

**Report on
the Parental Support
Obligation in
Section 90 of the
Family Relations Act**

British Columbia Law Institute

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

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INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Report on the Parental Support Obligation in Section 90 of the Family Relations Act

Section 90 of the *Family Relations Act* creates a legal obligation for adult children to support their dependent parents. This legal obligation exists independently of any moral obligation that children may feel to support their parents in old age. Section 90 gives a parent the right to go to court to compel a child to make payments to the parent.

This parental support law has its origins in a desire on the part of governments in the 1920s and 1930s to reduce their obligations to provide social assistance to the indigent. It has long outlasted that purpose and now serves as a seldom-used analogue of child and spousal support. Section 90 does not meet the practical needs of poor older adults. The litigation it generates shows real signs of frustrating those older adults, their families, and the courts. Furthermore, parental support is an outdated concept that does not fit well with contemporary society. This report recommends modernizing the law by repealing section 90.

This report was made possible by funding from the Ministry of Attorney General and forms part of the Ministry's review of the *Family Relations Act*.



Ann McLean
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March 2007

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EXECUTIVE SUMMARY

This report addresses the topic of parental support. Its focus is on the legal obligation that adult children have to pay monetary support to a parent who has become dependent on the child for reasons of age, illness, infirmity, or economic circumstances. This legal obligation is set out in section 90 of the *Family Relations Act*, this province's main family law statute. Funding for this report has been provided by the Ministry of Attorney General. The report forms part of the Ministry's broader, full-scale review of the *Family Relations Act*.

This report does not address any of the moral, psychological, or economic issues that may arise when an adult child voluntarily provides care, most often in the form of services, to a parent. That phenomenon is wide-ranging, multi-dimensional, and has been the subject of intensive study elsewhere. In contrast, the legal obligation of an adult child is not well known and is little discussed and understood. Under section 90 of the *Family Relations Act*, a dependent parent may sue an adult child. If successful, the parent will receive an award of monetary support from the child. Section 90 does not authorize a court to order that a child provide caregiving services to a dependent parent.

In its current guise, section 90 appears to be based on the proposition that litigation can provide some assistance in relieving poverty, particularly among older adults. The tensions inherent in that proposition have given the courts considerable difficulty in applying the provision, on the infrequent occasions when a parental support claim has been contested. Over the course of its eighty-five year history, the parental support law has only rarely been invoked. (But it has generated much more litigation over the past fifteen years than over the previous seventy.)

Both the practical difficulties of applying section 90 and its troubling theoretical underpinnings have led the Law Institute to conclude that the section should be repealed. Repealing section 90 would not deprive the poor of a useful remedy and would be a welcome modernization of the law. The Law Institute arrived at this conclusion after a thorough examination of the legislative history of, judicial interpretation of, and policy rationales for parental support laws.

This report contains six chapters. The first chapter is a brief introduction and the sixth is a short conclusion. The bulk of the analysis in the report is contained in its middle four chapters.

Chapter 2 examines the history of parental support laws, from their origins in England to their current articulation in British Columbia. The chapter begins with the advent of parental support in England. There was no obligation placed on children to support their

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parents at common law. Parental support came into being as part of the Poor Laws, which were designed as a comprehensive response to the problem of poverty that arose and deepened throughout the sixteenth century. For the first time in English legal history, the Poor Laws created a framework for delivering cash relief to the destitute. The role of parental support in this framework was to minimize the financial burden placed on government to support the elderly and disabled poor. The theory was that the families of these people would be responsible for their support, and the parental support law would give the government a way to enforce that obligation and reduce or recover any financial assistance it was required to give. The historical record shows that the legislation did not work well in practice, and the government rarely resorted to its use.

The chapter then moves on to consider the Canadian legislative history. Parental support laws were first enacted in British Columbia in 1922. This province was part of a trend that would see almost all the provinces and territories enact parental support legislation during the hard economic times of the 1920s and 1930s. The reason for enacting parental support legislation in Canada echoes the reason that convinced the English to enact it 300 years earlier. In the 1920s, Canadian governments—federal, provincial, and municipal—for the first time recognized the need for direct cash payments to the indigent as part of the social welfare system. Once again, the theory that parental support would help lighten the welfare burden on government supplied the rationale for enacting parental support laws. And once again, those laws proved to be a disappointment in practice. They were almost entirely ignored until the 1970s, when a significant development took place. In the wake of legislation at the federal level in the late 1960s to liberalize divorce, the provinces came under extraordinary pressure to reform their antiquated family law statutes. In British Columbia, as in most of the other provinces and territories, parental support was caught up in this wave of reform. For reasons that remain obscure, parental support was placed on the same footing as child and spousal support. In effect, our parental support law was cut loose from its moorings in the public welfare system and set adrift in the litigation-based family law system.

Chapter two concludes by surveying the results of this decision, the small body of court cases on section 90 that has emerged in the 1990s and the present decade. Section 90 gives the courts precious little direction on resolving both the theoretical tensions inherent in treating parental support as another family support obligation and the practical problems raised by this type of litigation. All too often, the cases have displayed the dysfunctions that have caused dissatisfaction with the family law system as a whole.

Chapter three briefly makes the case for reform of the law on parental support in British Columbia. In part, this is done by pointing to the frustrations of litigants in relying on section 90 and the courts in applying the current law. The chapter also surveys some recent data on demographic and economic trends concerning older adults in British Columbia.

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Chapter four addresses the major policy issue to consider in reforming parental support laws. This issue is whether parental support legislation (such as section 90) can be amended in a way that will allow it to be relevant to contemporary society. If this is not possible, then section 90 should simply be repealed. The chapter surveys academic commentary on the policy rationales for parental support legislation. It summarizes the major arguments of proponents and opponents of parental support. These arguments are almost perfectly symmetrical. Whereas proponents argue that parental support laws provide the poor with a sustainable and necessary source of funds, strengthen family solidarity, and lessen the burden on the public purse, opponents argue that they do not provide practical assistance to the poor, disrupt family relations, and have no meaningful impact on government finances. The chapter ends by setting out the reasons for Law Institute's conclusion that, on balance, these opposing arguments should be resolved in favour of repealing section 90.

Chapter five deals with a series of discrete issues that would arise if section 90 were to be amended. These issues are drawn from comments in the case law and from consideration of the legislation in force in other jurisdictions. They are primarily of a technical nature. Since there is little academic commentary on the practical and drafting issues that would be faced in amending a parental support law, we felt it would be useful to canvass these issues. No recommendations are made in this chapter, as our basic recommendation is to repeal, not amend, section 90.

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I. INTRODUCTION

Almost everyone appreciates that a parent must give material support to that parent's child or children who have not reached adulthood. If a parent fails to support a minor child, then that parent has breached a legal obligation that exists independently from the parent's moral duties.

But most British Columbians would be surprised to learn that a corresponding legal obligation exists for adult children. If an adult child has a parent who has become dependent on that child, then that child must support that parent if the child has the means to do so. If the child refuses, then the parent has a legal right to sue the child and obtain a court order requiring the child to pay monetary support. This law is laid down in one short section of the *Family Relations Act*.¹

Obligation to support parent

- 90** (1) In this section:
- “**child**” means an adult child of a parent;
 - “**parent**” means a father or mother dependent on a child because of age, illness, infirmity or economic circumstances.
- (2) A child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.

In July 2006, the British Columbia Law Institute received a request from the Ministry of Attorney General to take on a project that would examine parental support, discuss the options for reform of the law in this area, and make recommendations on whether section 90 should be amended and, if so, what those amendments should be. This project has been carried out to assist the Ministry in its comprehensive review of the *Family Relations Act*.²

This report begins by examining how the law of parental support came into existence and where it stands today. It delves into the origins of parental support, both in England and in British Columbia. It charts a key development in the law of parental support in British Columbia, which took place in the 1970s—the evolution of parental support from an element of the public welfare system into a litigation-based adjunct of child and spousal support. Finally, it reviews the leading British Columbia court decisions on parental sup-

1. R.S.B.C. 1996, c. 128, s. 90.

2. See British Columbia, Ministry of Attorney General, *Review of the Family Relations Act* (February 2006), online: Ministry of Attorney General <http://www.ag.gov.bc.ca/justice-services/publications/Review_Family_Relations_Act.pdf>.

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port. After laying out this background information, this report then moves on to consider how the law of parental support in British Columbia should be reformed. The major policy options are canvassed and evaluated. In addition, a number of smaller, discrete issues are considered. This report concludes by setting out the Law Institute's recommendations for reform.

II. ORIGINS AND DEVELOPMENT OF PARENTAL SUPPORT

A. Introduction

The origins of parental support laws shed a considerable amount of light on their scope and rationale. Intuitively, one would suspect that parental support finds its genesis in a moral sentiment, which was translated into a legal obligation to reinforce an idealized sense of how a family should act. While this perception holds true for many civil law jurisdictions,³ it is inaccurate for those jurisdictions that are in the English common law tradition. The story of how the common law world arrived at its parental support laws is rather more complicated. At common law, children are under no obligation to support their parents. In common law jurisdictions, parental support is entirely a creature of statute. And its creation was intimately bound up with a legislative response to the problem of poverty in England in the sixteenth century.

B. Parental Support in England

From the mid-fourteenth to the early sixteenth century, poverty in England was addressed by a combination of tight controls on the mobility of labour,⁴ criminal prosecution of vagrancy,⁵ and private (mainly religious) charity.⁶ By the middle of the sixteenth century, this approach was beginning to fail for a number of reasons.⁷ In large measure, it was undone by the economic dislocations accompanying the long-term decline of England's feudal system and the corresponding rise of a capitalist economy. In addition, a cyclical downturn created a dramatic increase in the number of people living in poverty.⁸ And the

3. See Jean Van Houtte & Jef Breda, "Maintenance of the Aged by Their Adult Children: The Family as a Residual Agency in the Solution of Poverty in Belgium" (1978) 12 *Law & Soc'y Rev.* 645 at 646–49 (discussing origins of parental support in legal rules formulated in the late Roman Empire). Contemporary civil law jurisdictions have followed these Roman rules. See, e.g., France: Arts. 205–07 C. civ.; Québec: Arts. 585, 587 C.C.Q.; Louisiana: LA. CIV. CODE art. 229 (2006).

4. See, e.g., *Statute of Labourers*, 25 Edw. III, st. 1 (1350–01), preceded by the *Ordinance of Labourers*, 23 Edw. III, c. 1–8 (1349).

5. See, e.g., 11 Hen. VII, c. 2 (1494); 19 Hen. VIII, c. 12 (1527).

6. See William Holdsworth, *A History of English Law*, vol. 4, 3d ed. (London: Methuen & Sweet / Maxwell, 1945) at 388–90.

7. See Holdsworth, *ibid.* at 391–92 (summarizing the various causes contributing to the rise in poverty and the government's response to it).

8. See Paul A. Fideler, *Social Welfare in Pre-Industrial England: The Old Poor Law Tradition* (Hound-

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widespread state expropriations of church and monastic property only served to accelerate the decline, as it hobbled the institution that had traditionally been responsible for the relief of poverty.⁹

Faced with both deteriorating social conditions and a newfound popular sense that the government bore some responsibility for managing the crisis of poverty, Parliament began to act. Its first halting steps consisted of a series of statutes providing for even stricter labour controls, hoping to keep poverty manageable at the local level. Next, in an attempt to shore up the failing charitable sector, it enacted statutes designed to make charitable giving compulsory.¹⁰ Finally, it legislated harsh punishments for the unemployed and alms-seekers, or, as the statutes labelled them, “rogues, vagabonds, and sturdy beggars.”¹¹ As an example of the measures employed, one Act¹² established a barbaric progression of punishments for these individuals, starting with whipping for a first offence, moving to the cutting off of part of the ear for a second, and concluding with imprisonment and execution for a third.¹³

Needless to say, this approach did not solve the problem of poverty. In fact, these Acts turned out to be little more than paper tigers, as it was difficult to find public officials who were willing to enforce them.¹⁴ With poverty worsening, it was necessary to take a different and more practical tack. The new approach was crystallized and codified in two key statutes, enacted respectively in 1597¹⁵ and 1601,¹⁶ which are known to posterity as the Poor Laws.¹⁷

mills, UK: Palgrave Macmillan, 2006) at 68 (“Conditions that would lead to an increase in structural poverty for the next 100 years came to the fore around 1540.”).

9. See Jacobus tenBroek, “California’s Dual System of Family Law: Its Origin, Development, and Present Status (Parts I & II)” (1964) 16 Stan. L. Rev. 257 at 266 (“Though church charity probably declined before 1536, expropriation of the monasteries then and in 1539 accelerated the process.” [footnotes omitted]) & 900; James L. Lopes, “Filial Support and Family Solidarity” (1975) 6 Pac. L.J. 508 at 510 (“The need became critical in the last half of the sixteenth century when Henry VIII expropriated the monasteries and gave this property to his followers, thus eliminating what had been a major source of assistance to the poor.”).
10. See, e.g., 27 Hen. VIII, c. 25 (1535).
11. See S.G. Checkland & E.O.A. Checkland, eds., *The Poor Law Report of 1834* (Harmondsworth, UK: Penguin, 1974) [Poor Law Report] at 72–81 (citing and discussing the relevant statutes).
12. *Supra* note 10.
13. See Poor Law Report, *supra* note 11 at 74–75.
14. See Poor Law Report, *ibid.* at 75.
15. *An Act for the Reliefe of the Poore*, 39 Eliz. I, c. 3 (1597).
16. *An Act for the Relief of the Poor*, 43 Eliz. I, c. 2 (1601).
17. See Holdsworth, *supra* note 6 at 397 (“These Acts taken together form a great code in which is embodied the experience derived from the legislative and municipal experiments of the preceding years.”)

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The Poor Laws were complex and multifaceted statutes, but only a few key points need to be grasped for the purpose of this report. First, the Poor Laws provided for direct cash payments from the government to the poor. Second, despite their being national legislation, the Poor Laws were designed to be administered at the local level. Local religious authorities would elect “overseers” who would be responsible for setting the poor law “rate,” or the amount of relief to be provided. The “rate” was then raised by taxing local landowners.

