



## **BRIEFING NOTE**

***AMENDING THE EMPLOYMENT AND ASSISTANCE ACT AND THE  
EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES  
ACT TO BETTER SUPPORT WOMEN'S FINANCIAL INDEPENDENCE***

**September 2016**

## BRIEFING NOTE

### AMENDING THE *EMPLOYMENT AND ASSISTANCE ACT* AND THE *EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES ACT* TO BETTER SUPPORT WOMEN'S FINANCIAL INDEPENDENCE

#### PURPOSE

To address the negative impact of BC's income and disability assistance laws on women by recommending amendments to the definitions of "dependent" and "spouse" in the *Employment and Assistance Act* (the "EAA") and the *Employment and Assistance for Persons with Disabilities Act* (the "EAPWDA").<sup>1</sup>

#### SUMMARY

The current definitions of both "dependent" and "spouse" in BC's social assistance legislation disproportionately and negatively impact women by imposing financial dependence on another person. By forcing this financial dependence, the definitions put women at heightened risk of relationship violence, undermine their independence, and prohibit them from entering new relationships that could eventually provide mutual support.

This briefing note recommends specific legislative amendments that will:

- Clarify that only relationships that display significant financial dependence or interdependence are relevant for the purposes of income and disability assistance eligibility;
- Remove financial interdependence by default on the basis that a person indicates a parental role for a child unless a spousal relationship can be established;
- Recognize the legal right of spouses to separate but live in the same residence, consistent with family law;
- Alter the length of cohabitation before a couple may be deemed "spouses" to align with parallel provisions in BC's *Family Law Act* and other provincial legislation;
- Provide guidance on how separated spouses can live together, consistent with BC's *Family Law Act*; and
- Provide clarification on the reconciliation provisions in the current legislation consistent with BC's *Family Law Act*.

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<sup>1</sup> *Employment and Assistance Act*, SBC 2002, c 40 and *Employment and Assistance for Persons with Disability Act*, SBC 2002, c 41.

## BACKGROUND

The definitions of “dependent” and “spouse” are critical to how the BC Ministry of Social Development and Social Innovation (the “Ministry”) determines eligibility for income and disability assistance. In order to be eligible for income or disability assistance, a person must apply on behalf of their entire family unit,<sup>2</sup> and legislative definitions govern who is or is not a member of a given family unit.

Determining the members of a given family unit is crucial for two reasons. First, in order for a family unit to be eligible for income or disability assistance, all members of the family unit must be eligible.<sup>3</sup> As a result, including someone as member of a family unit may disqualify the entire family unit from receiving any assistance. For example, if the Ministry deems a person to be a member of a family unit and that person fails to provide necessary information, has recently quit a job, is on strike, earns too much income, or hold assets in excess of the legislative limits, the entire family unit becomes ineligible for benefits regardless of the needs of the other family unit members.

Second, if a family unit is eligible for assistance, the amount of monthly benefits the family can receive is determined using the whole unit’s non-exempt income.<sup>4</sup> If someone is deemed a member of the family unit, that person’s income will be used to determine the benefits received by the entire family unit regardless of whether other members actually have access to that income.

### Current definitions

Currently, family units are made up of the applicant/recipient and their dependents. Dependents of an applicant/recipient include any person who resides with them and is (1) a spouse, (2) a dependent child, or (3) indicates a parental role for the applicant/recipient’s dependent child.<sup>5</sup>

The legislation provides that two people are spouses if they meet one of the following criteria:

- They are married to each other (there is no provision for legal separation while remaining in the same residence).
- They acknowledge to the Minister that they are spouses.
- They are deemed to be spouses because they have resided together for at least three months, or nine of the last 12 months, and the Minister is satisfied that their

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<sup>2</sup> *Employment and Assistance Regulation*, BC Reg 263/2002, s 5(1) [“EAR”]; *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg 265/2002, s 5(1) [“EAPWDR”].

<sup>3</sup> *EAA*, s 2; *EAPWDA*, s 3.

