the purposes of domestic violence legislation must necessarily be broad since the issue is a matter of public law and order, a central issue in public law. The definition for the purposes of the reform of the SLCC is really a matter of what relationships are to be recognized under private law, the main purpose of which is the regulation of relations between persons, which is the object of the SLCC.

(2) The framework emphasized the importance of distinguishing between the rights of partners in unions other than marriage and those of the children of such unions. It has already been recommended that the rights and responsibilities of parents in relation to their children exist whether or not the parents are or ever were married to each other (see Chapter 16).

The issue in this Chapter is the rights and responsibilities of the partners or former partners towards each other in unions other than marriage.

Same-Sex Unions

The committee discussed the issue of the scope of unions other than marriage and the possible inclusion of same-sex unions and, noting the homosexual relations are illegal in Saint Lucia and that there is very considerable hostility to homosexuality, made the following decision:

Recommendation 17-1: That there is insufficient public support for the recognition of same-sex unions and that accordingly only unions consisting of a man and a woman be recognized.

Civil Unions

The civil union is an institutional approach to the question of conferring rights on relationships outside marriage. It is quite common in civil systems in Europe and exists in Quebec. There are very similar common law responses such as that in the state of Vermont. The primary purpose of civil unions is to provide an equivalent of marriage for gay people. Having already recommended that same-sex unions not be recognized in Saint Lucia, this discussion is confined to heterosexual unions.

The following is a brief summary of the Quebec law relating to civil unions. A civil union is defined as follows in article 521.1 of the CCQ as follows:

Art. 521.1 A civil union is a commitment by two persons eighteen years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status.

A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union and who in relation to each other are neither an ascendant or a descendant, nor a brother or a sister.

It bears a striking resemblance to marriage. To form a civil union, both partners must be single. If one or both partners are still married or involved in a previous civil union, they must free themselves from such a bond before they can contract a new civil union. As in marriage, the partners cannot contract a civil union if they are related lineally by consanguinity or as brother and sister.

A civil union must be contracted openly (art. 521.2). The solemnization of a civil union is subject to the same rules, with the necessary modifications, as are applicable to the solemnization of marriage (art. 521.3). A civil union entails the same rights and obligations for the partners as for husband and wife in marriage (art. 521.6 and 521.8).

A civil union is dissolved by the death of one of the partners or by a court judgment or by a notarised joint declaration when the partners' will to live together is irretrievably undermined (art. 521.12). The partners may consent, by way of a joint declaration, to the dissolution of the civil union if they settle all the consequences of the dissolution in an agreement (art. 521.13). In the absence of a joint declaration dissolving the civil union, or where the interests of the common children of the partners are at stake, the dissolution of the union must be pronounced by the court or a notary (art. 521.17). It is important to remember that the dissolution of a civil union does not deprive the children of the advantages secured to them by law or by the civil union contract. The rights and obligations of parents towards their children are unaffected by the dissolution of the union (art. 521.18). The dissolution of the civil union entails the dissolution of the civil union regime (art. 521.19).

The Committee felt that, even though rates of marriage are low, marriage is the primary institution in Saint Lucian life and that providing an alternative so similar to marriage would undermine that institution. Furthermore, the civil union is not any more effective than marriage in addressing the problem of simultaneous unions with other partners.

Recommendation 17-2: That the institution of civil union not be adopted in Saint Lucia.

The Framework for Analysis of Unions other than Marriage

The Committee agreed that key legal issues applicable to the relationship between married persons are equally applicable to unions other than marriage, namely:

1. Partners' obligation to maintain each other during the union and after it ceases;
2. Protection of the family residence;
3. Sharing of a partner's property after breakdown of the union;
4. A partner's rights on succession.

In the following, the word “partner” should be taken to include former partner.

Having identified the above issues, the framework for analysis then posed the question as to whether the rights and obligations of partners ought to be confined to single persons involved in unions other than marriage. The protection of the legal spouse and the institution of marriage generally was identified as a central issue in determining this matter. Another issue is the presumed intent of a partner in a union other than marriage who is married to someone else. The arguments were as follows: if one partner had wanted to confer rights on his or her partner, he or she could have got a divorce and married the partner or entered into an agreement to provide for the partner. By the same token, in the context of succession, if a partner had intended to benefit a partner, he or she could have made a will in favour of the other. The Committee found that it was in the public interest to recognize rights even when a partner may not have intended such recognition.

Are the rights of one spouse necessarily incompatible with granting rights to a partner or partners of the other spouse? That question hinges on two factors, the protections afforded to the spouse and the character of the rights granted to the partner. This Report has already recommended that the spouses be given mandatory rights *in rem* in the form of rights in the family patrimony and the right to make an agreement with respect to private property in default of which the partnership of shareable property will apply (see Chapter 14). These guarantee a spouse a large measure of security. In determining the character of the rights of partners as between themselves, the Committee drew a distinction between a partner’s rights *in rem*, that is to say, in things, and his or her rights *in personam* or money claims. (For the purposes of its discussion the Committee treated a claim to the value of property as a right *in rem* since it carries with it the possibility of partition.)

The Committee reviewed various pieces of Caribbean legislation, namely:

- the Family Law Act (CAP. 214) (Barbados) (the “Barbados Family Law Act”)
- the Cohabital Relationships Act, Act No. 30 of 1998 (Trinidad and Tobago) (the “Trinidad and Tobago Cohabital Relationships Act”), and
- the Family Property (Rights of Spouses) Act, 2003 (Jamaica) (the “Jamaica Family Property Act”).

The tendency in the above Caribbean legislation is to assimilate unions other than marriage to marriages and to frame remedies in the area in terms of maintenance as well as rights to property. Maintenance claims can be readily accommodated by the legal system. Property claims are another matter. Since property is unique, there is the possibility of unseemly property disputes involving one spouse and a partner or partners or former partner or partners of the other spouse or between the spouses and a former partner or partners of one of the spouses.¹⁹ The Committee thought that such disputes should be avoided. To avoid such disputes over property one Caribbean jurisdiction limits such claims to a partner of a person who is unmarried.²⁰ In doing so, it ignores the potential injustice to the partner or partners of a married person who is also in a

¹⁹ See the Trinidad and Tobago Cohabital Relationships Act and the Jamaica Family Property Act, under which it appears that such disputes could arise.