It probably goes without saying that a society that was seriously contemplating whipping, mutilating, and executing the poor in one year is not a society that would institute a generous program of social assistance in the next. It should come as no surprise that one theme ran clearly and forcefully through the Poor Laws, and that theme was that cash relief from the local authorities would only be given as a last resort. Here, the legislation distinguished between the able-bodied poor, who from age twelve up were to be forced to labour in workhouses, and the disabled poor, or as the Act of 1601 called them, the “poor, old, blind, lame, and impotent.”¹⁸ These people were to look first to their immediate family members—parents, children, or grandparents—for relief. If support was not given, then the parent, child, or grandparent was liable to forfeit to the local authorities twenty shillings for every month in which they failed to provide support.¹⁹ So this is the origin of parental support in the common law world—it was a device primarily intended to relieve local governments from the responsibility to provide for the poor, or to reimburse those governments for any provision made to the poor.

This, at least, was the theory underlying the legislation. The practice proved to be quite different. In their landmark report of 1834, the Poor Law Commissioners concluded that “[i]t appears from the whole evidence, that the clause of the [Act of 1601] which directs the parents and children of the impotent to be assessed for their support is very seldom enforced.”²⁰ The Commissioners did not explain why the parental support obligation was rarely enforced in the seventeenth and eighteenth centuries, and the reasons may now be lost to us. Nevertheless, common sense would suggest that this system was costly, inefficient, inconvenient, and widely disliked by the population that was subject to it.²¹

[footnote omitted]).

18. *Ibid.*, s. 7.

19. *Ibid.*, ss. 7, 11.

20. Poor Law Report, *supra* note 11 at 115.

21. See David Thomson, “‘I am not my father’s keeper’: Families and the Elderly in Nineteenth Century England” (1984) 2 *Law & Hist. Rev.* 265 at 266 (positing that “statutory prescription and social practice seldom conformed”).

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Before leaving England, it is instructive to bring the story of parental support there to a close. After a brief attempt at more robust enforcement following on the Poor Law Report in the late nineteenth century,²² which proved very unpopular,²³ the legal obligation of parental support fell into disfavour, and was repealed as part of the legislation setting up the United Kingdom's comprehensive post-World War II welfare state.²⁴

C. Parental Support in British Columbia

1. INTRODUCTION

Turing to British Columbia, the origins of parental support in this province bear a striking similarity to the origins of the English provision, but parental support has developed in British Columbia—and in most of the rest of common law Canada—in ways unseen in England.

2. ORIGINS IN THE 1920S

British Columbia first enacted parental support legislation in 1922.²⁵ This province was not alone in taking this step. Nearly all the provinces and territories enacted similar legislation in two waves. The first wave crested in the early 1920s;²⁶ the second in the 1930s.²⁷

The date of first enactment is significant because it shows that this legislation made its appearance in Canada during times of economic crisis. The dire conditions of the Great Depression are well known; perhaps less widely appreciated is the harshness of the economic recession that followed World War I and blighted the early 1920s. In British Columbia, the Report of the Deputy Minister of Labour for 1921 described that year as “. . . probably the most critical period the industries of this Province have ever known,”²⁸ fea-

22. See Thomson, *ibid.* at 280–85.

23. See Thomson, *ibid.* at 285.

24. *National Assistance Act*, 1948 (U.K), 11 & 12 Geo. VI, c. 29, s. 1.

25. *Parents' Maintenance Act*, S.B.C. 1922, c. 57.

26. Alberta: *The Maintenance Order Act*, S.A. 1921, c. 13; Saskatchewan: *The Parents Maintenance Act*, 1923, S.S. 1923, c. 53; Ontario: *The Parents Maintenance Act*, 1921, S.O. 1921, c. 52.

27. Manitoba: *The Parents' Maintenance Act*, S.M. 1933, c. 31; New Brunswick: *The Parents Maintenance Act*, S.N.B. 1936, c. 50; Prince Edward Island: *The Parents' Maintenance Act of Prince Edward Island*, S.P.E.I. 1933, c. 12; Nova Scotia: *The Parents Maintenance Act*, S.N.S. 1933, c. 14; Northwest Territories: *Maintenance Act* (assented to 7 March 1938). Yukon enacted its legislation in the 1950s. *Maintenance Act*, S.Y. 1958, c. 9. Newfoundland did not become a province until 1949. It adopted parental support legislation relatively early in its existence as a British colony. *An act to afford relief to wives and children deserted by their husbands and parents*, S.N. 1834 (2d Sess.), c. 8. Québec, the country's lone civil law jurisdiction, also had parental support legislation dating from the nineteenth century. Arts. 166–68 C.C.L.C. (1866).

28. British Columbia, Legislative Assembly, “Report of the Deputy Minister of Labour for 1921” by J.D.

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turing “. . . an alarming state of unemployment . . .”²⁹ and “. . . a period of falling wages. . . .”³⁰ The federal government reacted to the crisis by instituting an emergency program providing cash grants to those in need. This response departed from what was, until then, the usual pattern of responding to unemployment by creating make-work programs. The federal government attached two significant conditions to the program. First, it was to be administered at the local level and would only come into effect if requested by the local government. Second, the cost of the program was to be shared equally by the federal, provincial, and local governments.³¹

There is no direct statement of legislative intent that explains why British Columbia enacted parental support legislation in 1922. But all signs point to allaying the concerns of local governments that their newfound obligations to relieve poverty would overwhelm their ability to raise revenue as a primary reason for enacting this legislation. This rationale was broadly similar to the rationale underlying the English legislation: poor people, who cannot work, should look first to their families for support.

This policy was supported by the procedural machinery set out in the Act. For example, the legislation could be invoked by the complaint of a parent, the Attorney General, or “[w]here the parent resides in any municipality required by law to make provision for its poor and destitute, the municipality may by any constable or peace officer . . . make the complaint on behalf of the parent, whether aid has been given by the municipality or by any public organization or institution. . . .”³² Upon receiving a complaint, the local magistrate was required to issue a summons to the child to appear before the magistrate and “. . . show cause why an order should not be made against him or her under [the] Act for the maintenance of the parent.”³³ If the child failed to show cause, or failed to attend the hearing, the magistrate, upon being satisfied that the parent was unable to support himself or herself due to age, disease, or infirmity and that the child had sufficient means to contribute to the maintenance of the parent, could order the child to pay support.³⁴ The support order could not exceed twenty dollars per week.³⁵ The legislation in force in the other provinces and territories contained nearly identical provisions.

McNiven in *Sessional Papers*, 2d Sess., 15th Parl., vol. 2 (1921) at P8.

29. *Ibid.*

30. *Ibid.* at P1.

31. *Ibid.* at P1–P2.

32. *Parents’ Maintenance Act*, *supra* note 25, s. 4 (2).

33. *Ibid.*, s. 4 (1).

34. *Ibid.*, s. 5 (1).

35. *Ibid.*, s. 5 (1).

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As in England, the theory that parental support would relieve governments from providing for the poor did not hold up in practice. In fact, the legislation was hardly ever invoked. The number of court cases from before the 1970s that considered it could be counted on the fingers of one hand.³⁶ Of course, the legislation was designed to be administered by local officials, such as magistrates and justices of the peace, and not by the courts. But it was ignored at the local level too. A historian who reviewed the Attorney General's correspondence files in the British Columbia provincial archives found references to only 11 cases in the 1920s and 1930s.³⁷ After noting that a fuller set of records existed in Ontario, and that they disclosed a similar lack of use of the legislation, he concluded that "[t]he parents' maintenance act played an extremely minor role in facilitating substantial family support for the elderly."³⁸ The legislation appears to have been forgotten in the years after World War II. But, in contrast to the United Kingdom, parental support legislation was not repealed when Canada created its welfare state. Instead, it survived into the 1970s, where its character changed in British Columbia, and in most of the other provinces and territories.

3. STATUTORY REFORM IN THE 1970S

Parental support legislation in Canada has only retained its original form, in a separate statute administered by local magistrates or justices of the peace, in the prairie provinces.³⁹ All the other provinces and territories revised their legislation in the 1970s or 1980s.⁴⁰ The impetus for this reform had nothing to do with parental support legislation

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36. See *Ste. Marie v. Ste. Marie*, [1929] 4 D.L.R. 1076 (Sask. Dist. Ct.); *R. v. Skilling*, [1935] 1 W.W.R. 183 (B.C. Co. Ct.).
37. James G. Snell, "Filial Responsibility Laws in Canada: An Historical Study" (1990) 9 Can. J. on Aging 268 at 271.
38. *Ibid.* at 272. See also Manitoba Law Reform Commission, *Informal Report on Parents' Maintenance Legislation* (Rep. No. 11A, 1981) [unpublished, archived at the British Columbia Law Institute] at 3 (finding that only three applications were made under the Manitoba Act between its enactment in 1933 and 1981).
39. Saskatchewan: *The Parents' Maintenance Act*, R.S.S. 1978, c. P-1; Manitoba: *The Parents' Maintenance Act*, C.C.S.M. c. P10. See also *infra* note 137 and accompanying text for a discussion of reform in Alberta.
40. Ontario: *Family Law Reform Act*, S.O. 1978, c. 2, s. 16 (now *Family Law Act*, R.S.O. 1990, c. F.3, s. 32); New Brunswick: *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 114 (now *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 114); Prince Edward Island: *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 18 (now *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 32); Nova Scotia: *Family Maintenance Act*, S.N.S. 1980, c. 6, ss. 15-17 (now *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, ss. 15-17); Newfoundland and Labrador: *Family Law Act*, S.N.L. 1988, c. 60, s. 38 (now *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 38); Yukon: *Matrimonial Property and Family Support Act*, S.Y. 1980 (2d Sess.), c. 15, s. 30.4 (now *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 33; Northwest Territories: *Family Law Act*, S.N.W.T. 1997, c. 18, s. 17. The Northwest Territories legislation is duplicated for Nunavut by section 29 of the *Nunavut Act*, S.C. 1993, c. 28.

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itself. Instead, parental support was caught up in a general trend to reform family law, which swept the provinces in the wake of the federal government's liberalization of divorce in the late 1960s.⁴¹

British Columbia's experience is representative of this trend. In 1972, the parental support statute was consolidated together with a number of other Acts to form province's main family law statute, the *Family Relations Act*.⁴² The former statute retained some of its independent flavour—it was self-contained in a separate Part⁴³ of the larger *Family Relations Act*. The only notable changes were procedural: proceedings would now be commenced in Provincial Court, rather than before a local magistrate, and local governments no longer had standing to commence a proceeding. But, when the *Family Relations Act* was completely overhauled in 1978,⁴⁴ parental support was taken along for the ride. The changes were both symbolic—parental support was, for the first time, grouped with the other family support obligations—and substantive—the amorphous category of “economic circumstances” was added to the list of factors that would entitle a parent to support. When the two rounds of changes are tallied together, they show that parental support in British Columbia in the 1970s lost the characteristics that distinguished it as a part of a public social welfare system, which were local administration, the standing of local governments to commence proceedings,⁴⁵ and payment of support conditioned strictly on inability to work. In effect, these changes assimilated parental support to the more familiar support obligations that followed on the breakdown of a marriage—spousal support and child support.⁴⁶

Again, there is little direct evidence of the reasons for making these changes. When the 1978 bill came up for consideration, the Legislature's attention was clearly focussed

41. See *Divorce Act*, S.C. 1967–68, c. 24.

42. S.B.C. 1972, c. 20.

43. *Ibid.*, Part V (ss. 43–47).

44. S.B.C. 1978, c. 20.

45. The last vestige of public standing to enforce a parental support obligation was eliminated in 2000, when the right of the Attorney General to commence an action under section 91 of the *Family Relations Act* was repealed. See *Family Relations Act*, R.S.B.C. 1996 (Supp.), c. 128, s. 7 (a). (This provision was brought into force on 28 February 2000. See B.C. Reg. 12/00.) But see *infra* note 91.

46. Some commentators have theorized that a dual system of family law exists in common law jurisdictions. See, e.g., tenBroek, *supra* note 9 at 261 (“Thus the family law of the poor, which evolved as an integral part of the labor and poor law systems, was the creation of Parliament and was then as today primarily statutory. The family law of the rest of the community was created by the common-law courts. It was integrated into the main body of the nation's statutory law only as it was a part of the feudal law of inheritance and wardship. Here the role of the courts was primary and that of Parliament secondary.”) One way to understand the effect of the changes in the 1970s is to appreciate that they moved parental support in British Columbia out of its traditional place in the poor law system and into the other, court-driven, system.

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elsewhere, on other parts of a set of sweeping legislative changes. In introducing the bill for second reading, the Attorney General remarked that one of its five principal elements was “. . . that the maintenance of spouses, children and dependent parents will be based on reasonable economic need rather than on the notion of fault, with emphasis upon the duty of people to take responsibility for their own lives and wherewithal where they can. . . .”⁴⁷ These remarks do little to clarify the government’s intentions for its reformed parental support obligation. Parental support before 1978 had nothing to do with fault; that concept is more applicable to spousal support. Further, the idea of self-sufficiency was not translated into the legislation, which says nothing on this point. The obvious differences⁴⁸ between spousal and child support, which in 1978 were becoming pressing concerns due to the rise of divorce, and parental support, which is in no way connected to the breakdown of a marriage, were simply glossed over in the legislation. In addition, the drafting retained language (such as “dependent”) that was more consistent with the public welfare origins of parental support than its new home as one of the family support obligations. The new legislation, in effect, prepared the ground for some thorny problems, which would appear in due course in the courts.

4. COURT DECISIONS IN THE 1990S AND 2000S

Court decisions involving parental support represent a trickle next to the flood of cases on spousal and child support.⁴⁹ There were hardly any cases in the immediate wake of the family law reforms of the 1970s and 1980s. More cases have appeared in the 1990s and in this decade. A distinct body of law has begun to emerge, one that shows the strain of trying to apply concepts created for spousal and child support cases to parental support cases.