<sup>4</sup> *EAR*, s 28; *EAPWDA*, s 24.

<sup>5</sup> *EAA* s 1; *EAPWDA*, s 1.

relationship demonstrates (1) financial dependence or interdependence, and (2) social and familial interdependence, consistent with a marriage-like relationship.<sup>6</sup>

When the definition of spouse was amended in 2006, then Minister Richmond explained the Ministry's goals in defining dependents:

For the Ministry, dependency is premised on the economic principle of a social unit where there is support or obligation and, if established, considers the income and assets of all parties as available to all members of a family unit.<sup>7</sup>

## KEY CONSIDERATIONS

### **(1) Women are more likely to be found ineligible because of the current definitions**

Legal scholars and commentators have noted for some time that dependency eligibility rules regarding income and disability assistance, and particularly those that deem a relationship to be spousal, disproportionately impact women.<sup>8</sup> In addition, courts have also concluded that such provisions discriminate against women.<sup>9</sup>

Statistics in the BC income and disability assistance context are also consistent with these findings. An examination of Employment and Assistance Appeal Tribunal decisions over the last five years illustrates that, in cases that come before the Tribunal, women are more likely than men to be negatively impacted by the definitions of dependent and spouse in BC's legislation. As of June 2016, women headed 48% of all the family units led by single adults receiving income or disability assistance (those potentially subject to the definitions).<sup>10</sup> If the current definitions impact men and women equally, one would expect that women would make up approximately the same percentage of recipients found to be ineligible as a result of the definitions. However, women headed 62% of the families the Tribunal found to be ineligible for assistance under the current definitions, indicating that women are more likely than men to be

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<sup>6</sup> *EAA* s 1.1; *EAPWDA*, s 1.1.

<sup>7</sup> British Columbia, Official Reports of the Legislative Assembly (Hansard) 38th Parl 2nd Sess, Vol 9 No 10 (26 April 2006) at 4049 (Hon C Richmond).

<sup>8</sup> See for example, Rebecca Crookshanks, "Marginalization Through a Custom of Deservingness: Sole-Support Mothers and Welfare Law in Canada" (2012) 17 *Appeal* 97; Shelley AM Gavigan & Dorothy E Chunn, "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Laws as Liberal and Neo-Liberal Reforms" (2007) 45 *Osgoode Hall LJ* 733; Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 *Can J Women & L* 371.

<sup>9</sup> *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 212 DLR (4<sup>th</sup>) 633 (OCA) [*Falkiner*]; *R v Rehberg* (1994), 127 NSR (2d) 331 (SCNS).

<sup>10</sup> Ministry of Social Development and Social Innovation, "BC Employment and Assistance Summary Report" (June 2016). Note: this statistic was calculated based on all recipient families categorized as either a single recipient or a single parent family. The gender breakdown for single parent families, which is not available in the Ministry's monthly caseload summaries, is based on the Ministry's public statements that approximately 90% of single parent families on assistance are headed by women.

negatively impacted.<sup>11</sup> The rates at which women are disproportionately impacted increases further for recipients the Tribunal found to be ineligible because of a deemed spousal relationship (69% were women) and because a co-resident indicated a parental role for their dependent child (73% were women).

The gendered impact of the current definitions amounts to a violation of s. 15 of the *Charter of Rights and Freedoms* because the definitions discriminate against women. As the Ontario Court of Appeal has noted,

...social assistance recipients – especially single mothers on social assistance – are [a] historically disadvantaged group. The definition of spouse at issue... perpetuates this historical disadvantage. It creates financial stress from the beginning of the relationships. It reinforces the stereotypical assumption that women will be supported by the man with whom she cohabits and will have access to his resources. And it devalues women's desire for financial independence.<sup>12</sup>

While the definition referred to in the case differs from BC's current definitions, BC's definitions reflects the same discriminatory assumptions: that women will be supported by cohabitants who provide them even minimal supports, as well as the assumption that the financial independence of women is of lesser importance than the Ministry's financial bottom-line.

