

Divisible Assets in Common Law Canada

by

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Abstract

One of the most contentious issues within the area of recent matrimonial property legislation in Canadian common law provinces concerns what part of a spouse's property is prima facie distributable between both spouses on marriage breakdown. Each provincial statute dealing with this issue contains its own definition of what is or is not a divisible asset<sup>1</sup> and in every province that definition has been the subject of judicial scrutiny.

This study will assess and compare the definition of "divisible asset" employed by each province, particularly in regard to how that definition has been interpreted by the judiciary.

The thesis is prefaced by an introduction, which briefly outlines the purpose of the study.

Chapters 1 to 9 deal with the legislation of the individual provinces.

The final section of the thesis contains the general observations and recommendations of the writer.

The study is based on material available up to September 1982. Efforts have been made to give the correct position in each province as of that date. Where possible, changes which occurred since the writing of the first draft have been incorporated in the text of

the thesis. In other instances, such changes have been footnoted.



Footnotes to Abstract

1. This terminology is used for convenience only in this part. The terminology of the legislation is not uniform and will be referred to where appropriate.

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## Introduction

In recent years rapid developments have been made throughout the common law provinces of Canada in the field of matrimonial property law. Each common law province has introduced legislation in this area which radically changed the pre-existing system adopted under the common law. The major reason for the new legislation was that common law and equitable principles had proven inadequate to compensate the homemaker for her role in building up family or matrimonial assets during the course of the marriage. Under the separate property regime in existence before the introduction of reform, each spouse retained ownership of property he or she had acquired before marriage. Property obtained during the course of the marriage usually remained the possession of the spouse who had acquired it by purchase from his or her earnings or savings, by inheritance or by gift. While equitable doctrines had some bearing on the question, particularly in regard to the concept of trust, the intervention of equity was often not thought enough to prevent unfairness in many instances<sup>1</sup>. The publicity attached to decisions such as Murdoch v Murdoch<sup>2</sup> centred public attention on the plight of the homemaker who might find herself in the situation that, after many years of marriage, she had no legal entitlement to matrimonial property which had been built up over the years through the joint efforts of both spouses.

The aim of the new legislation was to effect a more equitable

distribution of matrimonial property than would have been achieved at common law. In most provinces the legislation attempted to effect this goal by the introduction of a system of deferred sharing coupled with judicial discretion. Such a system involves the retention of separate property while the marriage remains ongoing. Once the marriage has broken down, each spouse is prima facie entitled to one-half of certain specified property. Where an equal division of such assets would be unfair, the court in its discretion may vary the division or order a distribution of property that is not specified as prima facie divisible. Central to the whole scheme of the new Acts is the question of what property is to be subject to their regime. Each provincial statute contains its own definition of what assets are prima facie deemed to be divisible. In some statutes the term is defined so broadly as to appear at first instance to encompass almost all the property of the spouses. Other provinces draw a distinction between assets in which spouses are prima facie entitled to share and "business assets", the latter not generally being available for distribution.

The purpose of this thesis is to examine each common law province's definition of what property is prima facie distributable. and to examine how the definition of such has been interpreted by the courts. The legislation of each of the nine provinces has been discussed to this end. Comparisons between the definitions of the different statutes and judicial interpretation thereof have been drawn where appropriate. As the matrimonial home is generally treated specifically in each provincial statute, it has been discussed separately at the conclusion of each chapter. Certain matters such

as extra-provincial jurisdiction and the question of taxation are not dealt with in the thesis. While they have important implications for family property law, they were felt to be outside the scope of this study.

In the final chapter general conclusions are drawn as to the effectiveness of the legislation in its existing form and suggestions offered as to how the legislation may be improved. The question of what property is to be included in a distribution of matrimonial assets is a question of policy which must ultimately be decided individually by each of the provinces. By having regard to the approaches of other provinces, however, ways may be discovered to correct confusion which has evolved as a result of the interpretation of existing definitions.