The cases have been concentrated in two jurisdictions: British Columbia and Ontario. The majority of the cases are simply applications for parental support, but a number of them raise parental support as a collateral issue to some other dispute.

47. British Columbia, Legislative Assembly, *Official Reports of Debates of the Legislative Assembly (Hansard)*, (27 June 1978) at 2673 (Garde Gardom). In the line-by-line review of the bill the parental support section was approved without comment. *Ibid.* at 2693.

48. The most obvious difference is the element of choice in creating the relationships. Despite differences in individual circumstances, at bottom people make a voluntary decision to marry (or, to accommodate later changes to the *Family Relations Act*, to enter into a non-marital spousal relationship) and to have and raise children. This element of choice is absent for children, who, as the old adage goes, cannot choose their parents.

49. The caseload of the Family Maintenance Enforcement Program—which enforces court orders involving child support, spousal support, or parental support claims—provides one indication of the relative scarcity of parental support cases. In autumn 2006, out of approximately 50 000 active files, only 10 involved claims of parental support. Telephone conversation with Ringo Dosanjh, Deputy Director of Maintenance Enforcement (20 November 2006).

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One fact pattern that has appeared repeatedly is an attempt to join an adult child in a dispute between divorcing parents over spousal support. The intent is to obtain a contribution from the child, thereby lowering the amount that the payor spouse will be required to pay. Such an application was rejected in British Columbia, on the basis the applicant had no standing under the Act,⁵⁰ but was accepted in Ontario, where the court found that liberal civil procedure rules allowed a child to be joined.⁵¹ Parents have also applied for support from children after failing to obtain support from a spouse who has transferred or concealed assets. These cases have met with mixed success, with awards being granted against a child who apparently participated in judgment-proofing one parent,⁵² and being denied because the underlying trust claim strayed too far outside the boundaries of parental support legislation.⁵³

Parental support claims have also cropped up in a few cases that primarily involved a dispute over property. In one case,⁵⁴ a mother and her son and daughter-in-law purchased a house together, putting title jointly in their names. Each of the parties contributed funds to the purchase of the house, but the mother contributed the greatest amount. The mother obtained her funds by mortgaging a house she solely owned, which she then rented out, using the rent to make the mortgage payments. The parties found they were unable to live together, and the mother moved back into her other house. Now she was deprived of her rental income and was faced with mortgage payments that she was unable to afford. The court rejected her application for support. In another case,⁵⁵ which involved similar facts, the court awarded interim support. The key fact that led to the different results was the ability of the child to pay.

This group of parental support judgments indicates that the legislation is being used as a stopgap in some cases. For one reason or another, the court was unable to grant a parent a remedy in a dispute over spousal support or property, and it turned to parental support as a means to provide some relief.⁵⁶

50. See *Smeland v. Smeland* (1997), 38 B.C.L.R. (3d) 96 (S.C.).

51. See *Baddeley v. Baddeley* (1989), 71 O.R. (2d) 318, 65 D.L.R. (4th) 130 (H.C.J.).

52. See *Whiteley v. Brodie*, [1994] O.J. No. 1038 (Prov. Div.) (QL); *Re Blum and Blum* (1982), 132 D.L.R. (3d) 69 (Ont. Prov. Ct.), *aff'd (sub nom. Blum v. Blum)*, [1982] O.J. No. 610 (Co. Ct.) (QL).

53. See *Puskeppelies v. Puskeppelies*, [1997] B.C.J. No. 2080 (S.C.) (QL).

54. *Nevill v. Nevill*, [1998] B.C.J. 2802 (S.C.) (QL).

55. *Peach v. Emlyn*, [1999] B.C.J. No. 1455 (S.C.) (QL).

56. Although it is not entirely clear, *Nevill v. Nevill* and *Peach v. Emlyn* may be instances of private care agreements gone awry. Other work by the British Columbia Law Institute may be germane here. See *Report on Private Care Agreements Between Older Adults and Friends or Family Members* (BCLI Rep. No. 18) (Vancouver: The Institute, 2002).

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Among cases that raise the issue of parental support squarely, the courts have tended to focus on the parent's need for support and the child's ability to pay—the traditional needs-and-means analysis familiar from older spousal support cases. The cases have been largely fact-driven exercises, concerned with tallying up the parents' and children's economic circumstances. To the extent that any theoretical rationale can be discerned in them, these cases show the beginnings of a development in parental support that parallels a more widely discussed development in spousal support—the evolution from awards based on needs-and-means to awards based on economic compensation.⁵⁷ Ironically, although this development has led to a more generous approach to spousal support by focussing the court's attention away from the individual circumstances of the parties and on broader social phenomena,⁵⁸ it has tended to have the opposite effect in parental support, serving instead as a limiting factor by introducing parental conduct as a major consideration in some parental support cases.⁵⁹

Even more noteworthy than these underlying theoretical anomalies is the practical effect of parental support cases. Although the body of jurisprudence is small, it displays many of the dysfunctions that can plague family law litigation. Many of the cases consist of repeated applications for interim support or other interlocutory remedies, with no final resolution at trial.⁶⁰ Breach of court orders, particularly those requiring timely and full disclosure of financial information, is a recurring problem.⁶¹ All too often, the proceedings degenerate into allegations of abuse, stretching back many years into the past.⁶² As a result,

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57. See *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 15, 169 D.L.R. (4th) 577, McLachlin J. (for the court) [*Bracklow* cited to S.C.R.] (identifying “. . . three conceptual grounds for entitlement to spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory”).
58. See Carol J. Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act*, 1985 (Parts I & II)” (1991) 7 C.F.L.Q. 155 & 270; Carol Rogerson, “Spousal Support After *Moge*” (1996–97) 14 C.F.L.Q. 281.
59. Here it should be noted that Ontario's legislation differs from British Columbia's: it contains an express condition that the parent have cared for the child or provided support in the past, which points even more clearly to compensation as a rationale for the legislation.
60. See, e.g., *Anderson v. Anderson*, [2000] B.C.J. No. 2694 (S.C. Master) (QL), *aff'd*, [2001] B.C.J. No. 418 (S.C.) (QL); *Godwin v. Bolsco* (1993), 45 R.F.L. (3d) 310 (Ont. Prov. Div.) [*Godwin* (Prov. Div.)]; *Godwin v. Bolsco*, [1993] O.J. No. 4227 (Gen. Div.) (QL), *aff'd (sub nom. Bolsco v. Godwin)* (1995), 16 R.F.L. (4th) 419 (Ont. C.A.) [*Godwin* (C.A.)].
61. See, e.g., *Hua v. Lam* (1985), 49 R.F.L. (2d) 6 at 7 (B.C. Prov. Ct.), Collings Prov. Ct. J. (“[b]oth [parties] have been somewhat reticent in discussing their finances with the court . . .”); *Godwin* (C.A.), *ibid.* at para. 5, Finlayson J.A. (“The problem that now confronts the court finds its genesis in the reluctance of the appellant children to file financial statements, despite having been ordered to do so. . . . They said they feared their mother, that she was a member of a cult, that she wanted the money for this cult. . . .”).
62. See, e.g., *S.A.G. v. M.R.G.*, 2000 BCPC 45 at para. 29, Gillis Prov. Ct. J. (“. . . the main bone of contention [before the court] is: does the conduct of the parent in her capacity as a parent affect her ability

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the courts are often lacking full and clear evidence on which to base a judgment, and in the absence of any guidance from the legislation, are left with applying either normative notions of what ideal family behaviour should be or a kind of rough common sense.⁶³

The *Newson* litigation is a striking example of all of these pathologies. *Newson* involved a claim launched by a father in his seventies against his six adult children. The father had been successful in business in the 1960s and early 1970s. This period corresponded with the time when his children were in their infancy or teens. As a result, the children benefited from an affluent upbringing. In the late 1970s, business reversals, marital problems, and an extravagant lifestyle eroded the father's wealth. (But this decline in his fortunes did not have a direct financial impact on the children, as four of them had already reached the age of majority and the other two continued to be supported by their mother.) In the early 1980s, the father divorced. He received an award of spousal support from his ex-wife. Throughout the 1980s, the father's health deteriorated due to back and knee injuries and alcoholism. He was unable to work. His ex-wife died in the early 1990s, ending the spousal support payments and leaving the father dependent on a modest pension that situated him at—or just above—the poverty line. This development precipitated the father's parental support claim.

Four of the father's children were born to his first wife; two were born to his second. The children presented a diverse financial picture. Three had married; two had subsequently divorced; two had children of their own. The younger two, who were both unmarried and without children, were better off than the older four. Their brighter financial picture was due, in part, to inheritances from their mother and maternal grandparents. The six children were all estranged, to varying degrees, from their father. They variously alleged that they

to receive maintenance from her adult child"); *Godwin* (Prov. Div.), *supra* note 60 at 314, Dunn Prov. Div. J. ("During this trial, the respondents complained, sometimes bitterly, about the fact that they were not raised in a warm, nurturing home."); *Skrzypacz v. Skrzypacz* (1996), 22 R.F.L. (4th) 450 at para. 8 (Ont. Prov. Div.), Wolder Prov. Div. J. (child's affidavit alleges abandonment by mother, who "tried to make a living by stealing"). A noteworthy example of this tendency to turn an application for parental support into a forum to air family grievances occurred in a Québec case involving one black sheep daughter (of three children) who had been turned out of the family home at age 14. The application was commenced shortly after this daughter won \$2.1 million in the provincial lottery. *See Droit de la famille—2626*, [1997] R.J.Q. 1117 (C.S.).

63. *See, e.g., Hua, supra* note 61 at 13 ("I appreciate that this may not be the Vietnamese priority, but I am applying the law of British Columbia."); *S.A.G., ibid.* at para. 45 ("Because of her depressed temperament and other infirmities mentioned above and her liaisons with men who often stayed at her home, [the mother] led a reclusive life. There appeared from the evidence to be little in the way of love and happiness which comes from time to time in a mother/son relationship."); *Godwin* (Prov. Div.), *ibid.* at 324 ("The quality of care that Veronica gave her children perhaps fell short of parenting standards of 1993, where there is now a clearer psychological understanding of children's need for nurturance and empathy. Surely, however, the care that this mother provided was somehow influential in producing four adults who are well-educated, sophisticated, worthy, and productive members of society.").

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had suffered from mistreatment, emotional abuse, or physical abuse at the hands of their father as they were growing up.

Newson raised a number of difficult issues. What role should a parent's past conduct play in determining whether the parent is entitled to support? How should a child's other obligations be balanced against the obligation to provide parental support? Are children jointly and severally liable to pay support? And, finally, is the rationale for parental support simply to ensure that a parent does not fall into abject poverty and become a charge on the government or is it to compensate a parent for support given when a child is growing up?

Newson generated five sets of written reasons from two levels of court without ever reaching trial. The initial application, for interim support, went before a Master of the Supreme Court, who dismissed it. This decision was appealed to a judge of the Supreme Court.⁶⁴ The judge dismissed it, reasoning that “. . . some sort of pre-existing support relationship between the parent and child must have existed on which the parent relied”⁶⁵ in order for a parent to succeed in an application under the Act.

The father appealed to the Court of Appeal.⁶⁶ This court ruled that the earlier Supreme Court judgment “. . . restricts the operation of the section to an absurd degree.”⁶⁷ The Court of Appeal went on to make the point that parental support should be treated in a manner similar to spousal or child support.⁶⁸ The matter was remitted to the Supreme Court for determination consistent with the Court of Appeal's reasoning.

This ruling led to the second decision by the Supreme Court,⁶⁹ a judgment notable in its attempt to explore the policies underlying parental support legislation and to state principled answers to the difficult issues raised by this case. After reviewing the history of the legislation, court decisions in British Columbia, the rest of Canada, and the United States, and some academic commentary on parental support, the court formulated a list of five factors to be considered on a parental support application:⁷⁰

64. *Newson v. Newson* (1994), 99 B.C.L.R. (2d) 197 (S.C.), Dohm J.

65. *Ibid.* at para. 9.

66. *Newson v. Newson* (1997), 35 B.C.L.R. (3d) 341 (C.A.), Hinds, Goldie, and Ryan JJ.A.

67. *Ibid.* at para. 15.

68. *Ibid.* at para. 30 (“S. 58 [now section 90] is one of a fasciculus of sections comprising Part 4 [now Part 7] of the Act under the general heading ‘Maintenance and Support Obligations’. . . S. 58 is to be construed not only in relation to itself but also in the context of the other sections of Part 4.”).

69. *Newson v. Newson* (1998), 53 B.C.L.R. (3d) 191 (S.C.), Burnyeat J.

70. *Ibid.* at para. 140 [citations omitted].

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- (a) The obligations that each of the defendants have to their own families will take priority over any obligations they owe to the applicant;
- (b) Any assets and income which are available to the defendants from their spouse or former spouses are not to be taken into account when determining whether, on the basis of their responsibilities and liabilities and their reasonable needs, they also have an ability to maintain and support the applicant;
- (c) Evidence of abandonment, abuse and estrangement can be taken into account as one of the factors in the objective evaluation of the application;
- (d) The length of the period of estrangement is also a factor to be taken into account in the objective evaluation of the application and the consequent ranking of the needs of the adult child; and
- (e) A parent should first look to spousal support and, only if such support is not available, to then look to possible child support.

These factors attempted to balance the parental support obligation with other support obligations and to explain how abandonment, abuse, and estrangement should be taken into account on an application for parental support. Reasonable people may disagree with one or more of the items on this list, but the key point is that the list makes an effort to articulate a principled approach to applying section 90 that extends beyond the dispute at hand. Applying this approach, the court dismissed the father's application.