²⁰ See the Barbados Act, definition of spouse in s. 2 and the definition of “single man” and single woman” in s. 2(2).

union other than marriage. The Committee thought that this “either/or” approach was unjust. In addition, most Caribbean jurisdictions that confer property rights on partners seem to ignore the reality of a person being involved in a number of simultaneous partnerships, whether or not a married person is involved. Even if a person is single, Caribbean legislation seems to contemplate only one such union.²¹ The Committee thought this was not only unrealistic but unfair as well. In order to avoid the consequences that flow from basing the claim of a partner in a union other than marriage on property, the Committee adopted the approach of granting maintenance claims instead. The convenient aspect of a maintenance claim is that it is a claim to money, which is fungible.

The Committee then applied these considerations to the four key legal issues enumerated earlier in this paper.

Partners’ Obligation to Maintain each other during and after the Union is Terminated

Having decided to limit claims to maintenance (of which more is said below), then the question was, “When does a partner in a union outside marriage have the right to claim maintenance from the other partner?” The framework suggested (on the analogy of marriage) that whatever criteria were selected, they should evidence a long-term commitment. The committee considered three indications—

- length of commitment in terms of length of cohabitation
- the existence of a child of the partners
- a combination of length of commitment in terms of cohabitation and the existence of a child of the partners.

Five years or the birth of a child of the cohabitational relationship appears to be a standard in those jurisdictions which have granted claims for maintenance in unions other than marriage. In the case of cohabitation when there is a child, no period is prescribed in any of the laws above-mentioned. It appears that the length of the conjugal relationship must be sufficient to constitute cohabitation. Certain Caribbean legislation appears to limit claims for money by one partner against another to certain extreme situations such where one partner has the care and control of a minor child of the union who is disabled.²² In the view of the Committee such limitations written into the law may well work a serious injustice and it was felt that the court was best equipped to separate meritorious from unmeritorious claims. There is also a tendency to mix property claims with other claims like maintenance by making contributions to property one of the grounds to claim maintenance.²³ If a partner makes a substantial contribution to property in the name of the other, the contribution should be claimed under the law of trusts as a contribution to property and not maintenance.

It should be noted that the Committee recommended that maintenance to a spouse or an ex-spouse not be open-ended. Recommendation 15-4 and 15-16 are designed to foster the autonomy of a spouse or ex-spouse. Those principles should apply equally to partners in unions other than marriage.

²¹ The Barbados Family Law Act.

²² The Trinidad and Tobago Cohabital Relationships Act, s. 15(1).

²³ The Trinidad and Tobago Cohabital Relationships Act, s. 6 and 7.

Recommendation 17-3: The threshold requirement for one partner to apply for maintenance from the other is either

- (a) that the parties have been in a cohabitational relationship (in the sense of living together in a conjugal relationship) continuously for a period of not less than five years, whether or not one or both of the parties during that period has also been in such a cohabitational relationship continuously with another partner or partners; or*
- (b) that the partners have lived continuously in a conjugal relationship for a sufficient period to constitute cohabitation (even though the period is less than five years and whether or not one or both of the parties during that period has also been in such a cohabitational relationship continuously with another partner or partners) and are the parents of a child (including an adopted child);*

Recommendation 17-4: For the purpose of claiming maintenance for him or herself, it is not relevant whether either of the partners in a union other marriage is married to someone else so long as either threshold requirement in Recommendation 17-3 is met;

Recommendation 17-5: That in awarding maintenance to a partner the court take into account the same criteria that would apply to a maintenance claim between spouses.

Protection of the Family Residence

The Committee decided that, once a threshold commitment requirement has been met, the family residence of the partners and its contents ought to be entitled to protection on the same basis as the family residence of married persons and its contents (see Recommendation 13-1).

Recommendation 17-6: That a partner who has satisfied either threshold requirement has the same rights in the family residence occupied as the place of cohabitation of the partners and their family and in its contents, regardless of who is the owner, as a spouse would have in his or her family residence.

Sharing of a Partner's Property on Breakdown of the Union

The Committee considered the various options available to deal with the property issues of partners in unions other than marriage during their lifetime, such as agreements, the law of constructive trusts and the various legislative solutions like the modified community of property law in Jamaica.²⁴ Each has serious limitations. Agreements are effective but not likely to be extensively used. The law of constructive trusts is a narrow remedy in Caribbean jurisprudence and as such does not in its present state offer much assistance to a person seeking assert a property right.²⁵ The limitations of the legislative solutions in the Caribbean (granting rights only to single persons or only to one of several partners) have been remarked on. The potential disputes relating to the granting of rights *in rem* where there are a number of partners has already been noted. The Committee's view was that, if partners want to grant rights in each other's property, then they must enter into an agreement or marry or make a will or inter vivos gift. In the absence of either of these alternatives, the Committee decided that a partner ought to be entitled to make a maintenance claim.

²⁴ The Jamaica Family Property Act

²⁵ See *Otway v. Gibbs* (Unreported) 25 October 2000, Privy Council, Grenada (PCA No. 30 of 1999).

Recommendation 17-7: That, during their relationship and on the breakdown of the relationship, one partner has a right to claim maintenance against a partner or former partner, but, apart from a claim to use the family residence of the partners, has no claim to the property of the other partner during the partner's lifetime, other than a claim arising under an agreement between the partners, a will or by reason of a constructive trust.

Sharing by one Party of the other Partner's Property on Death

Under the present law of Saint Lucia partners in unions outside marriage have no automatic right to inherit from each other. One partner, whether married or not, may make a will in favour of another partner, but he or she has no duty to do so. When there is an intestacy, a surviving spouse has a right to inherit, but the law makes no provision for a partner outside marriage to take from the estate of a partner.

The legal tools under the present law, such as agreements, wills and the law of constructive trusts are available to deal with property issues arising between partners on death, and are subject to the same criticisms set out earlier.

The Committee considered whether it was appropriate that there be a claim against the estate for maintenance only or for another amount representing the moral obligations of the deceased, or a combination thereof, depending on the applicant. In such a case there will be a balancing of the competing claims of the beneficiaries and the claimants (some of whom may also be beneficiaries). The Committee unequivocally rejected the idea of the court rewriting the will of the deceased or upsetting the distribution on intestacy. They felt that a maintenance claim alone was sufficient. The Committee's recommendation needs to be put in context. It will be noted that the matter of the payment of maintenance is discussed at length in the Chapter 19 of this Report entitled "The Right to Claim Maintenance against an Estate", where more comprehensive recommendations are made in relation to all persons whom the deceased had an obligation to maintain.