Footnotes to Introduction

1. For a more detailed examination of the property regime that applied before provincial legislative reform, see Bromley, Family Law, 5th ed. (1976); Cullity, "Property Rights During the Subsistence of Marriage", in Mendes da Costa, ed. Studies in Canadian Family Law, (1972), vol. 1, p.179; and Dicey, Law and Opinion, 2nd. ed. (1919), pp.371-398.
2. [1975] 1 S.C.R. 423.



## Chapter 1 - Alberta

The first tentative steps towards matrimonial law reform were taken by the Alberta Legislature in 1977. In that year, following the publication of a report of the Institute of Law Research and Reform<sup>1</sup>, two bills were introduced in the third session of the 18th legislature. The bills, entitled respectively "The Matrimonial Property Act" and "The Matrimonial Home Possession Act", were given second reading and then allowed to die on the order paper. In May of 1978 the Legislature passed the present Matrimonial Property Act<sup>2</sup>. The Act was assented to on May 16, 1978, and came into force on January 1, 1979.

The Matrimonial Property Act of Alberta is divided into three parts of which only Parts 1 and 2 are relevant to this discussion. Part 1 deals with the distribution of matrimonial property upon the application of one of the spouses. Part 2 is concerned with the matrimonial home.

In embarking upon an examination of this enactment, it is helpful to bear in mind the words of McClung J. in Kamuchik v Kamuchik<sup>3</sup> as to his view of the philosophy underlying the Act:

The Matrimonial Property Act was not designed to be, nor is it, a vehicle to redistribute wealth. What it does represent is the social necessity of recognising and protecting pecuniary rights in matrimonial property emerging from non-pecuniary contributions which had been questioned by the former case law.

The Matrimonial Property Act

Under the Matrimonial Property Act it is provided that upon marriage breakdown other than termination by death a spouse may apply to the court for an order in respect of the disposition of almost all the property owned by the spouses. The distribution of the property is in general subject to a presumption of equal sharing, which presumption may be varied at the discretion of a court having regard to a prescribed list of thirteen factors<sup>4</sup>.

Property subject to the Act

Given the title of the Alberta statute it is perhaps suprising that the Act gives no comprehensive definition of the term "matrimonial property". The closest the Act comes to a definition is in the wording of s.7(1), which provides that the court is empowered to "make a distribution between the spouses of all the property owned by both spouses or by each of them". The legislation thus clearly eschewed any attempt to segregate "family assets" from "non-family assets". What is important is not the type of asset nor the use of it by one or both parties but the fact of ownership. The fact of ownership brings the asset within s.7(1) irrespective of whether the asset is owned jointly, or in common, or by one of the parties only, or jointly or in common with a third party. Presumably also, property in which one spouse has a beneficial interest would be regarded as falling within s.7(1). Where property is held by a spouse but is held in trust for a third party, that property will not be included in a distribution under the Act. This was affirmed in Dochuk v Dochuk<sup>5</sup>,

where real property purchased by the wife for her father and registered in her name because of his mental disability, was held to be beneficially owned by the father and exempt from distribution.

The major advantage of the Alberta approach to a definition of divisible assets is the absence of any necessity to define the way in which property is held. The definition, however, is not free of complexities. Some difficulties have arisen from the fact that not all matrimonial property is subject to distribution in quite the same way. Subsequent subsections of s.7 isolate three categories of property:

- (a) property not exempt in itself but in respect of which a money value is exempt from sharing<sup>6</sup>;
- (b) gains and acquisitions which are shareable but without any presumption of equality<sup>7</sup>; and
- (c) property which is shareable equally in the discretion of the court<sup>8</sup>.

In making distributions under s.7(3) or (4) the court must have regard to the criteria itemized in s.8.

#### A.Exempt property - s.7(2)

Section 7(2) of the Matrimonial Property Act provides as follows:

7(2) If the property is

- (a) property acquired by a spouse by gift from a third party,
- (b) property acquired by a spouse by inheritance,
- (c) property acquired by a spouse before the marriage,
- (d) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
- (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

the market value of that property

- (f) at the time of the marriage, or
- (g) on the date on which the property was acquired by the spouse,

whichever is later, is exempted from a distribution under this section.