The father sought leave to appeal to the Court of Appeal yet again.⁷¹ Leave was granted, but only after the judge expressed his dismay at the conduct of this litigation⁷² and his hope that the Legislature repeal the parental support obligation.⁷³

On appeal, the Court of Appeal reversed the decision of the Supreme Court, ordering that two of the father's children pay him interim support.⁷⁴ This decision was unremarkable, and certainly defensible, but the Court of Appeal felt compelled to go further and question the way that the Supreme Court approached the case. Citing with approval the dictum that "[i]nterim proceedings are summary in their nature and provide a rough justice at best,"⁷⁵ the Court of Appeal expressly declared that the factors enumerated in the Supreme Court would not be binding on any judge who should ultimately preside over a

71. *Newson v. Newson* (1998), 39 R.F.L. (4th) 410 (B.C.C.A.), Esson J.A.

72. *Ibid.* at para. 8 ("I can say that I have every sympathy with the position of the respondents that they are being ground down to the point of oppression by this seemingly endless proceeding. . . .").

73. *Ibid.* at para. 9 (" . . . [S]ome good may come of all this if the appropriate authorities in due course consider whether the benign neglect conferred on this provision for over seven decades did not reflect a sound community consensus that this form of compulsion does not benefit society. If so, it may be concluded that the public weal would be best served by a repeal of the section.").

74. *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22 (C.A.), Esson, Goldie, and Newbury JJ.A.

75. *Ibid.* at para. 11, quoting *B. (R.) v. B. (M.)* (1989), 19 R.F.L. (3d) 92 at 98 (Ont. H.C.J.), Wright J.

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trial of the matter⁷⁶ and strongly disapproved of taking such a principled approach in the future.⁷⁷ This conclusion is understandable if one takes a broad view that encompasses the vast amount of litigation over spousal and child support that comes before the courts. But, given the relative scarcity of cases involving parental support, the Court of Appeal's last decision in *Newson* is a disappointment, as it signals that needed reforms in this area will be very difficult to pursue in the courts.⁷⁸

5. SUMMARY

Several conclusions may be drawn from British Columbia's eighty-five-year experience with parental support. The legislation was initially enacted in the 1920s for reasons similar to those underlying the first enactment of parental support in England, over 300 years earlier. Parental support became law in this province as an attempt to relieve the public burden of making cash payments to those individuals who were unable to work. In practice, the law was almost never used for its original purpose. In the 1970s, parental support was caught up in a wave to reform the *Family Relations Act*. The character of British Columbia's parental support law changed from being part of a social welfare system that was administered locally to being part of a court-based system of determining family support obligations. This development resulted in more litigation reaching the courts, which have expressed their frustration with applying the existing parental support law.

III. WHY REFORM IS NEEDED NOW

The case for reform of section 90 stems from the difficulties experienced by litigants and the courts. The exasperation on all sides in cases like *Newson* is plain. In part, it follows from unresolved issues inherent in the conception and current design of section 90; in part, it is due to the general difficulties that have prompted a wide-ranging review of the *Family Relations Act*.⁷⁹

While it would be difficult to argue that section 90 is operating successfully, one could plausibly claim that reform is not a pressing concern. The number of cases involving section 90 is still very small. For most British Columbians, the problems with our parental support law are more hypothetical than real.

This argument is not convincing for two reasons. First, broader social trends raise the possibility of increased reliance on section 90 in the future. According to Statistics Can-

76. *Ibid.* at para. 14.

77. *Ibid.*

78. The lower courts appear to have got the message from *Newson*. None of the judgments on parental support from the period after the Court of Appeal's decision attempt anything like Mr. Justice Burnyeat's principled approach.

79. *See supra* note 2.

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ada, “. . . population aging will begin to accelerate in 2011, exacerbated until 2031 as individuals belonging to the large baby-boom cohorts reach age 65. . . . [N]o projection scenario reverses this trend, which is inevitable since it is already inherent in the age structure of the Canadian population.”⁸⁰ In 2005, the number of persons over age 65 in Canada was 4.2 million or 13% of the population; by 2031, there is projected to be between 8.9 million and 9.4 million persons over age 65 in Canada, or between 23% and 25% of the population.⁸¹ A similar trend may be observed for British Columbia. In 2005, persons over age 65 made up 13.8% of the total population of this province; by 2031, this share is projected to grow to between 22.8% and 25.4% of total population.⁸²

Along with this increase in the population over age 65, the continuing economic vulnerability of older adults must also be taken into account. Canada may be reaching the end of a period of brightening economic prospects for older adults. The National Advisory Council on Aging has reported that a reversal of fortune may now be occurring for those over age 65:⁸³

Until recently, the percentage of seniors with low incomes had been declining. It went from 21% in 1980, to 10% in 1990, to 7% in 2003. . . . Since the middle of the 1990s, seniors’ income has reached a ceiling and the gap between seniors’ revenues and those of other Canadians is now increasing.

Further, the income level of 19% of older adults was only marginally above the before-tax low income cut-off.⁸⁴

Applications under section 90 are not restricted to persons over age 65, but this group has supplied the greatest number of applicants. Demonstrating “dependency” is a requirement for a successful application under section 90, and this requirement has been interpreted to mean financial dependence brought about by age, illness, infirmity, or economic need.⁸⁵ One consequence of increases in both the absolute number of older adults and the number living in poverty will almost certainly be an increase in the number of applications under section 90. One commentator has even compared this situation to the boom in spousal and child support applications that followed the liberalization of divorce laws in the late

80. *Population Projections for Canada, Provinces and Territories* (Ottawa: Minister of Industry, 2005) at 44.

81. *Ibid.* at 46–47.

82. *Ibid.* at 60.

83. *Seniors on the Margins: Aging in Poverty in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2005) at 8 [footnote omitted].

84. *Ibid.* at 11. The “before-tax low income cut-off” is usually called the poverty line.

85. *Newson v. Newson*, *supra* note 66 at para. 33.

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1960s.⁸⁶ While this comparison probably overstates the case, there should be no question of the desirability to act now, before demographic trends create even more pressure on British Columbia's parental support law.

Second, the argument that a statutory provision should escape reform because it is little-used fails on principle. It would be cold comfort for a parent or adult child who suffered at the hands of a defective law to be told that reform was not pursued because only a few people each year will suffer in this manner. It is for this reason that little-used laws which are determined only to hold out the prospect of mischief are usually considered to be among the most suitable candidates for law reform.

IV. ARGUMENTS FOR AND AGAINST PARENTAL SUPPORT LAWS

A. Introduction

In deciding on the best reforms for British Columbia's parental support law, the first task that must be addressed is to decide whether this law is needed at all. The current rationale for section 90 is far from clear. Parental support legislation was enacted in the 1920s as a means to relieve the burden on governments in providing assistance to the poor. This policy goal, which proved to be not very important in practice, has been completely overtaken since the reforms of the 1970s. But no clearly articulated rationale for the legislation has appeared to take its place.

This chapter surveys the leading academic arguments for and against parental support legislation, with a view to determining whether such legislation continues to be relevant in twenty-first century British Columbia and, if it is, on what basis. There is actually little academic commentary to be found from Canadian sources,⁸⁷ but parental support has generated a fair amount of discussion among American lawyers, law professors, and law students. This American commentary is helpful primarily because it canvasses the major policy positions and because it focusses on the challenges of applying these laws to an ag-

86. See Freda Steel, "Financial Obligations Toward the Elderly: Filial Responsibility Laws," in Margaret E. Hughes & E. Diane Pask, eds., *National Themes in Family Law: Selected Papers Presented to the 1987 Canadian Association of Law Teachers Family Law Conference* (Toronto: Carswell, 1988) 99 at 102–03 ("An analogous situation occurred with respect to married women in the 1970s and 1980s. The escalation in the divorce rate led to a substantial increase in the number of divorced women with dependent children. . . . That situation in turn led to a re-examination of the private and public means of support. . . . A similar situation may develop with respect to the aged in our population.").

87. See Steel, *ibid.*; Wendy Bernt, "Lines of Dependence: The Rebirth of Parental Support Legislation in Canada" (1996) 2 Appeal 52; Christa Bracci, "Ties that Bind: Ontario's Filial Responsibility Law" (2000) 17 Can. J. Fam. L. 455. See also Georgiale A. Lang, "Parental Support in Canada: Honour Thy Father and Thy Mother," in Canadian Bar Association & Federation of Law Societies of Canada, *The 1998 National Family Law Program: Whistler Conference* (June 1998); John-Paul Boyd, "Intergenerational Conflict, Part I: Parental Support," in Continuing Legal Education Society of British Columbia, *Aging, Death & Divorce: The Big Three and The Perfect Storm* (February 2007) 1.1.1.

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ing population.⁸⁸ Further, both American and Canadian parental support laws derived from the same source, the English poor laws,⁸⁹ and show a family resemblance to one another. But it must be borne in mind that the American experience with parental support differs in important ways from the Canadian. Most notably, parental support laws in the United States are still viewed as a part of the public welfare system. They did not go through a development analogous to the Canadian reforms in the 1970s and 1980s.⁹⁰ As a result, American commentators tend to be very concerned with government enforcement of parental support laws, which has not been an issue in British Columbia since at least 2000, when public standing to commence a proceeding to enforce the parental support obligation was eliminated.⁹¹

88. In this chapter there are repeated references to the needs of older adults. These references reflect the prevalence of seniors' issues in the commentary. But they should not be taken as a limitation on the scope of section 90. Historically and at present, parental support laws applied to disabled parents of any age. Since 1978, section 90 of the *Family Relations Act* has applied to parents of any age who are dependent upon their children due to "economic circumstances." But it must be conceded that demographic trends make the application of section 90 to senior citizens the most pressing concern for policymakers and commentators.
89. With the exception of the laws in force in Québec and Louisiana, the two civil law jurisdictions in Canada and the United States. *See supra* note 3.
90. The major development on the American scene during these years had to do with one part of the American social safety net, the Medicaid program. Medicaid is a program that provides monetary assistance for the medical care of low-income people. Its costs are shared by the federal and state governments. The decision to participate in Medicaid is left to the states, but once a state opts in it is bound by the federal legislative framework to comply with all federal statutory and administrative requirements. One of the provisions in the federal enabling legislation prohibited the consideration of an adult child's income and resources in determining the eligibility of a person to assistance. After the program was established in the 1960s, the prevailing legal opinion was that state parental support laws were incompatible with the federal legislation. Faced with the risk of losing federal funding, many states repealed their laws. The vast majority of those states that left their parental support laws in place stopped enforcing them. In 1983, the federal government issued an administrative "transmittal" that contradicted the prevailing legal view and appeared to encourage states to enact or to resume enforcement of their parental support laws. During the tight budgetary times of the 1980s and 1990s, this message received a sympathetic ear from many state governments. But, replaying a pattern that was observed in England and Canada, when the time came to enforce the parental support laws in practice (as opposed to musing about their utility in theory), very few state governments decided to follow through. *See generally* George F. Indest, "Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act" (1988) 15 S. U. L. Rev. 225. *See also* Ann Britton, "America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents" (1990) 26 Cal. W. L. Rev. 351 at 353 ("It was a politically unpopular administrative decision to resurrect use of the filial support obligation and, therefore, enforcement was not pressed." [footnote omitted]).
91. *See supra* note 45. Under s. 91 (2.1) of the *Family Relations Act* a "designated agency" may apply for a parental support order on behalf of a parent. "Designated agency" is defined in the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, as being a public body, organization, or person designated to carry out certain functions in connection with various Parts of the *Adult Guardianship Act*. For the purposes of
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B. Arguments For Parental Support Laws

1. INTRODUCTION

Most, if not all, proponents of parental support laws concede that there are problems with the current design and implementation of those laws. But these commentators argue that the problems are not so grave as to require the repeal of parental support laws. Rather, parental support should be reformed along lines that are more relevant to today's society.⁹² If, as one lawyer put it, a "rational role"⁹³ can be found for parental support laws, then legislation like section 90 of the *Family Relations Act* can make a meaningful contribution to the lives of needy citizens, their families, and the general public.

Commentators have sought this rational role in three places. First, they have argued that parental support can serve as a last line of defence to save a person from falling into abject poverty. Second, they have claimed that parental support laws are an organic growth from the moral benevolence that worthy families show to their members, and can therefore serve to strengthen the bonds between members of families where that natural gener-

this report, only the designated agencies appointed in connection with the administration of Part 3 of the *Adult Guardianship Act* (which deals with support and assistance for abused and neglected adults) are relevant. (In fact, to date agencies have only been designated in connection with Part 3.) Designated agencies were intended to "... improve and coordinate the services offered by existing community agencies." See British Columbia, Joint Working Group, *How Can We Help? A New Look at Self-Determination, Interdependence, Substitute Decision Making and Guardianship in B.C.* (May 1992) at 29. The Public Guardian and Trustee is authorized to designate agencies pursuant to *Adult Guardianship Act*, s. 60 (a.1). Acting under this authority, the Public Guardian and Trustee has designated Community Living British Columbia and the five regional health authorities as designated agencies. *Adult Guardianship Act*, s. 44 describes the purpose of Part 3 as providing for the support and assistance of adults who are abused or neglected and who cannot seek support and assistance due to several listed reasons. To further this purpose, designated agencies are authorized to investigate whether an adult requires support and assistance. *Adult Guardianship Act*, ss. 47–48. One of the outcomes of a completed investigation may be an application to the Provincial Court for various orders, including an order for parental support under *Family Relations Act*, s. 90. *Adult Guardianship Act*, ss. 51 (1) (f), 56 (3) (b). This complex legislative framework leaves open the possibility that designated agencies could carry out the cost-recovery rationale for parental support that was formerly delegated to the Attorney General and municipal governments. But this possibility would have to be balanced against two other considerations. First, the main thrust of Part 3 is protective, not financial. Second, by virtue of the statutory framework, the standing of designated agencies to commence parental support proceedings is very limited. For these reasons, it is not appropriate to place designated agencies in the same position as the public officials authorized to enforce parental support legislation under earlier versions of British Columbia's legislation or under the legislation in force in the United States.

92. See, e.g., Daniel R. Mandelker, "Family Responsibility Under the American Poor Laws: Parts I & II" (1956) 54 Mich. L. R. 497 at 505 ("This writer, however, sees no objection to the retention of the family responsibility laws, provided that some revisions in the statutory framework are made.") & 607.