Recommendation 17-8: That, on the death of a partner, the surviving partner have a right to claim maintenance against the estate of a former partner but, apart from a claim to use the family residence of the partners, have no claim to his or her estate, other than a claim arising under the will of the deceased, an agreement between the partners or under a constructive trust.

18. SUCCESSION

The Committee recommended a variety of reforms in the area of succession. In addition to important recommendations to remove provisions that discriminate between men and women and between legitimate and illegitimate children, the Committee made a number of technical amendments intended to clarify and reform various provisions of the SLCC. Time did not permit a thorough reconsideration of succession. That may be possible in the drafting phase.

Survivorship

Articles 546-548 of the SLCC make provision for cases where persons who are entitled to succeed each other die in such circumstances that it is impossible to determine which person died first. The present SLCC establishes a series of presumptions of survivorship based on age and on sex. Generally speaking the younger persons are presumed to have survived the older persons and males are presumed to have survived females. These presumptions amount to discrimination by virtue of sex and age and are contrary to the CEDAW and, to the extent that they affect children, to the CRC. There is a solution to this issue that does not involve discrimination and which works a fairer result in relation to the beneficiaries of the estate, namely, to presume that all the persons died simultaneously so the succession of each person devolves to his or her representatives. Such an amendment has been made in article 616 of the CCQ,

Recommendation 18-1: That articles 546-548 of the SLCC be reformed to provide that, where persons who are entitled to succeed each other die in such circumstances that it is impossible to determine which person died first, it be presumed that the persons died simultaneously so that their heirs step in by representation.

Qualities requisite to inherit

Articles 551-556 of the SLCC list the persons who cannot inherit by reason of incapacity or unworthiness.

Article 551 provides that in order to inherit it is necessary to be in existence at the time of devolution of the succession and thus persons who are not yet conceived and persons who are not viable when born are incapable of inheriting. Article 551 should be expressed in positive terms so that natural persons who exist at the time a succession opens, including absentees if they are presumed to be alive and children conceived but not yet born if they are born alive and viable, are capable of inheriting.

Recommendation 18-2: That article 551 should be redrafted in positive terms so that natural persons who exist at the time a succession opens, including absentees if they are presumed to be alive and children conceived but not yet born if they are born alive and viable, are capable of inheriting.

Article 552 of the SLCC states that aliens may inherit in the same manner as British subjects. It is submitted that this provision is unnecessary and should be repealed as it adds nothing to the SLCC.

Recommendation 18-3: That article 552 is superfluous and should be repealed.

Article 553 of the SLCC lists persons who are unworthy of inheriting, namely, a person

1. who has been convicted of killing or attempting to kill the deceased;
2. who has brought a capital charge against the deceased which was adjudged to be calumnious; or
3. an heir of full age who, being cognizant of the murder of the deceased, has failed to give judicial information of it.

Ground 1 in article 553 should be amended to provide not merely for killing but for unworthiness as a result of manslaughter or murder of the deceased. The other 2 grounds are so narrow as not to merit inclusion in the SLCC. In addition as regards ground 2, police now lay all capital charges so that the situation will almost certainly not arise. As regards ground 3, the failure to give information regarding the murder of the deceased is inappropriate given that there is generally no duty to report a crime.

Recommendation 18-4: That article 553 should be reformed to provide for unworthiness of a person as a result of the manslaughter or murder of the deceased by that person and to remove the references to the unworthiness of those who bring calumnious capital charges against the deceased and those who know about the murder of the deceased who fail to give judicial information respecting the murder.

A provision should also be inserted in the SLCC to provide that, where a parent is deprived of parental authority and the child is exempted from the obligation to provide support, that parent is unworthy of the child's succession. Such a failure in the obligations of the parent and corollary exemption of the child is self-evidently sufficient grounds for unworthiness.

Recommendation 18-5: That a provision be inserted in the SLCC to provide that where a parent deprived of parental authority and the child is exempted from the obligation to provide support, that parent is unworthy of the child's succession

The SLCC should also be amended to set out circumstances in which the court would have the discretion to declare a person unworthy for example, where the person

1. is guilty of cruelty towards the deceased or having behaved toward the deceased in a seriously reprehensible manner;
2. has destroyed, concealed or altered the will of the deceased in bad faith;
3. has hindered the deceased in the writing, amendment or revocation of his or her will.

Recommendation 18-6: That the court be given the discretion to declare a person unworthy for example, where the person

- (1) *is guilty of cruelty towards the deceased or having behaved toward the deceased in a seriously reprehensible manner;*
- (2) *has destroyed, concealed or altered the will of the deceased in bad faith; or*
- (3) *has hindered the deceased in the writing, amendment or revocation of his or her will.*

The SLCC makes no provision for the situation that occurs when the deceased knew of the cause of unworthiness of the person but still conferred the benefit on him or her or refused to modify a liberality when he could have done so. In such a situation the deceased's actions indicate that he or she intended that the heir remain worthy.

Recommendation 18-7: That provision be made for the heir to remain worthy where the deceased knew of the cause of the unworthiness but still conferred the benefit or did not modify the liberality.

The SLCC is silent on the question as to whether the State and other legal persons are capable of inheriting. It is recommended that the SLCC should provide that the State and other legal persons are capable of inheriting property that they may legally hold.

Recommendation 18-8: That SLCC be reformed to provide that the State and other legal persons are capable of inheriting property that they may legally be entitled to hold.

Representation

Article 562 of the SLCC provides that representation is a fiction of law the effect of which is to put representatives in the place, in the degree and in the rights of the person who is dead²⁶ and who is represented in a succession. This definition of representation should be reworded to characterize it more appropriately as a favour of the law and to clarify its application as follows:

Representation is a favour granted by law by which a relative is called to a succession where his or her ascendant, who is a closer relative would have taken under the succession but is unable to take himself or herself having died previously or at the time or being unworthy.

Recommendation 18-9: That the definition of representation be reworded to reflect that it is a favour granted by law by which a relative is called to a succession where his or her ascendant, who is a closer relative would have taken but is unable to take himself or herself having died previously or at the time or being unworthy.