This subsection seeks to exempt from a distribution the market value as of the date of acquisition of specified items of property owned by one spouse to which the other spouse has not contributed during marriage. Gifts from third parties, inheritances, property brought into the marriage, tort recoveries of a personal nature, and insurance proceeds which are not in respect of property and do not compensate for a loss to both spouses are accordingly excluded from the Act's provisions in some respect. The section, however, has not been found as simple to operate as its provisions might suggest.

One difficulty with this subsection is that it seems to ignore the possibility that equitable interests may be acquired in property prior to the acquisition of legal title to such property by gift or inheritance. An example of such a situation would be where married persons expend money and labour on the maintenance and improvement of property on the assumption that it will eventually be conveyed to them. If the property is then conveyed to one spouse only, s.7(2) will favour that spouse with an exemption of the market value of the property when it was acquired to the exclusion of the other spouse. Such a situation appears to have arisen in Mazurenko v Mazurenko<sup>9</sup>. In that case, a husband and wife had lived and worked on a farm belonging to the husband's parents. The majority of the properties comprising the farm were eventually transferred to the husband alone, although one

quarter-section which had been specifically promised to both parties in consideration of the wife returning to live with the husband after separation for a number of years was transferred to the spouses jointly. The court found that the parties had contributed equally to the running of the farm. Nevertheless, the wife was held entitled to share under s.7(1) only in that property which had been specifically promised. The other two properties were gifts to the husband and thus fell within s.7(2). Accordingly the market value of these properties as of the date of their acquisition was exempt from distribution. The wife in this instance could probably have made an application under the old common law as interpreted in Petkus v Becker<sup>10</sup> to the effect that she was entitled to an equitable interest in the land. No such application was made here, however. It is submitted that the necessity of going outside the provisions of the Act in order to achieve a fair and just result reflects a serious want on the part of the enactment.

Mazurenko v Mazurenko also indicated that difficulty may be encountered in determining whether a gift was intended by the donor to be given to one or both spouses. In Mazurenko it was found on the evidence that only one of the properties was intended as a gift to both spouses and that the others were intended for the husband alone. This decision was in part premised on the fact that one of the properties had been transferred into the joint names of the parties. Where such evidence is lacking the courts have shown themselves willing to look to the intention of the donor. In Hudyma v Hudyma<sup>11</sup>, for example, the court accepted the testimony of the wife's mother that a \$20,000 gift to her daughter was intended for the daughter alone and was not a gift to both spouses. Logically it would seem that if it can be shown

that a gift or inheritance was conferred with the intention of benefitting both spouses, then it should qualify as property beneficially owned by each of them. This was the view taken in Swanson v Swanson<sup>12</sup>, in which a gift for the purpose of a down-payment on the matrimonial home was treated as a gift to both parties.

The exclusion in s.7(2)(c) of property acquired by a spouse before marriage means that contributions made during a period of cohabitation prior to the marriage lie outside the discretion granted by the Act. In Karminiski v Karminiski<sup>13</sup>, a further flaw in the wording of the section came to light. In this case it was the husband who had brought an application for distribution of matrimonial property. The couple had cohabited for a period of eight years before marriage in 1969, during which time the husband transferred the matrimonial home to the wife. In these circumstances the court held that the matrimonial home was exempt from distribution under s.7(2)(c), as being property owned by the wife before marriage. The husband could not rely on s.7(3)(d) of the Act<sup>14</sup> as the property was not property "acquired by a spouse by gift from the other spouse". The parties were not married to each other at the time of the transfer.

Even where property has been given by one spouse to the other during the marriage, s.7(2)(c) may operate so as to give double compensation to the donor spouse. No specific cases in point have been reported as yet, but an example will illustrate. If a husband gives his wife an expensive item of jewellery which he owned at the time of the marriage, then under s.7(2)(c) he may claim an exemption in respect of the market value of the property at the time of the marriage. The

wife may be permitted to retain the jewellery but its value will have been accredited to the husband. Further, he may be entitled to a share in the market value of the property by virtue of s.7(3)(d).