93. Terrance A. Kline, "A Rational Role for Filial Responsibility Laws in Modern Society?" (1992) 26 Fam. L.Q. 195.

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osity is lacking. And, third, they have alleged that the enforcement of parental support laws may have a salutary effect on government finances.

2. PARENTAL SUPPORT LAWS MAKE A NECESSARY SOURCE OF FUNDS AVAILABLE TO IMPOVERISHED INDIVIDUALS

Proponents of parental support laws like to point out that poverty still exists among older adults, despite concerted government efforts to stamp it out.⁹⁴ They posit that a gap will always exist between the needs of the poor and the ability of the government to meet those needs.⁹⁵ Parental support laws can help to fill that gap.⁹⁶

Parental support, by itself, cannot solve the problem of poverty or take the place of government programs, and its proponents are careful to point these facts out.⁹⁷ But it is more useful for the poor, particularly the older poor, to have a range of options at their disposal. The loss of parental support would leave the poor more dependent on government programs—a development that could increase their vulnerability, since funding for government programs can ebb and flow. Financing of government programs may be increasing at one moment, but the future could hold cutbacks. Doing away with parental support laws on the basis that the government can provide all necessary assistance may be short-sighted.⁹⁸

94. See, e.g., Kline, *ibid.* at 202 (“Empirical evidence demonstrates the persistence of poverty among the aged, notwithstanding massive government aid for the benefit of the elderly.” [footnote omitted]).

95. See Kline, *ibid.* at 203 (“Further government aid is improbable due to increasing budget constraints. With 30 percent of the federal budget already set aside for programs benefitting the elderly, and with state budgets tighter than ever, additional benefits to alleviate poverty among the aged are not likely. . . .”); Bracci, *supra* note 87 at 500 (“As the years progress and the senior population grows, government resources may not be able to keep up with either financial demands or demands for services.”).

96. See Robin M. Jacobson, “*Americana Healthcare Center v. Randall*: The Renaissance of Filial Responsibility,” Note (1995) 40 S.D. L. Rev. 518 at 541 (“Filial responsibility statutes also provide support to the elderly beyond what the government is able to provide.” [footnote omitted]); Kline, *ibid.* at 207 (“Perhaps the most convincing argument in favor of filial responsibility laws is that they have the potential to provide the indigent elderly with financial support beyond that which is provided by the government.”).

97. See Kline, *ibid.* at 210 (“Filial responsibility laws alone would be incapable of solving the enormous problem of poverty among the aged, but they may begin to alleviate the problem and achieve desirable public and social policy results.”).

98. See, e.g., Bernt, *supra* note 87 at 57 (“It is not difficult to foresee a time when Canada’s increasing elderly population will be forced to balance decreasing financial resources with increased living and health care costs. If the state is unwilling or unable to help the elderly meet those costs, it is likely that the burden of parental support will shift once again to adult children.”).

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Proponents of parental support also point out that egregious cases of deprivation still exist.⁹⁹ In too many of these cases, the immediate family members of the indigent older adult live in comparative ease. The existence of such a state of affairs speaks both to the existence of holes in the social safety net and the continuing need for a legal remedy for such deprived parents.

In the past, parental support laws were designed with the primary goal of limiting government funding of social programs. Modern parental support laws can be designed to enhance and supplement existing government programs.¹⁰⁰ They can be reformed by placing the needs of poor older adults, rather than governments, at the centre of their focus. British Columbia has already started down this road by taking the decision to commence proceedings under section 90 of the *Family Relations Act* out of the hands of government and giving it primarily to the affected parent. Further development can make this province's parental support law a helpful strand in the social safety net.

3. PARENTAL SUPPORT LAWS REINFORCE AND STRENGTHEN FAMILY SOLIDARITY

Parental support laws have long been seen as a way to reinforce family solidarity and to promote an ideal of family behaviour. In the eighteenth century, William Blackstone attempted to explain their origin as “. . . aris[ing] from a principle of natural justice and retribution”:¹⁰¹

For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in their infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws.

Blackstone's comment is historically inaccurate, but it has been adopted by some proponents of parental support laws. They see it as a valuable expression of a policy goal of parental support laws, rather than as an account of how those laws came into being.¹⁰²

99. See Kline, *supra* note 93 at 195–96; Joann Blair, “‘Honor Thy Father and Thy Mother’—But for How Long?—Adult Children's Duty to Care for and Protect Elderly Parents,” Note (1997) 35 U. Louisville J. Fam. L. 765.

100. See Kline, *ibid.* at 208 (“Filial responsibility laws can be limited to those cases where existing government and charitable programs are insufficient to provide life's basic necessities for indigent persons. This would help to ensure that the laws serve only to supplement government benefits, not replace them.”).

101. Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England*, vol. 1 (London: Cavendish, 2001) at 348.

102. See Jacobson, *supra* note 96 at 543–44.

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As a general proposition, moral approbation attaches to acts that relieve another person from distress. No one questions the generosity and benevolence of adult children who voluntarily seek to remedy the situation of a parent who has fallen into poverty. In fact, many Canadians have taken up the burden of caring for their parents (either monetarily or, more commonly, by providing services), without being compelled to do so by the law.¹⁰³

Proponents of parental support laws claim that those laws can usefully strengthen solidarity among the members of those families who do not respond to distress voluntarily.¹⁰⁴ In their view, parental support laws impart a salutary moral lesson or example of proper family behaviour. Parental support laws reinforce well-established patterns of family relations.¹⁰⁵ They encourage independence, self-sufficiency, and benevolence among family members.¹⁰⁶

Some commentators go further and claim that parental support laws can be a useful tool in the suppression of elder abuse.¹⁰⁷ In their view, parental support laws share a common rationale with criminal laws designed to protect the elderly.¹⁰⁸ Respect for parental support laws may pre-empt the development of neglect into out-and-out abuse.

4. PARENTAL SUPPORT LAWS FREE UP PUBLIC FUNDS FOR OTHER SOCIALLY VALUABLE PURPOSES

Parental support laws can still encourage some savings of government expenditures, even if this goal is no longer their primary rationale. One American commentator has estimated

103. See, e.g., Wendy Piper, “Balancing Career and Care” (2006) 7.11 Perspectives on Labour and Income 5 at 5 (“In 2002, over 1.7 million adults aged 45 to 64 provided informal care to almost 2.3 million seniors with long term disabilities or physical limitations.” [citation omitted]).

104. See Kline, *supra* note 93 at 207 (“While government regulation of private family conduct in a normal, healthy family is undesirable, intervention may be necessary when the family breaks down.”).

105. See Jacobson, *supra* note 96 at 543 (“By their mandate, filial responsibility statutes encourage traditional family principles.” [footnote omitted]).

106. See Jacobson, *ibid.* at 544 (“... filial responsibility statutes encourage a return to close family bonds by removing governmental interference” [footnote omitted]); Kline, *supra* note 93 at 203 (“The enforcement of filial responsibility laws might also reduce government expenditures and serve to enforce a moral duty between parent and child in those cases where a child has failed to assume the appropriate responsibility for parental support, thereby strengthening family ties by encouraging family members, rather than the government, to care for one another.”).

107. See Kline, *ibid.* at 195–96.

108. See Blair, *supra* note 99 at 780 (“Some of the same reasons underlying filial responsibility laws . . . are applicable to the question of whether children should face criminal liability for neglect of an elder.” [footnote omitted]).

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the savings at between 11 percent and 30 percent of a typical state's social welfare costs.¹⁰⁹

In the American context, these savings come from two sources. First, the state obtains funds from adult children directly by the enforcement of parental support laws; second, the state benefits indirectly when parents receive compensation from their adult children in lieu of obtaining state assistance.¹¹⁰ Since public enforcement of parental support laws has been abandoned in British Columbia, the potential savings would be lower and much harder to estimate, as they would only derive from the second source.

Proponents acknowledge both the difficulty of measuring the savings produced by parental support laws and the historical failure of using those laws to fulfill only this rationale. But they argue that there can be benefits to society as a whole in the form of savings that may be used on other priorities, even if those benefits are collateral to the primary goals of parental support laws, which are to shore up the finances of the poor and contribute to family solidarity.¹¹¹

5. SUMMARY

Proponents of parental support laws argue that the existing legislation can be updated to advance contemporary policy goals. Reformed parental support laws would primarily meet the concerns of the poor, particularly the older poor. The existence of a legal remedy would give them one more avenue for recourse, which may help to relieve their distress. More broadly the renewal of these laws could provide benefits for the family (by strengthening family ties) and the general public (by lessening the burden on government to provide assistance to the poor).

109. Usha Narayanan, "The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What?, A Cross-Cultural Perspective," Note (1996) 4 Elder L.J. 369 at 378.

110. See Lopes, *supra* note 9 at 520 ("The first means of public financial gain is the direct revenues produced by the application of these laws, balanced against the administrative costs involved in making these collections. The second form of financial benefit is the indirect lessening of public assistance costs brought about by the failure of elderly people to apply for assistance due to the inhibitory presence of these statutes."); Kline, *supra* note 93 at 204 ("Costs might be reduced either by shifting the costs of welfare to children or by deterring the destitute from accepting government benefits.").

111. See Jacobson, *supra* note 96 at 544–45 ("The court's decision in *Americana* [upholding the South Dakota parental support statute in the face of a constitutional challenge] advocates reliance on the family rather than the government, thereby relieving the government's burden of supporting the poor. By renewing notions of filial responsibility, the court has provided a meaningful method of holding children accountable to their indigent parents. Filial responsibility statutes ensure that parents have at least a minimal standard of living. In the final analysis, they strengthen the family by encouraging reliance on one another rather than on government.").

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C. Arguments Against Parental Support Laws

1. INTRODUCTION

By a wide margin, there are more commentators arguing for the repeal of parental support laws than there are those arguing for the laws' preservation.¹¹² Much of this commentary comes from the United States and is directed toward aspects of American parental support laws that have no equivalent in British Columbia's *Family Relations Act*. (Public enforcement of parental support laws is a particular concern.) But some of the commentary is directed at the general rationale for parental support laws¹¹³ and, even more helpfully, some of it engages in detailed discussions of the policy choices underlying those laws.

There is symmetry between the arguments for and against parental support laws. Opponents of parental support have focussed on arguments that rebut the arguments advanced by proponents of parental support. Opponents of parental support laws have argued that those laws should be repealed for three reasons. First, they do not provide the poor with adequate and sustainable assistance. Second, they harm rather than foster family relations. And third, they are less efficient than direct state support of the poor.

2. PARENTAL SUPPORT LAWS DO NOT PROVIDE THE POOR WITH A SUSTAINABLE SOURCE OF FUNDS

Opponents of parental support laws offer a number of arguments on how those laws fail to provide adequate, lasting relief for the poor. These arguments run the gamut from immediate practical concerns to more wide-ranging social and policy issues.

At a practical level, litigation is an unusual way to combat poverty.¹¹⁴ Two recent reports have emphasized the escalating costs and increasing delays that are plaguing both civil

112. See Britton, *supra* note 90 at 368 ("Commentators are almost unanimously opposed to the statutes." [footnote omitted]); Catherine Doscher Byrd, "Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent's Medical Needs" (1988) 22 Fam. L.Q. 87 at 100–01 ("The appraisal by legal scholars of relative responsibility laws is nearly unanimously negative." [footnote omitted]).

113. See, e.g., Robert Whitman & Diane Whitney, "Are Children Legally Responsible for the Support of their Parents?" *Trusts & Estates* 123:12 (December 1984) 43 at 46 ("Filial responsibility statutes have never worked well in the past and they do not work well today."); Leo J. Tully, "Family Responsibility Laws: An Unwise and Unconstitutional Imposition" (1971) 5 Fam. L.Q. 32 at 62 ("... the family responsibility statutes are actually operating in our modern social context to undermine the very objectives they were conceived to serve").

114. See Seymour Moskowitz, "Filial Responsibility Statutes: Legal and Policy Considerations" (2001) 9 J. L. & Pol'y 709 at 726 ("Litigation as a means of solving problems is a particularly blunt instrument when continuing relationships or processes are involved. Its strength is maximized when discrete transactions between parties are involved or a relationship is to be terminated." [footnote omitted]); Britton, *supra* note 90 at 356 ("... it is a burden on the older person to expect him or her to sue a relative for support").

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litigation system¹¹⁵ in general and the family law system¹¹⁶ in particular, effectively placing the right to go to court out of the reach of many ordinary people. The difficulties inherent in going to court are even more pronounced for the segment of the population that is supposed to be assisted by the parental support law. A destitute parent would have to find the means to hire a lawyer (if it were not possible to engage one *pro bono*) or to summon the wherewithal to act as a self-represented litigant. Since a successful application under section 90 requires an applicant to show economic dependency due to age, illness, infirmity, or economic circumstances, an applicant would be required to navigate the family law system at a time of financial, and possibly physical or psychological, distress. The disjunction between the requirements of the legislation and the practical realities of litigation sets up a classic catch-22.¹¹⁷

Opponents of parental support have pointed out that most cases that make their way to court involve both poor parents and poor adult children.¹¹⁸ As a result, even in cases where the need of the parent is plain, no relief can be obtained because the child does not have the means to provide it. In other cases, an award is granted, but it is inadequate. The periodic nature of parental support payments can also cause problems. Circumstances may change for the adult child, justifying a discontinuation of support, but leaving the parent in a vulnerable and precarious financial position. Enforcement of spousal and child support orders has proved to be an especially vexing problem, and there is no reason to believe that similar issues cannot arise in the context of parental support.¹¹⁹ Finally, opponents have argued that parental support laws can have the insidious effect of perpetuating poverty from one generation to the next: the funds awarded to the parent are often in-

115. BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), online: BC Justice Review Task Force <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf> at vii (“‘Too expensive, too complex and too slow.’ These are the words used by many members of the public and litigants of all types in British Columbia to describe our present civil justice system.”).