## **(2) Only significant financial dependence is relevant to eligibility**

When the Ministry includes a spouse or other dependent in a family unit, it treats the individuals as a joint unit for financial eligibility assessment, essentially assuming that the parties are completely financially dependent on each other. However, this consequence has little connection to the relationships that the Ministry's definitions actually capture. Instead, the current definitions focus on whether or not a relationship between two people is spousal in nature, or whether a person is playing some aspect of a parental role for a dependent child. In contrast to the Ministry's assumptions, these relationships do not come with any obligation to provide financial support during the relationship.

The current definitions reflect an archaic and outdated understanding of families and spousal relationships as unions that are primarily economic in nature, an interpretation that has historically disadvantaged women. In contrast, family law has modernized significantly and it is now well-settled that financial dependence is not a determinative

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<sup>11</sup> This statistic was calculated using all publicly available Employment and Assistance Appeal Tribunal decisions that:

- were issued between 2011 and 2016; and
- the Tribunal categorized as "Dependency/ Living Arrangement" decisions, except those that relate to determining whether a child is a dependent child.

<sup>12</sup> *Falkiner*, *supra* note 9 at para 96.

factor when deciding whether a relationship is marriage-like.<sup>13</sup> A spousal relationship may be marriage-like and the individuals in it may maintain totally separate financial lives.

Even in cases where there is some minimal financial dependence or interdependence, it is unfair to treat two people as a joint unit for financial eligibility assessments. For example, the Ministry's own policies suggest that a joint tenancy agreement listing two people as partners, spouses, or a couple is sufficient to establish that they meet all the factors required to be captured within the Ministry's definition of spouse.<sup>14</sup> While entering into a joint tenancy agreement may indicate a minimal level of financial interdependence based on the joint contract, it has no bearing on whether or not two people share finances or financially support each other with day-to-day costs, which is the consideration relevant to the Ministry's goals. Certainly the existence of a joint tenancy agreement does not lead to any obligation for individuals to support each another and it in no way indicates that they are a joint financial unit.<sup>15</sup>

To meet the Ministry's stated goal of capturing relationships in which both parties have equal access to each other's income and assets during a relationship, only relationships that exhibit significant financial dependence or interdependence (i.e. where significant access to income and assets is actually being provided) are relevant. Otherwise, they should not be treated as a joint financial unit.

### **(3) Indicating a parental role has no bearing on financial interdependence or support obligations**

The current provisions have been used to find women ineligible because a co-resident has provided even minimal levels of support for children. For example, in one case before the Tribunal, the occasional purchase of diapers or formula for a baby was enough to deem a dependency relationship despite the fact that the two adults intentionally maintained separate finances and did not support each other financially.<sup>16</sup> The inference from the decision is that the woman in the case should be forced to rely completely on her co-resident, and that the co-resident somehow has an obligation to provide for her and her child, because of this minimal, sporadic support.

Co-parenting may be a useful factor in determining whether or not a relationship is spousal in nature. However, whether or not a co-resident indicates a parental role for a

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<sup>13</sup> *Weber v Leclerc*, 2015 BCCA 492 at 12.

<sup>14</sup> Ministry of Social Development and Social Innovation, BCEA Policy & Procedure Manual, "Family Composition" (undated), online: <http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/support-and-shelter/family-composition>.

<sup>15</sup> In addition, given that people in receipt of income assistance live in deep poverty, applying for a tenancy as spouses may be done for purely practical reasons. For example, if two roommates can only afford a one bedroom apartment and one person intends to sleep in the living room, as is common, they may hold themselves out as spouses to a landlord to increase the likelihood that they will be granted the apartment.

<sup>16</sup> Employment and Assistance Appeal Tribunal decision 14-88, online: <http://www.eaat.ca/CMFiles/Decisions/14-881HWZ-5292015-1797.pdf>.

recipient's dependent child has, on its own, no bearing on whether the co-resident has any legal obligation to financially support either the recipient or her child, or whether there is any actual financial interdependence in a relationship.