B. Distributable property - s.7(3)

Section 7(2) exempts only the market value of specified property as of the date of acquisition or marriage. The difference between the value at that date and its value at trial is dealt with, inter alia, in s.7(3). Section 7(3) provides:

7(3) The Court shall, after taking the matters in s.8 into consideration, distribute the following in such manner as it considers just and equitable:

- (a) the difference between the exempted value of property described in subsection (2) (in this subsection referred to as the "original property") and the market value at the time of trial of the original property or property acquired
  - (i) as a result of an exchange of the original property, or
  - (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
- (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
- (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
- (d) property acquired by a spouse by gift from the other spouse.

No presumption of equal sharing applies to property covered by this subsection. Whether and in what proportion such property will be distributed is a matter for the discretion of the court, having regard to the criteria in s.8.

Sections 7(3)(a) and (b) embrace gains in, property substituted for, or proceeds of disposition of exempt property. In order to fall within this category it is necessary to be able to trace the increase

or substituted property from the original property. The courts have emphasised in particular that when attempting to trace property purchased with the proceeds of the original property, a direct substitution of one for the other must be proven. Thus in Baker v Baker<sup>15</sup> the husband had financed the purchase of certain lands by mortgaging some exempt property and claimed that the new properties ought also to be regarded as exempt. Purvis J. rejected this contention and held that mortgaging the original property in order to purchase further properties did not constitute a "disposition" within the meaning of the legislation so as to make those further properties exempt. He felt that the language of s.7(3)(a)(ii) indicated that the legislature intended to allow the substitution of newly acquired property when there was a direct exchange or when the original property was sold and the proceeds used to buy new property. Mortgaging did not come within this definition.

While property dealt with in ss.7(3)(a) and (b) is not subject to a presumption of equal sharing, s.7 seems framed in such a way as to suggest that the non-owning spouse ought generally to be entitled to share in some part of the increment in such property. In Mazurenko v Mazurenko<sup>16</sup>, the Court of Appeal indicated that the contrary might be the case. The approach of the Court can best be summarised in the words of Stephenson J.A.:<sup>17</sup>

...Section 7(3) envisages a tracing of exempted property. The traced property is to be distributed in a just and equitable manner, but there is no presumption. The factors which are to be considered are the same, namely those contained in s.8. It seems to me that a relevant factor or circumstance in looking at the kind of property, looking at s.8(m), is the circumstance under which it is acquired....I am of the view that in looking at the increment or proceeds we must ask ourselves whether or not the exempt property was brought into the matrimonial regime; did it come in to be used for the mutual



benefit and account? (emphasis added).

In applying this test, which the court considered particularly appropriate for farm property, the increment on a portion of farm property given to the husband was excluded as it had not been "brought into the matrimonial regime". In respect of certain of that property, however, the crucial factor was regarded as being that the property had been given to the husband after the separation of the spouses, one of the factors a court is expressly directed to take into account under s.8(f) when making a distribution under the Act.

The Court of Appeal gave no indication in this case as to what might constitute "mutual benefit and account" within its definition, thus leaving scope for uncertainty. Would it be enough that the property was managed separately by one spouse, even though the money from the property was shared? What of property which was used solely by one spouse as a hobby, or was used by the husband and children of the marriage, but not by the wife?

Perhaps the biggest criticism which can be levelled against the Court of Appeal test is the fact that such a test is nowhere mentioned in the scheme of the Act. Section 7(3) gives the court a free hand to consider the factors in s.8 without being bound by any presumption. It does not seek to impose any criteria by which increments should be distributed. In effect, the Court of Appeal has decided that the s.7(3) category can only be dealt with adequately by the introduction of some basis (the user test) on which increments of exempt property will be distributed. In the vast majority of cases, increments will result

from the effect of inflation on exempt property. The question thus arises as to whether such gains should be distributed at all and if so, whether they should be distributed on a different basis from general property as distributed under s.7(4).