116. BC Justice Review Task Force, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (May 2005), online: BC Justice Review Task Force <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> at 10 (“The system we make available to [persons with family law disputes] today is complicated, intimidating and costs a great deal of money. . .”).

117. See Moskowitz, *supra* note 114 at 727 (“It is difficult if not impossible to enforce the legal rights of indigent aged parents, who are often frail, homebound, or in nursing homes.”).

118. See Tully, *supra* note 113 at 42 (“The children and other relatives of the poor are most likely to be poor themselves—and relatives who are not officially ‘poor’ are apt to be so close to it that they can support none other than themselves.”).

119. See Britton, *supra* note 90 at 370 (“[Parental support laws] suffer from the same defects as our statutes for supporting minor children; it is no secret that our enforcement of child support orders is scandalous.”).

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sufficient to lift the parent out of poverty, but may be just enough, when added to other financial pressures, to tip the adult children into destitution.¹²⁰

On a broader, more philosophical level opponents have argued that parental support is incompatible with contemporary social trends and modern approaches to public welfare and social assistance.¹²¹ When parental support laws were first enacted in England and North America, agriculture was the dominant economic activity. Families were typically much larger than they are today.¹²² And life expectancy was much lower.¹²³ Support was a natural extension of society's basic economic unit—the family farm—being concentrated in the hands of parents until they were physically no longer able to work. In return for relinquishing control over this asset, an informal support obligation (likely only lasting a few years) would be parceled out among a number of adult children reaching their productive and earning peak in middle age. In contrast, in today's world families are typically not

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120. See Lopes, *supra* note 9 at 526 (“The imposition of liability, in many cases, actively interferes with whatever potentialities for self-advancement ‘responsible’ children may have and helps to assure poverty for generations to come.”); Byrd, *supra* note 112 at 101 (“... [A]ssets are taken away from a younger family to aid the older. The net long-term effect is a depletion of resources where younger family members will have diminished means with which to furnish their own needs. . . .”); Renae Reed Patrick, “Honor Thy Father and Mother: Paying the Medical Bills of Elderly Patients” (1984) 19 U. Rich. L. Rev. 69 at 82 (“... [C]hildren forced to support their parents may do so at the cost of depriving their own immediate families of necessity. This could encourage a perpetuation of poverty.”).
121. See Lee E. Teitelbaum, “Intergenerational Responsibility and Family Obligation: On Sharing” [1992] Utah L. Rev. 765 at 766 (“The 1930s . . . saw the creation of the modern social security and welfare system and, with it, the first substantial, direct participation of the federal government in care for the disabled and elderly. Concomitantly, reliance on private and familial responsibility declined. . . . To the extent that social welfare was needs-based, the theory was of societal and intergenerational responsibility rather than familial responsibility.” [footnote omitted]); Kris Bulcroft, June Van Leynseele, & Edgar F. Borgatta, “Filial Responsibility Laws” (1989) 11 Research on Aging 374 at 391 (“Looking at the experience in the United States in the last half century or so, the global trend clearly has been one of provision of security for older persons, independent of their children and other relatives. . . . [T]he recent focus of policymakers and advocates on filial responsibility as a centerpiece of the debate on long-term care policy is not consistent with an historical perspective concerned with welfare of the elderly.”).
122. See Moskowitz, *supra* note 114 at 725 (“The average [American] family in 1910 had 4.5 children; in 1960, it had only 2.5 children, and it has even fewer today.” [footnote omitted]); *Population Projections for Canada*, *supra* note 80 at 17 (“While the number of children per woman in Canada, as measured by the total fertility rate, was close to 4.0 around 1960, it dropped below the replacement level (2.1 children per woman) in 1972 and has remained below this level ever since. The downward trend has continued almost uninterrupted for forty years, even though the recent trend indicates that the rate has stabilized around 1.5 children per women since 2000.” [footnote omitted]).
123. See, e.g., British Columbia, Premier’s Council on Aging and Seniors’ Issues, *Aging Well in British Columbia: Report of the Premier’s Council on Aging and Seniors’ Issues* (November 2006), online: Premier’s Council on Aging and Seniors’ Issues—Ministry of Community Services <http://www.cserv.gov.bc.ca/seniors/council/docs/Aging_Well_in_BC.pdf> at 1 (“Life expectancy in British Columbia rose from 62 years in 1921 to over 81 in 2005. . . .”).

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economically integrated, families are smaller, and parents live longer. A legally imposed parental support obligation is apt to fall on one or two children who are themselves nearing retirement age and to extend potentially for a decade or more.¹²⁴

Attitudes toward state support of social programs have also changed dramatically since the introduction of parental support laws. Opponents argue that the existence of parental support erodes public programs for the care and support of older adults in a way that would not be tolerated in the areas of medically necessary care or primary and secondary education.¹²⁵ While private financing of medical care and education certainly exists, it is not compelled by law. The main reason why such laws do not exist is that they would undermine social equality and lessen support for the public programs.¹²⁶ Opponents of parental support argue that support for older adults should be seen in the same light.

3. PARENTAL SUPPORT LAWS DISRUPT FAMILY RELATIONSHIPS

Opponents of parental support counter claims that parental support fosters family solidarity by focussing on the impact litigation has on the family. Taking disputes to court shines a harsh light on private matters. It exposes family finances, relationships, and arguments to public scrutiny. This scrutiny, and the adversarial nature of litigation, can dissolve whatever bonds remain among the members of the family.¹²⁷

There is a basic mismatch between what litigation can provide and what many older adults require from their children. The goal of parental support litigation is a monetary

124. See Bulcroft *et al.*, *supra* note 121 at 390 (“... the typical situation of the relevant unit is likely to be an 85-year-old mother being taken care of by a 60- or 65-year-old daughter”); Lopes, *supra* note 9 at 516–17 (“An old German proverb states that one father takes better care of ten children than ten children take care of one father. As the number of children in families decreases, each child’s proportionate share of the financial burden of caring for the needy parent is increased, leading to an increasing inability or reluctance to carry out this responsibility.”).

125. See Tully, *supra* note 113 at 44 (“The theory that public medical care will destroy family unity has not been advanced. Yet care for its sick members was first a function assumed by the family.” [footnote omitted]); Hilde Lindemann Nelson & James Lindemann Nelson, “Frail Parents, Robust Duties” [1992] Utah L. Rev. 747 at 762 (“... [W]e propose an analogy to education. We have agreed as a society that it is of fundamental importance to have an educated citizenry, and so the cost of that education is shared by all, even the childless. The needs of the elderly ought to be provided for on the same basis.”).

126. See Bulcroft, *et al.*, *supra* note 121 at 390 (“If born to a wealthy set of parents, it is likely that the person will not only be advantaged, but he or she may never be called upon to support parents. Thus ... the economic circumstances of being poor would be predisposing to the additional penalization of having to provide for dependent elders.”).

127. See Britton, *supra* note 90 at 357 (“Not only is such a suit inherently repugnant to most persons, but the publicity of a lawsuit bringing to public scrutiny the family’s ability and willingness to care for one another further raises the emotional cost.”).

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award. Many older adults require—and receive—care from their children in the form of services. The courts cannot compel children to provide services under parental support laws. Opponents of those laws have raised the spectre that a successful lawsuit will result in a short-term monetary gain that leads to a withdrawal of caregiving services, thwarting the long-term interests of older adults.¹²⁸

Parental support laws are also out of step with current notions about healthy family behaviour. Independence and mutual respect are among the keys to prospering family relationships. But parental support laws encourage dependency. Section 90 of the *Family Relations Act*, for example, requires an applicant to demonstrate dependency in order to succeed. Meeting this statutory requirement can trap families in unhealthy patterns of behaviour.¹²⁹

Finally, parental support laws can exacerbate inequality within the family. Opponents contend that parental support cannot be properly evaluated without taking into account its disproportionate impact on the lives and careers of women.¹³⁰ In most families, caregiving responsibilities tend to fall more heavily on the shoulders of women. A move to greater private financial responsibility for care provided to older adults could disturb what is already a delicate and tenuous balance in many families.¹³¹

128. See Britton, *ibid.* at 367 (“If the statutes require financial as opposed to other kinds of support, will it discourage families from providing in-kind services?”); Moskowitz, *supra* note 114 at 726–27 (“Indigent (and more affluent) older persons require long term care and continuing concerted efforts by formal and informal care givers. It is highly unlikely that the courts can create ongoing social and financial relationships within families.” [footnote omitted]).

129. See Britton, *ibid.* at 369–70 (“The statutes are also sharply criticized as creating disharmony in the family. Social scientists agree that having an aged person dependent on an adult child is disruptive to normal family interaction.” [footnote omitted]); Lopes, *supra* note 9 at 524 (“When an older person is financially dependent on his children, a great strain is put on their relationship. Both the parent and the child resent the dependence, both feel guilt as a result of this resentment and both tend to become hostile toward the source of their guilt. This kind of relationship is a vicious circle of resentment, guilt, and hostility that tends to grow increasingly worse—often to the point of breakdown of the relationship between parent and child.” [footnotes omitted]); Mandelker, *supra* note 92 at 504 (“Indeed, in any family relationship characterized by tension, the relative called on for support may deny the call for help in order to punish the relative who makes the demand.”).

130. See Moskowitz, *supra* note 114 at 724 (“... [F]ilial responsibility laws implicate important gender issues. It is typically women who find themselves saddled with the multiple responsibilities of rearing children, working for income outside the home and also providing care for aging family members.”); Lindemann Nelson & Lindemann Nelson, *supra* note 125 at 761 (“... [S]uch laws perpetuate a sexually oppressive feature of traditional family life by imposing the burden of care without the possibility of equitable enforcement.”).

131. See Moskowitz, *ibid.* at 724–25 (“To impose a legal/financial responsibility in addition to the traditional caregiving role will, in many circumstances, places [*sic*] an unfair burden on women.”).

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4. PARENTAL SUPPORT LAWS ARE LESS EFFICIENT THAN DIRECT STATE SUPPORT OF THE POOR

Parental support laws were originally introduced to alleviate the burden of welfare costs on the public purse. Historically, they did not have this intended effect. Opponents of parental support contend that this failure is due to flaws inherent in the design of parental support.¹³² They argue that relying on private financing for the care of older adults is, in the end, more costly than public financing for society as a whole.¹³³

It is immediately apparent that effective parental support laws would require investments in public institutions supporting the litigation process, such as legal aid and maintenance enforcement. Any savings from public welfare programs, then, would be counterbalanced by government funding of these institutions. To the extent that such investments are not made, then the practical utility of parental support would be compromised. Dependent parents would be faced with a choice between foregoing their rights under the legislation and commencing proceedings as a self-represented litigant. A rise in self-represented litigants would likely impose additional costs and delays across the civil litigation system.¹³⁴

Proponents of parental support acknowledge that much of the public savings realized from parental support derived from deterring the elderly from using social programs. Opponents argue that this strategy of deterring use of social programs is perverse and ultimately counterproductive. It is contradictory to make a program available to the public, and then discourage use of it.¹³⁵ And it is also short-sighted, as a person who is deterred

132. See Lopes, *supra* note 9 at 521 (“Although the evidence is scanty, it seems safe to conclude that net revenues, if any, produced by the direct application of filial support statutes are not very substantial. There seems to be little doubt that this small return can be traced to the high administrative costs involved in the enforcement of the relative’s obligation.”).

133. See Tully, *supra* note 113 at 34 (“Regardless of the merits of placing the public purse before the subsistence of the poor, it is an ironical fact that this policy is currently being seriously undermined in practice because of the high administrative costs of collecting money from the legally responsible family members outweigh the monies saved by the states in the form of lower welfare payments.”).

134. See BC Justice Review Task Force, *Exploring Fundamental Change: A Compendium of Potential Justice System Reforms* (July 2002), online: BC Justice Review Task Force <http://www.bcjusticereview.org/media_releases/2002/potential_reforms_07_02.pdf> at 23 (“... [M]any jurisdictions are very concerned about a perceived increase in the number of self-represented litigants in the courts, and it is certainly the perception of those within the system that there are increasing numbers of self-represented litigants. The concerns relate to both the plight of the self-represented litigant in navigating the complex waters of the civil justice system alone, as well as the inefficiencies for the system itself and the frustrations for justice system professionals created by the presence of self-represented parties in the courtroom.” [footnote omitted]). See also Alberta Law Reform Institute, *Self-Represented Litigants* (ALRI Consultation Memorandum No. 12.18, March 2005), online: Alberta Law Reform Institute <<http://www.law.ualberta.ca/alri/docs/cm12-18.pdf>>.

135. See Lopes, *supra* note 9 at 522 (“To view these indirect savings as a positive effect of the filial support laws is to embrace a contradiction with the very purpose of providing public support. If it is in fact de-

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from seeking care one day may be in a much worse situation later on, and may require more expensive care from public programs.¹³⁶

5. SUMMARY

Opponents of parental support argue that laws compelling adult children to support their parents only cause mischief and should be repealed. Litigation is not an appropriate or feasible device to use to reduce poverty. Its adversarial nature does not contribute to family solidarity, which cannot simply be legislated into being where it does not exist. And, by sending the message that individual family units are primarily responsible for supporting older adults, parental support laws have the potential to erode the public consensus underlying social programs geared toward older adults.

D. Summary and Conclusions

These policy arguments over the wisdom of retaining parental support laws have the stark quality of a gestalt image. The commentators often disagree over the basic facts surrounding the issue and tend to present their arguments as if the underlying policy choices were plain and obvious. In fact, the question of whether to retain a parental support law, in whatever form, involves complex and difficult choices.

In our view, this debate ultimately resolves itself in favour of repealing British Columbia's parental support law, section 90 of the *Family Relations Act*. The moral impulse that many children have to assist their parents in times of need is noble, but any attempt to give this impulse the force of law is misguided. Parental support legislation creates mischief for older adults, their families, and the general public, and this mischief cannot be completely remedied by amending the legislation.