Intestate Succession

Distinction between illegitimate and legitimate children

Article 568(2) of the SLCC provides that children or other descendants succeed without distinction of sex and primogeniture, and whether they are issue of the same or different marriages. In all cases they inherit in equal portions and by heads when they are all in the same degree and their own right; they inherit by roots when all, or some of them, come by representation. Although this seems to provide for equality among children, it implies that the children worthy of inheriting in the first place must be of a marriage. Indeed because of the provisions in article 579 which deal with children of single parents, the law of succession pursuant to the SLCC is applied a manner which discriminates against illegitimate children contrary to the CRC. It is also against the trend in the wider Caribbean to eliminate such discrimination. The SLCC thus requires amendment to remove this inequality among children so that there is no distinction between legitimate and illegitimate children in matters of succession.

Recommendation 18-10: That the SLCC be amended to remove inequality among children so that there is no distinction between legitimate and illegitimate children in matters of succession.

²⁶ Article 562 of SLCC.

Capacity to inherit

The rules relating to capacity of a spouse to inherit in articles 567B and 567C are determined by the matrimonial regime of the spouses and are contrary to the CEDAW because they are different in some respects for a husband and a wife. Thus, to be capable of inheriting, the wife must abandon all rights in any community of property which existed between herself and the deceased as well as rights of survivorship accruing to her under the marriage contract or by law. On the other hand, to be capable of inheriting a husband must first pay to the mass as if it were a return his share of any community of property which may have existed between the wife and himself when the community is accepted by the succession of the wife or he may abandon to the mass all the rights and advantages conferred on him by any marriage contract which may have existed between them. To be entitled to inherit the spouses also have to renounce their rights in the proceeds of any insurance policies made in their favour by the deceased spouse and return such proceeds to the mass. It is submitted that this requirement is unfair and should be repealed so that the option is not to renounce in the community and to take from the succession but merely to renounce or accept the succession.

Recommendation 18-11: That the SLCC be reformed to comply with CEDAW to permit a husband and wife to renounce or accept the succession on the same basis and to remove the requirement for abandoning rights, paying into the mass and renouncing rights in order to be capable of inheriting to reflect equality of spouses in accordance with the CEDAW.

Recommendation 18-12: That all references to spouse capable of inheriting be repealed.

Crown

Article 580 of the SLCC provides for the Crown to succeed to the estate of the deceased in default of any person succeeding to that estate. Article 581 further provides that the Crown must demand possession from the Court in the manner provided in the Code of Civil Procedure. Since the Code of Civil Procedure is practically extinct, with most of its provisions being repealed, it is recommended that the reference to it in article 581 be repealed and that the actual provisions for demanding possession be placed in the reformed SLCC.

Recommendation 18-13: That the reference to the Code of Civil Procedure in article 581 of the SLCC be repealed and the actual provisions relating possession be placed in the reformed SLCC.

Acceptance of Succession

There is no express provision in the SLCC as to the entitlement of an heir or a legatee to accept a succession; however, the SLCC makes reference to such a renunciation, for example, in article 655 of the SLCC which provides that in renouncing a succession an heir may nevertheless retain a gift or claim the legacies made to him. It is recommended that the reformed SLCC should include a provision that states that an heir or legatee is entitled to accept or renounce the succession. There should also be a time limit (six months seems reasonable) for renunciation and a presumption of acceptance if a succession is not renounced within that period once the heir or legatee is aware of his entitlement. The share of an heir who renounces should accrue to his or her co-heirs.

Recommendation 18-14: That provision should be made for the legatee or the heir to be entitled to accept or renounce the succession within a 6-month period and for the presumption of acceptance.

Administration of Successions, Partition and Returns

Articles 584-694 of the SLCC provide for the Administration of Successions, Partitions and Returns. These articles all require redrafting and updating in simple modern English. Also all references to the Code of Civil Procedure should be modified or repealed as appropriate since this document is largely obsolete. These articles should also be reformed to conform with the CEDAW especially articles 635, 657 and 658.

Article 635 of the SLCC provides that a husband may, with the consent of his wife, demand the partition of the movables or immovables which have accrued to her and have fallen into the community. The coheirs with the wife cannot demand a final partition without suing both husband and wife. These provisions are clearly discriminatory and contrary to the CEDAW and should be repealed.

Articles 657-658 provide that gifts and legacies made to the son of a person who, at the time when the succession devolves has become entitled to succeed, are subject to be returned. The father coming to the succession of the donor or testator is bound to return them. A grandson coming to the succession of his grandfather is bound to return what has been given to his father, although he should renounce the succession of the latter. These provisions are discriminatory and contrary to the CEDAW and on that basis should be reformed.

Recommendation 18-15:

- (1) *That articles 584-694 of the SLCC require redrafting and updating in simple modern English.*
- (2) *That all references to the Code of Civil Procedure in articles 584-694 of the SLCC should be modified or repealed, as appropriate, as the Code of Civil Procedure is largely obsolete.*
- (3) *That articles 584-694 of the SLCC should also be reformed to conform with the CEDAW, especially articles 635, 657 and 658.*

English Wills

Article 789 of the SLCC, which concerns English wills, provides as follows:

789. An English will, whether affecting movable or immovable property, must be in writing and signed at the end with the signature of the testator, or his mark, made by himself or by another person for him, in his presence, and under his express direction, which signature or mark is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses, *one of whom must be a Justice of the Peace*, who attest and sign the will immediately in presence and at the request of the testator, and in the presence of one another. The signature of a witness cannot be by mark.

The requirement italicised in the above is, however, not a requirement of a true English will, which demands simply two competent witnesses. The Project team recommended its deletion, but the Committee decided that it ought to be made optional.

Recommendation 18-16: That the requirement in article 789 of the SLCC that one of the witnesses to an English will “must be a Justice of the Peace” be amended to provide that one of the witnesses “may be a Justice of the Peace”.

Given the time constraints in the review of succession not all provisions affected by this chapter may have been identified.

Recommendation 18-17: That the provisions of the SLCC and extra-codal legislation affected but not specifically referenced in this specific recommendations in this Chapter be amended to accord with these recommendations.