“Indicating a parental role” for a child does not, on its own, create child support or spousal support obligations in family law.<sup>17</sup> In addition, given that the financial support of children in the form of child support is no longer relevant to eligibility for income and disability assistance, there is no rational basis on which to infer that indicating a parental role for a child leads to financial support obligations that are relevant to income and disability assistance eligibility.

#### **(4) Low income spouses often separate but continue residing together**

The current legislative definition of spouse leaves little room for Ministry staff to assess actual financial interdependence in cases of separated spouses who are still legally married and residing together. Even in cases where a recipient makes clear attempts to separate, the Ministry may find her ineligible. For example, in one recent case, a woman was living in her family home and was separated from her abusive husband, who was residing in a travel trailer on the same property. Because he continued to enter the family home despite her objections, the Ministry deemed him to part of the recipient's family unit and found her ineligible for income assistance despite that fact that he refused to provide any financial support. At the time of the Tribunal decision in the case, the recipient had no hot water or gas in her home, was boiling water for bathing, was begging or borrowing money to cover medication and food, and had no funds to rent housing elsewhere. Two levels of Ministry decision-makers and the Tribunal found that the woman was ineligible for assistance because she and her separated husband were a joint financial unit.<sup>18</sup>

Family law allows for both married and common law spouses to separate if they are living their lives separately and at least one spouse has the intention to separate. It is more common for low income couples to continue residing in the same residence because they are unable to afford two homes, but they can separate their lives by not sharing things like meals, a bedroom and social activities. After separation, new financial interdependence is limited; for example, new property obtained after separation does not become family property. There is no principled reason why the Ministry should not recognize separations and the financial independence that flows from them for persons receiving income or disability assistance.

#### **(5) Two years' cohabitation is more appropriate to capture spousal relationships**

It appears that BC chose a minimum cohabitation period of three months because Ontario adopted a similar provision. Hansard debates provide very little additional explanation of how the three month period was chosen, aside from then Minister

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<sup>17</sup> See *Family Law Act*, SBC 2011, c 25, ss 3, 39 and 147.

<sup>18</sup> Employment and Assistance Appeal Tribunal decision 16-111, online: <http://www.eaat.ca/CMFiles/Decisions/16-111JBM-692016-4624.pdf>.

Richmond's comments that "three months of living together in combination with other signs of a marriage-like relationship are sufficient to determine if the relationship is spousal or just a try-on relationship."<sup>19</sup> However, studies in other jurisdictions directly contradict this rationale.

After a review of Ontario's social assistance laws, the Commission for the Review of Social Assistance in Ontario found that a period of three months' cohabitation is too short for couples to "assess the viability of their relationship before being considered spouses, as couples who are not receiving social assistance usually do."<sup>20</sup> In particular, three months of cohabitation is not long enough for women to "try on" a relationship before being forced into a situation of financial dependency. The Ontario Commission recommended a longer period of cohabitation of one year before a relationship is deemed to be spousal. That length of time was chosen because it was consistent with other provincial statutory benefit schemes.

BC's family law system mandates that relationships become spousal in nature after two years of living together in a marriage-like relationship because financial interdependence is generally not presumed in informal relationships of less than two years. For example, equal rights to family property, reflecting the presumption that most spousal relationships are equal economic partnerships, do not accrue until a couple has lived together for at least two continuous years. No right to spousal support arises until a couple has lived together in a marriage-like relationship for at least two years unless they have a child together. Even in the latter case, aside from couples with an extraordinary income gap between the two parties, it is unlikely that any right to spousal support payments would arise after only three months of cohabitation.

Many statutory schemes in BC use a period of two years of cohabitation to define spousal relationships, including:

- *Cremation, Internment and Funeral Service Act*;
- *Family Compensation Act*;
- *Family Law Act*;
- *Forest Act*;
- *Home Owner Grant Act*;
- *Land (Spouse Protection) Act*;
- *Land Tax Deferment Act*;
- *Members' Remuneration and Pensions Act*;
- *Notaries Act*;
- *Pension Benefits Standards Act*;
- *Property Transfer Tax Act*;
- *School Act*;
- *Utilities Commission Act*;
- *Wills, Estates and Succession Act*;
- and
- *Workers Compensation Act*.<sup>21</sup>

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<sup>19</sup> *Supra* note 7 at 4049.