Section 90 has been rarely used in the past and it will likely continue to languish in the future, because it is based on a fundamental contradiction. Litigation is too costly, time-consuming, and complicated to be an effective method to deliver relief to the poor. Repealing section 90 will not deprive the poor of a practical tool to better their lot.

On a more philosophical level, retaining parental support as part of a reformed *Family Relations Act* would be problematic. It would implicitly endorse a model of combating poverty, especially among older adults, that focusses on dependency and private action.

sirable to reduce the costs of public support by deterring the use of the program, the logical goal would be to deter the use of the program by all potential recipients—to eliminate the program.”).

136. See Tully, *supra* note 113 at 56–57 (“Welfare, like education, or police and fire protection, is a basic public function benefitting all who live in the community. . . . If an individual’s house burns down and the fire department puts out the fire at great expense, it is inconceivable that the fire department under a relative responsibility law could seek to recover these expenses which were incurred in connection with the property of a single individual from a multitude of his relatives.”).

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In this regard, the recent experience of Alberta is instructive. In 2003, Alberta reformed its main family law statute.¹³⁷ In her remarks on second reading of the reform bill, the Minister of Justice noted that it would not carry forward the province's parental support law, because parental support is “. . . no longer consistent with government policy, which is to support the independence of disabled adults. . . .”¹³⁸ Similarly, we are of the view that government policy should be geared to support the independence of disabled adults and older adults. The Alberta Law Reform Institute, the major law reform body in that province, agreed with the government's conclusion, adding that they “. . . were concerned that legislating [parental support] in a modern statute amounted to taking a step backward in time.”¹³⁹ A similar concern would apply to the retention of section 90.¹⁴⁰

V. OTHER ISSUES

A. Introduction

This chapter reviews a number of issues that may be relevant if a decision is made to amend British Columbia's parental support law. In contrast to the relatively large body of literature that addresses the basic question of whether or not to repeal parental support laws, there is very little commentary on the more practical and technical issues that would arise if section 90 were amended. Since the question of repealing or retaining section 90 is one that will be ultimately made by the Legislature, and since it is also one which may lead reasonable people to different answers, we believe it would be helpful to discuss these practical and technical issues. We make no recommendations on resolving these issues, however, so as not to detract from our main recommendation for reform.

The best way of approaching these discrete issues is to place them in a broader context. The Manitoba Law Reform Commission, in an informal report produced 25 years ago,¹⁴¹ has usefully provided much helpful analysis of these practical and technical issues and a broader framework in which to view them. The Commission observed that parental sup-

137. *Family Law Act*, S.A. 2003, c. F-4.5 (repealing the *Maintenance Order Act*, R.S.A. 2000, c. M-2, among other legislative changes). Alberta was one of a handful of provinces that did not reform its parental support legislation in the 1970s. See *supra* note 39.

138. Alberta, Legislative Assembly, *Alberta Hansard* (27 November 2003) at 1947 (Marlene Graham).

139. Alberta Law Reform Institute, *Family Law Project: The Conclusion* (ALRI Rep. No. 93) (Edmonton: The Institute, 2004) at 32.

140. The recent experience of another jurisdiction should also be noted. In 1995, Singapore enacted its first parental support law. *Maintenance of Parents Act* (Cap. 167B, 1996 Rev. Ed. Sing.). The Singapore government candidly admitted that one of the purposes of this legislation was to forestall the development of a “Western-style state welfare system.” See President Ong Teng Cheong, Address Before the Second Session of Singapore's English Parliament (10 January 1994), quoted in Art Lee, “Singapore's Maintenance of Parents Act: A Lesson to be Learned from the United States,” Note (1995) 17 *Loy. L.A. Int'l & Comp. L.J.* 671 at 673.

141. *Supra* note 38.

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port laws in Canada tend to gravitate toward one of two poles.¹⁴² In the first instance, there are the traditional statutes found in the prairie provinces,¹⁴³ which have changed little since the 1930s. These statutes are still close to the public welfare roots of parental support. On paper, they apply only in restricted circumstances, essentially to relieve a destitute parent from extreme poverty brought on by the inability to work. The second group of statutes is represented by the legislation in force in Ontario,¹⁴⁴ most of Atlantic Canada,¹⁴⁵ and the territories.¹⁴⁶ The Uniform Law Conference of Canada's *Uniform Family Support Act*¹⁴⁷ also falls into this group. These statutes have more in common with child and spousal support than they do with the old public welfare model of parental support. Their underlying philosophy is to provide a legal mechanism to compensate parents for support given to a child.

The Manitoba Law Reform Commission correctly noted that British Columbia's parental support law falls somewhere on the spectrum between these two poles.¹⁴⁸ In terms of drafting, section 90 has elements in common with the older, traditional parental support statutes (such as its limitations on who may apply for support and its focus on dependency) and elements in common with the eastern and Uniform Acts (such as the addition of "economic circumstances" to the traditional catalogue of "age, illness, and infirmity"). Court cases decided since the Manitoba Law Reform Commission's informal report have tended to pull the interpretation of section 90 closer to that of the eastern Acts. Resolving these tensions in British Columbia's parental support law would be a major part of the task of amending that law.

There are two models of parental support that should be considered. One model was embraced by the Manitoba Law Reform Commission. They were in favour of a focussed and limited statute, which would clearly state who could apply for support, under what conditions, and what they would be entitled to receive. The purpose of such a statute would be to supplement the public welfare system by providing desperately poor parents with the means to escape from the worst consequences of poverty. Although the Manitoba Law

142. *Ibid.* at 3.

143. *Supra* note 39.

144. *Supra* note 40.

145. *Supra* note 40.

146. *Supra* note 40.

147. See Uniform Law Conference of Canada, *Proceedings of the Sixty-Second Annual Meeting* (Ottawa: The Conference, 1980) at 30, 138–51 [Uniform Act]. The Uniform Act was originally entitled the *Uniform Family Support Obligations Act*; its title was subsequently shortened to the *Uniform Family Support Act*.

148. *Supra* note 38 at 3. The Manitoba Law Reform Commission also included Nova Scotia's legislation (see *supra* note 40) in this intermediate group.

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Reform Commission did not go into this point, one of the other advantages of such a system would be its simplicity to administer. A limited regime would encourage fewer applications to court and would ensure that those applications could be quickly resolved.

The other model is implicit in the Uniform Act and in the eastern legislation. This model endorses the notion of compensation or an implied contract¹⁴⁹ as the basis for parental support. It is a broader, and potentially more generous, view of parental support, one that is more in tune with child and spousal support than with the public welfare system. In other words, under this model parental support is about more than just pulling the most desperate out of abject poverty. This more complex and expansive view of parental support also requires more oversight and attention from the courts.

Parental support laws need not be drafted in strict conformity with one model or another. But it would be advantageous in thinking about the resolution of the many practical and technical issues that would arise to achieve a broad type of consistency.

B. Should a Parent's Conduct Disqualify the Parent from Receiving Support?

British Columbia's parental support legislation is silent on the relation of a parent's past conduct to both the parent's entitlement to support and the level of support to be awarded. This has not stopped the issue from being raised repeatedly in parental support cases. One judgment surveyed these cases and concluded that that "evidence of abandonment, abuse, and estrangement" may be taken into account in determining entitlement to support,¹⁵⁰ and that the length of a period of estrangement may be relevant to the question of amount.¹⁵¹ These statements were made by the Supreme Court in the *Newson* case, and they were subsequently disapproved of by the Court of Appeal.¹⁵² Cases decided since *Newson* have approached the issue of parental conduct with caution.¹⁵³ If section 90 were to remain on the books, it would be helpful for the Legislature to clarify this issue.

Three patterns of parental conduct have been identified as relevant: physical or psychological abuse of a child before the child reaches the age of majority;¹⁵⁴ a long period of

149. See Britton, *supra* note 90 at 356 ("Some of the laws seem to view filial support as part of a reciprocal contract obligation—that is, since the parent supported the child, the adult child owes support to the needy parent.").

150. *Newson*, *supra* note 69 at para. 140.

151. *Ibid.*

152. *Supra* note 74.

153. See, e.g., *S.A.G.*, *supra* note 62.

154. See VA. CODE ANN. § 20-88 (2006) ("This section shall not apply if there is substantial evidence of desertion, neglect, abuse or willful failure to support any such child by the father or mother, as the case may be, prior to the child's emancipation. . . .").

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estrangement or neglect;¹⁵⁵ and spendthrift behaviour.¹⁵⁶ An inquiry into parental conduct poses the risk that the court will be sidetracked into a difficult, emotional, and time-consuming line of investigation. On the other hand, public approval of and regard for the legislation would be strained if support were awarded to an abusive parent.¹⁵⁷

The other Canadian parental support statutes have not directly addressed the issue of conduct. An argument could be made that the drafting of the Uniform Act and the eastern legislation, which make support conditional on the parent having “cared for and provided support for the child,”¹⁵⁸ implicitly authorizes the courts to inquire into past conduct at least to the extent necessary to make a determination of whether the parent has provided care and support. Some American legislation has been more explicit, creating a bar to support in cases of abuse or abandonment.¹⁵⁹

Parental conduct is clearly a more relevant issue for parental support laws based on the compensation model. The Manitoba Law Reform Commission has argued that the more restrictive model would be inherently resistant to this type of inquiry.¹⁶⁰ The Commission’s reasoning was that the court would only be called upon to make a limited inquiry into whether the adult was dependent due to age, illness, or infirmity. If this inquiry resulted into a finding of dependency, then the amount of the award would again be limited to the amount needed to satisfy the parent’s basic subsistence needs. Since the legislation

155. See 23 PA. CONS. STAT. § 4603 (a) (2) (ii) (2006) (“A child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of ten years during the child’s minority.”); CAL. FAM. CODE § 4411 (Deering 2006) (“The court shall make the order requested pursuant to Section 4410 [proceeding to obtain relief from obligation to support parent] only if the petition alleges and the court finds all of the following: (a) The child was abandoned by the parent when the child was a minor. (b) The abandonment continued for a period of two or more years before the time the child attained the age of 18 years. (c) During the period of abandonment the parent was physically and mentally able to provide support for the child.”).

156. See MONT. CODE ANN. § 40-6-301 (2006) (“It is the duty of every adult child, having the financial ability, to furnish and provide necessary food, clothing, shelter, medical attendance, and burial, entombment, or cremation costs for an indigent parent, unless, in the judgment of the court or jury, the child is excused by reason of intemperance, indolence, immorality, or profligacy of the parent.”). See also Amber Spataro, “‘Prodigal Parent’ as a Defense to Proceedings Brought to Require Support from a Child” (2000) 11 J. Contem. Legal Issues 385 at 388 (“Surely a court of equity would consider unjust the imposition of a duty to support on the child who has no ability to control how the parents spend their retirement savings, and must stand helplessly by while those savings are squandered in reckless living.”).

157. See Britton, *supra* note 90 at 368.

158. Uniform Act, *supra* note 147, s. 4.

159. See *supra* notes 154–56.

160. *Supra* note 38 at 13.

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is only trying to achieve very limited goals, an inquiry into parental conduct should not be necessary.¹⁶¹

C. Should the Concept of Dependency be Retained in the Legislation?

Section 90 retains the traditional term “dependency” to describe the entitlement of a parent to support. This word is taken from the older statutes, which classified parental support as part of the public welfare system. The effect of this term has been blunted in British Columbia by two developments. First, the addition of “economic circumstances” to the traditional catalogue of the elements of dependency (“age, illness, or infirmity”) helped to pull parental support closer into line with child and spousal support. Second, court decisions, which have established that a pre-existing relationship of dependency and support is not necessary to establish a claim under section 90¹⁶² and that dependency is to be interpreted in strictly financial terms,¹⁶³ have brought the law of parental support in this province even closer to that of child and spousal support.

Other Canadian parental support statutes have adopted the term “need” in place of “dependency.” For example, the Uniform Act makes the link between parental support and child and spousal support clear by repeating the phrase “in accordance with need” in the relevant statutory provisions.¹⁶⁴ Adoption of this more modern and neutral language may be useful to capture the consensus in the courts that section 90 should be interpreted in a manner consistent with child and spousal support.¹⁶⁵ Harmonizing section 90 with the majority of other Canadian parental support laws may also assist in the development of a national body of case law.

The Manitoba Law Reform Commission was opposed to this approach. It recommended that Manitoba strengthen and clarify the role of dependency in its statute, in part by avoiding the use of the phrase “economic circumstances.”¹⁶⁶ The Commission was of the view that a more restrictive and limited parental support law would better serve those who clearly come within the bounds of the statute—parents in truly desperate circumstances. The Commission pointed to the legislation in force in Nova Scotia as a model for Manitoba to follow and, in the course of discussing Nova Scotia’s statute, made a telling point:¹⁶⁷

161. *Ibid.*

162. *See Newson, supra* note 66 at para. 15.

163. *See Newson, ibid.* at para. 33.

164. Uniform Act, *supra* note 147, ss. 2–4.

165. *See, e.g., Newson, supra* note 66 at para. 30.

166. *Supra* note 38 at 13.

167. *Ibid.*

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It is also clear that the Nova Scotia legislators did not equate the parents' maintenance duty to other family obligations. The right of support is aimed towards those who are incapable of satisfying their basic needs; it is not broadly drafted so as potentially to allow a parent the right to continue his/her previous standard of living.

This broader question has not been squarely addressed in Canadian parental support laws. But it cuts across many of the discrete issues discussed in this chapter. In many respects, resolving some of the drafting and technical issues posed here helps to determine whether the overall philosophy of the parental support statute leans toward one pole or the other.

D. Should There be a Requirement for the Parent to Make Reasonable Efforts to Become Self-Sufficient?

None of the parental support legislation currently in force in Canada requires a parent to make reasonable efforts to become self-sufficient. The Acts are completely silent on this issue. Further, self-sufficiency has not been raised in the case law. Instead, self-sufficiency arises in this context primarily as a reflection of its use in spousal support laws. Both the *Divorce Act*¹⁶⁸ and the *Family Relations Act*¹⁶⁹ contain statements directing the court to consider self-sufficiency in crafting spousal support orders.