19. THE RIGHT TO CLAIM MAINTENANCE AGAINST AN ESTATE

The issue dealt with in this Chapter is what provision, if any, should a person make on death for the persons whom he or she is obliged to maintain. The recommendations in this Chapter represent a new departure in the law of Saint Lucia. Under the present law, the obligation to provide maintenance to a spouse or former spouse or to a child does not generally survive the death of the person obliged to pay. Behind this issue lies the law of freedom of testation, that is to say, the right of a person under the law of Saint Lucia to make a will disposing of his or her property as he or she chooses and the law governing the distribution of an estate on intestacy, that applies when a person does not make a will or makes a will without disposing of all his or her property. The law makes it quite legal for a testator to fail to provide, or fail to provide sufficiently, for persons he or she is obliged to maintain. If a person does not make a will, the law provides for a distribution that could result in the same failure to provide, or to provide sufficiently, for those persons. The Committee considered the impact of freedom of testation and the law relating to intestacy and felt that their effects ought to be mitigated. They felt that a person who was maintained or was entitled to be maintained by the deceased should have a claim against the estate for maintenance, but that that claim should take into account a number of factors to arrive at an equitable result for all persons making claims and all beneficiaries of the estate.

The Present Law on Payment of Maintenance by an Estate

As has been noted, under the present law of Saint Lucia, the obligation to provide maintenance to a spouse or former spouse or to a child does not generally survive the death of the person obliged to pay. (See the exception in section 37 of the DA.)

In relation to children, there are some limitations on the duration of orders in section 28 of the DA. Subject to some exceptions, the general rule is that such orders may not be made in favour of a child who has attained the age of 18 and, when an order is made in favour of a child who has not attained that age, such orders shall not extend beyond the child's 19th birthday.

The primary exceptions are:

- for a child who has attained the age of 18 years who is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (DA. S. 28(3)).
- where there are special circumstances which justify the court in making the order or provision for the benefit of the child.

If these payments are periodical, they cease on the death of the person obliged to pay the maintenance (DA, s. 28(4)).

The Committee recommended that maintenance to a spouse or ex-spouse not be open-ended. Recommendations 15-4 and 15-16 have added in other factors intended to encourage economic independence such as the chances of finding employment and the time and resources required for a spouse to acquire autonomy. Those factors will apply to all spousal claims and will act as limiting factor on those claims.

Previous recommendations

In Chapter 17 the Committee considered whether it was appropriate that there be a claim against the estate for maintenance only or for another amount representing the moral obligations of the deceased, or a combination thereof, depending on the applicant. The Committee unequivocally rejected the idea of the court rewriting the will of the deceased or upsetting the distribution on intestacy. The Committee decided that a maintenance claim alone was sufficient and that, on the death of a partner, the surviving partner should have a right to claim maintenance against the estate of a former partner, but should have no other claim to his or her estate, other than a claim arising under the will of the deceased, an agreement between the partners or by reason of a constructive trust (Recommendation 17-8). Building on that earlier recommendation the Committee reiterated its opposition to the court rewriting the will of the deceased or upsetting the distribution on intestacy and affirmed its view that a maintenance payment was the appropriate remedy when a deceased person fails to provide under a will or on intestacy or fails to provide sufficiently for a person to whom the deceased owed an obligation. There is significant precedent for claims of maintenance against the estate of a deceased in other jurisdictions, such as Trinidad and Tobago²⁷, England²⁸, and Quebec²⁹.

The Organization of this Chapter

The Committee considered the following matters:

- who may claim maintenance
- what criteria should be taken into account in deciding whether maintenance should be granted and in what amount
- how claims should be paid
- when claims must be made
- should there be a ceiling on claims for maintenance.

Who may Claim Maintenance?

Those potentially entitled to claim maintenance fall into the following groups:

- (a) the spouse, if any, of the deceased
- (b) the children of the deceased and his or her spouse
- (c) a child, other than a child of the deceased and his or her spouse, who was treated as a child of the family within the meaning of the DA, s. 2
- (d) the ex-spouse, if any, of the deceased
- (e) all the children of the deceased and his or her ex-spouse
- (f) a child, other than a child of the deceased and his or her ex-spouse, who was treated as a child of the family within the meaning of the DA, s. 2
- (h) any partner or former partners of the deceased in a union other than marriage
- (i) any child of the deceased not included in item (b),(c), (e) or (f);
- (j) the ascendants of the deceased.

²⁷ Trinidad and Tobago Succession Act 1981

²⁸ Inheritance (Provision for Family and Dependents) Act 1975 as amended by the Law Reform (Succession) Act 1995

²⁹ CCQ, arts. 684 to 695.

The Committee stressed that this right was a right to claim and not a guarantee that the claim would be successful.

In considering the issue of the obligation of a deceased person to a spouse or ex-spouse, the committee decided that maintenance should be a claim in addition to the right in the family patrimony or to the partnership of shared property or under an agreement or a will or intestacy. It was felt that the rights in the family patrimony and the rights, if any, under the partnership of shared property would almost always be sufficient to protect the surviving spouse, but that the spouse should nevertheless have a right to claim. They noted that a parent can make a will that does not provide or does not provide sufficiently for a wife or child.

They considered whether there were any limitations on any of the categories and decided that unworthy persons (see Recommendation 18-4) should be excluded and that an ex-spouse who has remarried should have no right to apply. (The latter restriction accords with the DA.) They also felt that children of the deceased should be entitled to claim maintenance but that the persons identified in items (c) and (f) above (*de facto* adoptees) ought not to be entitled to do so unless the deceased was maintaining them immediately before his or her death.

Recommendation 19-1 Subject to Recommendation 19-2, that the following persons be entitled to claim maintenance:

- (a) *the spouse, if any, of the deceased*
- (b) *the children of the deceased and that spouse*
- (c) *a child, other than a child referred to in item (b), who was treated as a child of the family within the meaning of the DA, s. 2 if the deceased was maintaining or was under an obligation to maintain the child at the time of his death*
- (d) *the ex-spouse, if any, of the deceased if the deceased maintained or was under an obligation to maintain the spouse at the time of his or her death but not if the spouse has remarried unless the remarriage was to the deceased*
- (e) *all the children of the deceased and his or her ex-spouse*
- (f) *a child, other than a child of the deceased and his or her ex-spouse, who was treated as a child of the family within the meaning of the DA, s. 2 if the deceased was maintaining the child or was under an obligation to maintain the child at the time of his death*
- (g) *any partner or partners of the deceased in a union other than marriage if the partner or partners have satisfied either of the threshold requirements in Recommendation 17-3*
- (h) *any former partner or partners of the deceased in a union other than marriage if the former partner has satisfied one of the threshold requirement and the deceased maintained or was under an obligation to maintain the former partner at the time of his or her death but not if the former partner has married*
- (i) *any child of the deceased other than a child included in item (b),(c), (e) or (f);*
- (j) *the ascendants of the deceased.*

Recommendation 19-2. That the following persons be denied a right to claim:

- (a) *unworthy persons*
- (b) *a child who has attained the age of 18 years unless the child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (DA. S. 28(3)) or there are special circumstances*

which justify the court in making an order or provision for the benefit of the child.