<sup>20</sup> Frances Lankin and Munir A Sheukh, *Brighter Prospects: Transforming Social Assistance in Ontario* (2012) at 87-88, online: [http://www.mcsc.gov.on.ca/documents/en/mcsc/social/publications/social\\_assistance\\_review\\_final\\_report.pdf](http://www.mcsc.gov.on.ca/documents/en/mcsc/social/publications/social_assistance_review_final_report.pdf).

<sup>21</sup> Many of the BC schemes that do not use two years of cohabitation deem a relationship to be spousal simply when two people "live together in a marriage-like relationship" with no minimum period of cohabitation. At least in the context of social assistance, such a definition would violate the *Charter*, as

## **(6) Amending the definitions would support *A Vision for a Violence Free BC***

The current definitions of spouse and dependent result in women being in what the Ministry defines as “dependent” relationships, reflecting the Ministry’s belief that women must be financially dependent on the person they reside with before they can access the Ministry for financial support. In essence, the Ministry is pushing women into significant financial dependence in their relationships in situations where it does not otherwise exist.

As recognized in BC’s *A Vision for a Violence Free BC* plan, women living in poverty or with disabilities, like those on income and disability assistance, are at a heightened risk of violence.<sup>22</sup> Financial dependence within relationships increases women’s risk of violence and makes it harder for them to leave an abuser.<sup>23</sup> In addition, the current definitions may force women to hide their personal relationships from the Ministry in order to protect their own independence. Out of fear of being reported to the Ministry, these women may be hesitant to call the police or otherwise protect their safety when violence occurs.

By forcing women to rely financially on their cohabitants, the Ministry has imposed a further barrier on women and their children from being able to live free from abuse. The current definitions undermine BC’s action to combat violence against women and intrude into a core aspect of one’s security of the person and are therefore a potential violation of section 7 of the *Charter*.

## **(7) Supporting autonomous relationships may allow recipients to become independent from Ministry benefits**

The Commission for the Review of Social Assistance in Ontario has noted that forming supportive relationships can lead to financial independence:

We heard that the imposition of this definition of a spousal relationship, and the obligation to financially support the other partner that it brings so early on, creates a disincentive for people, particularly women and people with disabilities, to try to form relationships with people who are not receiving social assistance. It may cause people receiving social assistance to be fearful about entering into relationships at all. In addition to what we heard, we also considered the research showing that entering into relationships helps support people in moving out of poverty.<sup>24</sup>

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noted by former Minister Richmond: *supra* note 7 at 4047 and 4053. No other scheme uses three months of cohabitation.

<sup>22</sup> British Columbia, *A Vision for a Violence Free BC: Addressing Violence Against Women in British Columbia* (2015), online: <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/publications/violence-free-bc.pdf> at 6.

<sup>23</sup> *Ibid* at 4-5.

<sup>24</sup> Lankin, *supra* note 20 at 87.

In an effort to reduce reliance on income and disability assistance, the Ministry's current definitions actually dissuade recipients from forming the very relationships that could support them to become financially independent from Ministry benefits. Women are unable to "try on" relationships in a safe way that respects their independence. They are in turn less likely to form long-term, supportive spousal relationships without putting themselves at risk early in a relationship. Similarly, women with disabilities may be forced to forgo relationships that would support their dignity and independence such as a roommate that assists with household tasks. Single mothers experience serious financial consequences and forced dependence if they form relationships that support their parenting. They may be forced to forgo these kinds of supportive relationships, which would benefit women and children, to ensure they remain financially independent.