This is another area where the parental support law should make clear the extent to which parental support is intended to mirror child and spousal support. Particular caution should be taken on this point, as self-sufficiency has proved to be a vexing issue in the area of spousal support. Applying the directions in the governing legislation has been difficult, especially in cases involving a disabled spouse.¹⁷⁰ In practice, this consideration would arise even more frequently in parental support cases, which would most often involve older adults or disabled adults.

In addition to practical difficulties with such a requirement, there is also a broader, thematic concern to consider. The Manitoba Law Reform Commission considered any provision requiring a dependent parent to make reasonable efforts to become self-sufficient to be incompatible with the model of parental support it recommended. Since the Commission's more limited model would only make support available to a parent who has become dependent due to age, illness, or infirmity, in the Commission's view there would

168. R.S.C. 1985 (2d Supp.), c. 3, s. 15.2 (6) (d) ("An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should . . . in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.").

169. *Supra* note 1, s. 89 (1) (d) ("A spouse is responsible and liable for the support and maintenance of the other spouse having regard to . . . the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves. . . .").

170. See *Bracklow*, *supra* note 57 at para. 1.

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be “. . . no issue as to whether a parent should attempt to become independent. Because of his/her debility, an applicant is incapable of that stature.”¹⁷¹ Here and elsewhere, it seems that taking a restrictive approach to some aspects of parental support can lead to a more liberal approach to others.

E. Should Parental Support be Subject to a Legislated Time Limit?

The question of placing a statutory time on support has not appeared in any Canadian legislation, and it has not been raised in any Canadian cases or commentary. But it has been the subject of some consideration in the United States, where two distinct approaches have emerged.

The first approach is to limit support orders to a maximum of eighteen or nineteen years. This limit is meant to mimic a parent’s legal requirement to support a minor child. It has been debated primarily in academic commentary.¹⁷² It has primarily been characterized as a natural extension of the implied contractual or compensatory basis of parental support and often appears to be raised to discredit that theory. As a serious legislative proposal, it would leave a lot to be desired. The lives and needs of minor children and older adults are clearly not parallel. Arbitrarily cutting off support could be a disastrous development for a vulnerable older adult.

The second approach focusses on the payor, rather than the recipient, of support. This approach caps the age at which a person is legally obligated to pay support at, for example, sixty-five or fifty-five years. The policy underlying such a provision is that the reduced earning power of older adults justifies a statutory exemption from the obligation to pay support, in much the same way that minor children are exempt from the obligation. Unlike the first approach, this type of cap has found its way into the legislation in force in a few American states.¹⁷³

F. Should the Legislation or the Regulations Contain Guidelines that Address the Level of Support a Parent Will be Entitled to?

The issues discussed to this point have primarily been concerned with entitlement to support. This issue directly raises the question of the amount of support a successful application should receive. At present, section 90 leaves this question almost entirely to the dis-

171. *Supra* note 38 at 13.

172. *See, e.g.*, Moskowitz, *supra* note 114 at 723 (“While the legal duty to support minor children is finite—that is, until eighteen years of age or emancipation—the legal duty to provide for parents would have no defined termination.” [footnotes omitted]).

173. *See, e.g.*, N.J. REV. STAT. § 44:4-101 (c) (2007) (“The provisions of this section shall not apply to any person 55 years of age or over except with regard to his or her spouse, or his or her natural or adopted child under the age of 18 years.”).

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cretion of the court, which is only directed to consider “the other responsibilities and liabilities and reasonable needs of the child.”

For the other family support obligations, there has been considerable interest in recent years in moving away from a judicial discretion model of determining support amounts to a model based on guidelines. Guidelines have become a familiar part of the landscape for child support, where since 1997 federal guidelines for support amounts have been in force.¹⁷⁴ For spousal support, an equally complex and detailed set of guidelines has been proposed.¹⁷⁵ These guidelines are currently only advisory; they do not bind the parties to a spousal support dispute in the same manner as the *Federal Child Support Guidelines* are binding on the parties to a child support case.

For child and spousal support, the adoption of guidelines is viewed as a way to bring order to an area of the law that is marked by its “highly discretionary nature,” by vast numbers of cases yielding “a wide variation of results,” and by “an unacceptable degree of uncertainty and unpredictability” that has made it difficult for people to arrange their financial affairs and plan for the future.¹⁷⁶ Proponents of guidelines argue that they provide clarity and certainty, reduce disputes and litigation, lower costs, and improve the efficiency of the process of determining support amounts.¹⁷⁷ Opponents counter that guidelines are too rigid, too apt to distort and simplify complex cases, and too focussed on producing out-of-court settlements.¹⁷⁸

Historically, Canadian parental support laws created certainty on the question of the amount of support a parent was entitled to by resorting to a cruder device—a legislative cap. (For example, the original British Columbia *Parents’ Maintenance Act* capped the amount of support at twenty dollars per week.¹⁷⁹) A handful of American states have enacted parental support guidelines.¹⁸⁰ These American guidelines were more sophisticated than a simple cap on the amount, but they were nothing like the detailed and complex contemporary Canadian guidelines for child and spousal support. The American guidelines were intended to track the amount made available to recipients of social assistance

174. *Federal Child Support Guidelines*, S.O.R./97-175.

175. See Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: A Draft Proposal* (January 2005), online: Department of Justice Canada <http://www.justice.gc.ca/en/dept/pub/spousal/project/spousal_support_advisory_guidelines_e.pdf>.

176. *Ibid.* at 9.

177. *Ibid.* at 19–20.

178. *Ibid.* at 20–21.

179. *Supra* note 25, s. 5 (1).

180. See Britton, *supra* note 90 at 372 (reproducing the guidelines formerly in force in Oregon). Oregon repealed its parental support guidelines in 2001.

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under state welfare laws. They were more in tune with the cost recovery rationale of parental support. Most of the states that had guidelines at one time or another have repealed them.

Deciding whether to implement guidelines for parental support would require thinking through the policy arguments for and against such guidelines. This exercise would be similar to the debates surrounding the creation and adoption of guidelines for child and spousal support. But there are two other complicating factors surrounding this issue for parental support. First, the drafters of the *Federal Child Support Guidelines* and the *Spousal Support Advisory Guidelines* were able to draw on a vast body of case law in developing their guidelines.¹⁸¹ For parental support, this empirical foundation is lacking. Second, as noted in connection with previous issues, the basic question of whether British Columbia's parental support laws should be a restrictive remedy aimed at meeting the basic needs of parents in abject poverty or a broader remedy designed to do more than this, remains unanswered. Clarifying this fundamental theoretical issue would be a condition precedent to formulating coherent and effective guidelines for parental support.

G. Should Entitlement to Parental Support be Limited to the Adult Child's "Father or Mother"?

Unlike the previous issues discussed in this chapter, the current British Columbia legislation does directly address the issue of who should be entitled to parental support. Section 90 defines parent as meaning "a father or mother." This specific definition appears to be intended to limit entitlement to claim parental support to biological or adoptive parents.¹⁸² Section 1 of the *Family Relations Act* contains a broader definition of "parent" that applies generally throughout the Act.¹⁸³

Other legislation in Canada has taken a broader approach that specifically applies to parental support. For example, the Uniform Act defines "parent" to mean:¹⁸⁴

the father or mother of a child by birth, whether within or outside marriage, or by virtue of (the provisions relating to the effect of adoption) and includes a person who has demonstrated

181. See Rogerson & Thompson, *supra* note 175 at 14 ("The project is premised on the view that patterns and structure are beginning to emerge in the law, at least a range of typical cases—some unspoken guidelines." [footnote omitted]).

182. See *Adoption Act*, R.S.B.C. 1996, c. 5, s. 37 (effect of adoption order).

183. *Family Relations Act*, *supra* note 1, s. 1 "parent" ("parent includes (a) a guardian or guardian of the person of a child, or (b) a stepparent of a child if (i) the stepparent contributed to the support and maintenance of the child for at least one year, and (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child.").

184. Uniform Act, *supra* note 147, s. 1 (f).

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a settled intention to treat a child as a child of his or her family other than under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

The Uniform Act's definition is more consistent with the law of child support. The child support obligation is not limited to biological parents.¹⁸⁵

The Manitoba Law Reform Commission expressly approved of British Columbia's approach to this issue and recommended that Manitoba adopt wording similar to section 90.¹⁸⁶ The Commission was concerned that language similar to that found in the Uniform Act could leave an adult child open to multiple applications for parental support.¹⁸⁷ On the other hand, the restrictive view of the relationship between parentage and financial support has clearly been removed in other areas of the law, so it is not clear why it should be upheld for parental support, unless the intent is to adopt a restrictive overall framework.

H. Should the Legislation Give Effect to, Prohibit, or Allow a Court to Override an Agreement Between a Parent and a Child Purporting to Govern the Child's Obligation to Pay Support?

Section 90 does not address the effect of an agreement between a parent and an adult child that purports to deal with the child's obligation to pay support. Legislative provisions concerning spousal support, on the other hand, do contain broad statements about the effect of agreements dealing with spousal support.¹⁸⁸

The lack of public awareness about parental support, when compared with spousal support, probably accounts for the absence of any legislative direction on contractual arrangements regarding parental support. The absence of a defining event, such as the separation of spouses, may also restrain the desire to enter into an agreement governing the

185. See *Divorce Act*, *supra* note 168, s. 2 (2) (b) (defining "child of the marriage" to include "any child of whom one is the parent and for whom the other stands in the place of a parent"); *Family Relations Act*, *supra* note 1, s. 1 "parent." See also *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

186. *Supra* note 38 at 7.

187. *Ibid.* ("This uniform definition could lead to problems in the Bill's practical application. That is, a person could, at least potentially, become the object of several parents' maintenance applications, especially where family breakdown has occurred.")

188. See *Divorce Act*, *supra* note 168, s. 15.2 (4) (c) ("In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including . . . any order, agreement or arrangement relating to support of either spouse."); *Family Relations Act*, *supra* note 1, s. 89 (1) (b) ("A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following . . . an express or implied agreement between the spouses that one has the responsibility to support and maintain the other."). See also *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303.

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obligation to pay parental support. But the impulse to use agreements as a means to provide certainty and order to family relations cannot be discounted. As an example of this impulse, a recent newspaper article on China, a country with both a strong tradition of filial piety and a forceful set of parental support laws, contained this anecdote:¹⁸⁹

Hao Maishou, a former sociology professor from Tianjin who quotes Marx, Lenin and Rousseau in equal measure, has taken a different approach. He signed a contract when his son was 20 years old that essentially read: I won't coddle you, find you a job, hunt for your wife or pay for more education, and you won't have to take care of me in my old age. Initially taken aback by his father's action, Hao's son now says it has made him more independent and confident.

"Chinese often regard raising children as an investment," said the younger Hao in his two-bedroom apartment decorated with miniature terra-cotta warriors and his father's calligraphy. "Filial piety is an old concept that only suits a particular period, and now it's no longer relevant."

While it is unlikely that a desire to enter into an agreement this blunt will sweep British Columbia in the near future, it would be worthwhile to have clear rules in place if section 90 is to be modernized. To a certain extent, the common law covers unconscionable contracts, but the issue is broader than unconscionability. The fundamental issue of whether the legislation should even recognize these types of agreements would have to be addressed first. If they were to be recognized, it would also be worthwhile to supplement through legislation the traditional common law tools for addressing unconscionable agreements.

I. Should the Legislation Expressly Deal with the Apportionment of Liability for Parental Support Among Two or More Adult Children?

The final issue that may be worthy of consideration is how to determine the contribution of the adult children, after a parent's entitlement to support has been established and the amount has been set. Section 90 does not address this question. When it has arisen in a recent case, it has been decided with little discussion that the children will be variably liable, according to their means and other obligations.¹⁹⁰ This resolution may be implicit in the legislation. The question is whether this basis for apportioning liability for support should be made explicit.

189. Mark Magnier, "China's Honor Code" *Los Angeles Times* (15 April 2006), online: Los Angeles Times <<http://www.latimes.com/news/nationworld/world/la-fg-piety15apr15,1,6330960.print.story?coll=la-headlines-world>>.

190. See *Newson*, *supra* note 74 at para. 16 (two children ordered to pay interim support of \$200 per month; four other children not liable to pay support); *Anderson (Master)*, *supra* note 60 at paras. 25, 29–34 (award of support in the amount of \$50 per month; five children ordered to contribute \$10 each and one not liable for support).

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There are some obvious advantages to specifying the basis for apportioning liability to pay parental support. For example, it should make the law clearer and allow for greater certainty in planning. But this approach has also proved to contain some drafting challenges. The original *Parents' Maintenance Act* contained an enigmatic section that was intended to achieve this result.¹⁹¹ This provision generated the only court case to consider the 1920s legislation.¹⁹² The Manitoba Law Reform Commission has also cautioned against using words such as “jointly” in drafting such a provision.¹⁹³

VI. CONCLUSION

A. Recommendations for Reform

For the reasons set out in section IV.D, above, the Law Institute favours the repeal of British Columbia's parental support laws.

The Law Institute recommends that:

1. Section 90 of the Family Relations Act should be repealed.

Apart from section 90, there are references to parental support (which often do not directly refer to section 90) in other sections of the *Family Relations Act*,¹⁹⁴ and in other statutes, such as the *Adult Guardianship Act*.¹⁹⁵ Although it probably goes without saying, a careful search of the statutes and regulations of British Columbia should be made, and any provisions that refer to parental support should either be repealed or appropriately amended.

The Law Institute recommends that:

2. Other provisions in British Columbia's statutes and regulations that contain references to parental support should either be repealed or amended appropriately.

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191. *Supra* note 25, s. 3.

192. *R. v. Skilling*, *supra* note 36.

193. *Supra* note 38 at 11.

194. *See, e.g., Family Relations Act*, *supra* note 1, s. 91 (2.1)–(2.1).

195. *See, e.g., Adult Guardianship Act*, *supra* note 91, s. 56 (3) (b).

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