What Criteria Should be Taken into Account in Deciding whether Maintenance Should be Granted and in what Amount?

In fixing the maintenance of a claimant, the following factors were identified:

1. the needs, means and capacities of the claimant, including any physical or mental disability of the claimant, and whether the claimant was receiving maintenance from the deceased at the time of his or her death,
2. any orders made by the court for periodical or lump sum payments in relation to the claimant,
3. any agreements made with respect to maintenance and other relevant matters by the claimant with the deceased,
4. the value of the net assets of the estate;
5. the needs, means and capacities of the beneficiaries of the estate;
6. the rights of other claimants for maintenance;
7. the duration of the marriage or relationship in the case of a spouse or partner.

Presumably a person who under an order of the court during the lifetime of the deceased received a lump sum payment in respect of maintenance would be precluded from receiving maintenance from the deceased.

Recommendation 19-3: That, in fixing the maintenance of a claimant, the following factors were identified:

1. *the needs, means and capacities of the claimant, including any physical or mental disability of the claimant, and whether the claimant was receiving maintenance from the deceased at the time of his or her death,*
2. *any orders made by the court for periodical or lump sum payments in relation to the claimant,*
3. *any agreements with respect to maintenance and other relevant matters made by the claimant with the deceased,*
4. *the value of the net assets of the estate;*
5. *the needs, means and capacities of the beneficiaries of the estate;*
6. *the rights of other claimants for maintenance;*
7. *the duration of the marriage or relationship in the case of a spouse, ex-spouse or partner.*

The court would have the power to determine how the payment of maintenance by the estate would affect the various gifts under the will of the deceased or the distribution on intestacy and to prorate the claims in appropriate cases.

Recommendation 19-4: That the court be given the power to determine how the payment of maintenance by the estate would affect the various gifts under the will of the deceased or the distribution on intestacy and to prorate the claims in appropriate cases.

How Should Claim be Paid?

In order to facilitate the winding up of the estate, claims are paid as a lump sum either all at once or by instalments.

Recommendation 19-5: That a claim be paid as a lump sum either all at once or by instalments.

When Claims Must be Made?

The committee decided that six months after the appointment of the personal representative of the person obliged to pay is a reasonable time but suggested that the court be given a power to extend the time and to freeze the distribution of the estate in appropriate cases. The personal representative making a distribution of the deceased's estate needs to be protected against liability for claims of which he has no notice.

Recommendation 19-6: That a claimant be entitled to make a claim within six months after the appointment of the personal representative of the person obliged to pay and that, after the expiration of that period, the court have a power to extend the time and to freeze the distribution of the estate in appropriate cases.

Recommendation 19-7: That the personal representative of the deceased not be liable for having distributed any part of the deceased's estate if no claim is made within six months of his or her appointment and after ascertaining that no application has been made to the court to extend the time and to freeze the distribution of the estate.

Should there be a Ceiling on Claims for Maintenance?

The Committee considered whether there ought to be a ceiling on claims to protect the beneficiaries of the estate. Such a ceiling could be in the number of months of support or the maximum percentage of the net value of the estate that a claimant can claim or the maximum amount that all claimants can claim. The Committee felt that setting any limit would be ill-advised. They cited the case of disabled child who may never become autonomous and felt that the matter of balancing the claims of the claimants (some of whom may also be beneficiaries) against the claims of all the beneficiaries could be more fairly done by the courts.

SCHEDULE

AN EXAMPLE OF THE PARTITION OF MATRIMONIAL PROPERTY RECOMMENDED BY THE REPORT OF THE COMMITTEE ON FAMILY LAW

Assume that the reformed SLCC reads in accordance with the recommendations set out in Chapter 14 of the Report.

The Committee recommended that there be a mandatory sharing of the value of the family patrimony (Recommendation 14-2(2)) and the optional sharing of their other property, which is called the partnership of sharable property (Recommendation 14-3(2)). To illustrate the scheme, the example assumes that there is no agreement with respect to shareable property, so that the default scheme in the Code will apply (Recommendation 14-3(2) item 3).

The calculations must be made in two stages, the calculation of each spouse's share of the family patrimony and the calculation of each spouse's share of the matrimonial regime.

Fact Situation:

The following was the situation during the marriage.

Fact 1: Paul and Louise got married in January 2, 1990. They did not enter into a marriage contract. During their marriage they each paid their personal debts in a timely way.

Fact 2: At the time of marriage Paul had worked for Cable and Wireless as a technician for 7 years and continued to work for that company throughout the marriage. On retirement, he will be entitled to a pension.

Fact 3: Louise worked as a secretary for the Department of Transport at the time of marriage and had done so for 5 years. She will also be entitled to a Government pension on retirement.

Fact 4: At the time of marriage, Paul was the sole owner of a house worth \$80,000. The balance owed at that time on the house and secured by hypothec was \$70,000. The house was used as the family residence throughout the marriage.

Fact 5: At the time of marriage Paul was also the owner of the household furniture used in the family residence. The furniture was worth \$25,000 and had been bought with money given to him by his parents.

Fact 6: At the time of marriage, Louise had a car that was worth \$15,000, but still owed \$5,000 on it.

Fact 7: At the time of marriage, Louise had just bought a villa complex comprised of four villas that were all rented at all material times. She bought the villas with an inheritance of \$25,000 from her father. The building was worth \$200,000 but was subject to a hypothec of \$175,000. Louise collected rent from each tenant and applied the money against the hypothec, the costs of the running the villa and the purchase of shares (see below).

Fact 8: In 1993, after much urging from Louise, Paul built an extension to the family residence with the income he earned from Cable and Wireless. The house was worth \$90,000 when construction began. The construction costs were \$20,000. The value of the house following construction was \$100,000.

Fact 9: During the marriage, Paul received an inheritance from his godmother in the amount of \$10,000. He gave Louise half of it. The relationship was a bit rocky at the time and, as evidence of his good faith, Paul said to Louise when he handed her the \$5,000, "Dear, I would like you to invest this money. I want you to treat this money and the money you earn from it as your own little nest egg." At Louise's insistence Paul had his lawyer prepare a deed of gift making the gift, the appreciation on it and the income derived from it hers and hers alone.