### **(8) Choices about how structure personal relationships are fundamental to dignity**

Finally, the current definitions place significant power in the hands of Ministry to unilaterally determine when relationships should or should not be interdependent. The right to make autonomous personal decisions free from government interference, including the right to freely decide how personal relationships are structured, is fundamental to the liberty and human dignity protections in s. 7 of the *Charter*.<sup>25</sup> The current definitions interfere with this freedom by creating serious financial and interpersonal constraints on when and how a recipient/applicant chooses to enter into a relationship.

## **CONCLUSION AND RECOMMENDED AMENDMENTS**

Given the above, we seek amendments to the *Employment Assistance Act* and the *Employment and Assistance for Persons with Disabilities Act* to ensure that both schemes support the financial independence of women. In particular, we recommend amendments to ensure that the definitions of "dependent" and "spouse" reflect actual levels of financial dependence in relationships reflected in the Ministry's stated purposes in having such definitions in the first place.

The current definitions force financial dependence in relationships where there may be none, assume financial support obligations when none exist, put women at increased risk of violence and prohibit them from forming supportive relationships. The amendments below will allow the Ministry to assess actual levels of financial dependence in relationships and will better support women's safety, financial independence and dignity.

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<sup>25</sup> See for example *R v Morgentaler*, [1988] 1 SCR 30.

## Recommended Amendments

Current provisions	Suggested amended provisions
<p><b>Interpretation</b></p> <p>1 (1) In this Act:</p> <p>[...]</p> <p>"<b>dependant</b>", in relation to a person, means anyone who resides with the person and who</p> <p>(a) is the spouse of the person,</p> <p>(b) is a dependent child of the person, or</p> <p>(c) indicates a parental role for the person's dependent child;</p> <p>[...]</p> <p>(3) For the purpose of the definition of "dependant", spouses do not reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit for periods longer than a day.</p>	<p><b>Interpretation</b></p> <p>1 (1) In this Act:</p> <p>[...]</p> <p>"<b>dependant</b>", in relation to a person, means anyone who resides with the person and who</p> <p>(a) is the spouse of the person, or</p> <p>(b) is a dependent child of the person.</p> <p>[...]</p> <p>(3) For the purpose of the definition of "dependant", spouses do not reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit for periods longer than a day.</p>
<p><b>Meaning of "spouse"</b></p> <p>1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if</p> <p>(a) they are married to each other, or</p> <p>(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.</p> <p>(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if</p> <p>(a) they have resided together for at least</p> <p>(i) the previous 3 consecutive months, or</p> <p>(ii) 9 of the previous 12 months,</p>	<p><b>Meaning of "spouse"</b></p> <p>1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if</p> <p>(a) they are married to each other and they are not separated,</p> <p>(b) they acknowledge to the minister that they are residing together in a marriage-like relationship, or</p> <p>(c) they have resided together for a continuous period of at least 2 years and the minister is satisfied that the relationship demonstrates social and familial interdependence consistent with a marriage-like relationship,</p> <p>and the minister is satisfied that the relationship demonstrates significant</p>

<p>and</p> <p>(b) the minister is satisfied that the relationship demonstrates</p> <ul style="list-style-type: none"><li>(i) financial dependence or interdependence, and</li><li>(ii) social and familial interdependence,</li></ul> <p>consistent with a marriage-like relationship.</p>	<p>financial dependence or interdependence.</p> <p>(2) For the purposes of this Act,</p> <ul style="list-style-type: none"><li>(a) married persons may be separated despite continuing to live in the same residence, and</li><li>(b) the minister may consider, as evidence of separation,<ul style="list-style-type: none"><li>(i) communication, by one married person to the other married person, of an intention to separate permanently, and</li><li>(j) an action, taken by a married person, that demonstrates their intention to separate permanently.</li></ul></li></ul> <p>(3) For the purposes of this Act, married persons are not considered to have separated if, within one year after separation,</p> <ul style="list-style-type: none"><li>(a) they begin to live together again as spouses and the primary purpose for doing so is to reconcile, and</li><li>(b) they continue to live together as spouses for one or more periods, totalling at least 90 days.</li></ul>
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