Fact 10: During his spare time during the marriage, Paul devoted the equivalent of one half day each week to the management of Louise's villa complex for which he was not paid.

Fact 11: In 1991, shortly before the birth of their first child, Louise ceased work to devote all her time to the management of the household. In 1992, their second child was born. During the marriage she did not work outside the home.

Fact 12: She decided, however, to have a garage built underneath her villas with the revenues collected from their rental. The villa complex was worth \$250,000 before construction of the garage began. The construction costs were \$50,000. The value of the building following construction was \$320,000.

Fact 13: During marriage, Louise bought 100 shares for \$25,000. She paid cash for them with Paul's gift of \$5,000 and \$20,000 from rental income d from the villas.

Fact 14: Paul and Louise separated on June 1, 2001. No action for separation was instituted. Paul filed for divorce on July 1, 2003 and the Court granted the divorce shortly after. Louise was granted custody of the two children.

The following was the situation at the time Paul filed for divorce.

Fact 15: The family residence was worth \$120,000. The hypothec had been paid off. The value added to the building by the extension was in the same proportion as it was at the time it was added.

Fact 16: The car was worth \$1,000 and nothing was owed on it.

Fact 17: The furniture was worth \$3,000.

Fact 18: The villa complex was worth \$350,000 and the balance owed and secured by hypothec was \$20,000. The value added to the villa complex by the garage was in the same proportion as it was at the time it was added.

Fact 19: The shares were worth \$75,000.

Fact 20: The accrued value of Paul's pension during the marriage was \$100,000.

Fact 21: The accrued value of Louise's pension was \$20,000.

Stage 1: Calculation of Each Spouse's Share of the Family Patrimony

Step 1: Determine what property is included in the family patrimony. Pursuant to Recommendation 14-2(1), the family patrimony is composed of the family residence, the household furniture, the car and the pension plans.

Step 2: Establish the net value of the family patrimony at the appropriate time in accordance with Recommendation 14-2(3).

The net value will be established on July 1, 2003, the date Paul filed for divorce. (Note that, if there had been a significant difference in the value of the debts or any of the property in the family patrimony between the date of separation and the date of instituting proceedings for divorce, the court has the option of choosing the earlier date (Recommendation 14-2(4) item 3)).

The Family Residence

Paul is entitled to a deduction representing the net value of the property at the date of marriage (Recommendation 14-2(3)) (art. 418 para 1).

The following numbers correspond to the numbers in Column 1 of the following Table.

1. On the date of marriage, the net value of the residence was \$10,000 (\$80,000 - \$70,000) (Fact 4). As owner Paul is entitled to a deduction of \$10,000 which represents the amount he has put into the house before marriage and that he is entitled to recover at the time of partition. Since the hypothec is a debt, it is shown as 0 in Column 4 of the Table, but since it was paid off during the marriage its value is added on at the end of the calculation.
2. The information on the Table reflects the appreciation or gain on Paul's original contribution immediately before the construction of the extension (Fact 8). Since his original contribution was $\frac{1}{8}^{\text{th}}$ of the value of the family residence, he will be entitled to $\frac{1}{8}^{\text{th}}$ of the appreciation. The other $\frac{7}{8}^{\text{ths}}$ of the appreciation of gain will enure to the benefit of the family patrimony.
3. This item reflects the effect of adding the extension (Fact 8). The gain or appreciation is due to the extension and therefore enures to the benefit of the family patrimony only.
4. The gain or appreciation realized between the completion of construction of the extension and the date of instituting of divorce proceedings is due in part to the extension, in part to Paul's original contribution and in part to that portion of the value of the property represented originally by the hypothec (Fact 15). The gain or appreciation of the last-mentioned enures entirely to the benefit of the family patrimony. In order to isolate that portion of the gain or appreciation attributable to Paul's original contribution, it is necessary to factor out the gain attributable to the extension. The necessary calculations are set out set out in Column 2 of the Table.

TABLE 1
NET VALUE OF THE FAMILY RESIDENCE

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
Relevant Dates	Value of Family Residence and Gains in Value	Value of Paul's Original Contribution to Family Residence and the Appreciation Attributable to Paul's Original Contribution	Value Attributable to the Family Residence as Part of the Family Patrimony
1. Jan. 2, 1990	\$80,000 with a hypothec of \$70,000	\$80,000 - \$70,000 = \$10,000 , which is 1/8 of value of Family Residence at the time of marriage	0
2. Jan. 2, 1990 –Sept 1, 1993	Value immediately <i>before</i> construction minus value at the time of marriage = \$90,000 – 80,000 or \$10,000, which must be apportioned between Paul and the Family Patrimony	10,000 X 1/8 (as above) = \$1,250	Total Gain minus Gain attributable to Paul's original contribution or \$10,000 - \$1,250 = \$8,750
3. Dec. 15, 1993	Value after construction= \$100,000, which is a gain of \$10,000 or 10% of the value of the Residence	0 The gain in value in Column 2 is due to the extension alone and does not enure to Paul's benefit	\$10,000
4. Dec.16, 1993 to July 1, 2003	Value at time of instituting divorce minus Value after construction = gain or \$120,000 – \$100,000 = \$20,000. This reflects both the gain on the extension and the gain on Paul's original contribution. If the gain attributable to the extension is factored out of the \$20,000, then the gain attributable to Paul's original contribution can be determined. Gain attributable to extension is 10% of gain of \$20,000 =		

	\$2,000 Gain on Family Residence excluding gain attributable to the extension: $\\$20,000 - \\$2,000 = \\$18,000$ Gain attributable to Paul's original contribution is $1/8 \times \\$18,000 = \\$2,250$ Gain on Family Patrimony attributable to other than the extension or Paul's contribution $\\$18,000 - \\$2,250 = \\$15,750$	\$2,250	\$2,000 \$15,750
	Amount of hypothec paid during the marriage, the value of which is part of the Family Patrimony (Fact 15)		\$70,000
	TOTAL	\$13,500	\$106,500

Paul's deduction in respect of his contribution to the family residence and the gain or appreciation on that contribution is \$13,500.

The Household Furniture

The furniture is excluded for two reasons: it was purchased with a gift from Paul's father and it was purchased before Paul married Louise (Fact 5).

The Car

At the time of marriage, the net value of Louise's car was \$10,000 (\$15,000 – \$5,000) (Fact 6). Since her original contribution before marriage was two-thirds of the value of the car, she will be entitled to two-thirds of its value at the time Paul filed for divorce. The other 1/3 enures to the benefit of the family patrimony.

At the time of partition, the car was worth only \$1,000 (Fact 16). Louise's deduction is two-thirds of that value or \$667. The balance of \$333 will belong to the family patrimony.

Paul's Pension

The accrued value of Paul's pension during the marriage was \$100,000 (Fact 20) (Recommendation 14-2(1) item 4). (In the real world the court will make this valuation of the pension benefits based on pension legislation or on regulations under the reformed SLCC and it is expected that the amount will be determined by an actuary.)

Louise's Pension:

The accrued value of Louise's pension was \$20,000.

Step 3: Determine the share of each spouse in the family patrimony. The calculations in Step 2 have demonstrated how the value of property in the family patrimony is apportioned between deductions (private property) and property in the family patrimony. For the purposes of calculation the equal shares of the spouses, a summary of the relevant information is set out:

TABLE 2

TOTAL VALUE OF THE FAMILY PATRIMONY (BEFORE DEDUCTIONS):

Owner	Property	Value
Paul	family residence	\$120,000
	accrued pension	\$100,000
Louise	car	\$1,000
	pension	\$20,000
Total		\$241,000

TABLE 3

TOTAL VALUE OF DEDUCTIONS FROM THE FAMILY PATRIMONY:

Person Entitled to Deduction	Property to which Deduction Relates	Amount of Deduction
Paul	family residence	\$13,500
Louise	car	\$667
Total		\$14,167

NET VALUE OF FAMILY PATRIMONY: TABLE 2 MINUS TABLE 3 = **\$226,833**

THE SHARE OF EACH SPOUSE IN THE FAMILY PATRIMONY IS
THE NET VALUE DIVIDED BY 2

\$113,416.50

Paul owes Louise \$113,416.50 as a result of the partition. This amount represents Louise's share in the value of a portion of the patrimony of the spouses associated with the character of marriage as an economic partnership. It also recognizes the non-financial contributions of the marriage such as parenting and household chores and the economic disadvantages marriage may entail in terms of missed career opportunities.

To guarantee sharing of the core of family property represented by the family patrimony, it is recommended that the scheme of sharing of the family patrimony be mandatory and not capable of being altered or contracted out of by agreement. Renunciation of the rights in the family patrimony is not permitted until judicial separation or the dissolution or annulment of their marriage or the date of death of one spouse, as the case may be.

Stage 2: Calculation of Each Spouse's Share of the Partnership of Shareable Property

Louise's villas and her shares are not part of the family patrimony so it is necessary to determine how they will be shared under the partnership of shareable property. The scheme recommended by the Committee permits spouses complete freedom to make agreements with respect to all property outside the family patrimony and provides for a default scheme of sharing in the event that there is no agreement (Recommendation 14-3(2)). Since Louise and Paul did not enter into a marriage contract, the default regime applies.

Recommendations 14-3(3) and (4), which set out the key concepts underpinning the partnership of shareable property, should be reviewed before proceeding to the example. It will be noted that, the appreciation on private property is not private property, but is shareable.

The Villa Complex

The villa complex belongs to Louise. She was the owner prior to marriage, having purchased it with \$25,000 given to her as an inheritance by her father (Fact 7). That money is private property pursuant to Recommendation 14-3(4) item 1.

At the time of instituting proceedings for divorce, the villa complex was worth 350,000 and \$20,000 remained to be paid on the hypothec (Fact 18). The net value of the villa complex is \$330,000.

Of that amount, \$25,000 is Louise's private property, leaving a residual value of **\$305,000**. All of this amount is subject to sharing because income collected from private property is shareable pursuant to Recommendation 14-3(3) item 2. The rentals from the villas, from which the hypothec was paid and the underground garage was built (Fact 12), is shareable as well.

The Shares

The \$75,000 in shares belong to Louise (Fact 19). They were bought for \$25,000, which was money from two different sources, Paul's gift to Louise and the rentals from the villa complex, so an apportionment of value as it relates to those two sources must be done. The total gain is \$50,000.

Of the total amount invested in the shares, \$5,000 or 20% came from Paul's gift to Louise (Fact 13). That gift is Louise's private property under Recommendation 14-3(4) item 2, which provides that "the private property of each spouse consists of property...which devolves to that spouse during the matrimonial regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided." That provision includes inter-spousal gifts. By virtue of the deed of gift the appreciation and income from this gift belongs to Louise. Therefore 20% of the increase in the value of the shares at the time of instituting the divorce (20% X \$50,000 gain or \$10,000) is also Louise's. Therefore, the original \$5,000 paid from the gift and the fruits and income from it, namely, \$10,000 or a total of \$15,000 belongs to Louise as her private property.

The \$20,000 balance of the original purchase price of the shares, or 80% of the original purchase price, came from the rents from Louise's villa complex. The fruits and income due or collected from private property are shareable property (Recommendation 14-3(3) item 2). Therefore the original \$20,000 paid from the rents of the villa complex and the fruits and income from it when it was invested in shares, namely, 80% X \$50,000 gain = \$40,000 is shareable property.

The total sharable property is therefore $\$20,000 + \$40,000 = \mathbf{\$60,000}$.

Louise must therefore share half of $\$305,000 + \$60,000 = \$365,000/2$ or **\$182,500** with Paul.

Compensation is therefore payable between the spouses as follows:

Conclusion

What Louise owes Paul from the partition of the partnership of shareable property	\$182,500.00
What Paul owes Louise from the partition of the family patrimony	- <u>\$113,416.50</u>
What Louise owes Paul	\$ 69,083.50

It will be noted that theoretically there is the possibility of the court ordering an unequal division of the family patrimony (Recommendation 14-2(4) item 1). There are no facts in this case to support such an order.

There are, however, some facts to support a claim by each of the spouses for a constructive trust or compensatory allowance (Recommendation 14-3(7)). First, Louise gave up her job at the Ministry of Transport in order to take care of the family (Fact 11). Second, Paul devoted the equivalent of one half day each week to the management of Louise's villa complex for which he was not paid (Fact 10). The Court will have to be addressed by the court, which will have to decide whether these claims are subsumed in the partition of the property or whether they are grounds for an adjustment.