The question of whether inflationary gains should be distributed was discussed by Forsyth J. in Hassell v Hassell<sup>18</sup> prior to the Mazurenko decision. In this case increments due to inflation were distributed, but on an unequal basis. In deciding the issue Forsyth J. referred to the philosophy behind similar legislation in the United States as interpreted by a Canadian commentator<sup>19</sup>. He adopted the following passage:<sup>20</sup>

Accordingly, the American jurisprudence would, on the whole, appear to establish that where property is exempt from distribution any increase in value due entirely to the nature of the property in circumstances not requiring the contributions of the parties should also remain exempt. Where, however, the increase in value or the profit resulting from the property are due in part to the efforts of the family unit, it is not unreasonable that the increase in value directly attributable to the family efforts be counted among the benefits available for distribution in the event of marriage breakdown.

In this instance the husband had used the exempt property (a house) as part of his residential property after he married inasmuch as he allowed his mother to reside there and charged only a minimal rent. The court found that the husband's desire to minimize debt load and pay off all debts outstanding resulted in a very spartan life for his wife and children during the course of the marriage, as revenue which might otherwise have come into the household by way of realization of appropriate rentals on the property was sacrificed in favour of cheap accommodation for the mother. It was in these circumstances that the wife was held entitled to share in inflationary gains in the exempt

property.

In discussing the share to which the wife was entitled under s.7(3), Forsyth J. noted:<sup>21</sup>

The statute in my opinion contemplates, in circumstances of this nature, arbitrary decisions being made. I say "arbitrary" not in the sense of without justification or reason, but "arbitrary" on the basis that no precise calculation or determination of what is appropriate can necessarily be made. It is clearly a matter of judgment.

Forsyth J.'s decision seems to have anticipated the judgment of the Court of Appeal in Mazurenko and it appears likely that the "user test" will be applied in future cases dealing with s.7(3). The test was expressly approved in Millhaem v Millhaem<sup>22</sup>. Stratton J. found that the exempt property giving rise to the incremental property claimed under s.7(3) in this instance had clearly been brought into the matrimonial regime. It was used for the ranch operations for the mutual benefit and advantage of both parties to the same extent as the other lands comprising the integrated ranch unit. It remains to be seen what limits the court will set to the test in future cases and how far the concept of "mutual benefit and account" will be extended.

#### C. Divisible property - s.7(4)

Section 7(4) covers property defined in subsection (1) and not dealt with in subsections (2) or (3). The section provides:

7(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute the property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in s.8.

This subsection is framed in simple terms and has not presented the courts with many difficulties in its application. An exception to this is the case of pensions. In Goetjen v Goetjen<sup>23</sup>, Dixon J. refused to include in a distribution a pension owned by the husband which was not yet payable. He noted:<sup>24</sup>

The defendant will be entitled to a pension of \$833 per month on retirement from the Calgary police force. No present calculations were made with respect to same; the defendant has remarried and will be required to continue to make such payments as are due under the decree nisi as varied, and under the circumstances I am treating the expectation of pension moneys only as additional information in terms of reaching a decision on financial matters generally.

The only reported decision since this case in which a pension has been mentioned appears to be Lucas v Lucas<sup>25</sup>. In this case Sinclair C.J.Q.B. clearly seemed to regard the husband's future pension rights as an item of divisible property, as he specifically rejected a contention by the husband that the pension was a gift from the husband's mother and therefore was exempt under s.7(2). The reported judgment, however, gives no indication as to how the pension was ultimately divided, as no reference to the pension is reported in Sinclair C.J.Q.B.'s conclusions.

It is unclear whether Dixon J.'s decision on pensions will be followed in future cases. He gave no legal reason for his decision not to include the pension in a distribution. The definition of property contained in s.7 certainly seems wide enough to include such an asset. If it were thought unfair to include it in a distribution the court could exercise its discretion under s.8 in order to vest it solely in the owner.

## Valuation

Valuation under the Act is important in two respects. First, the exemption in s.7(2) covers only the market value of property at the date of marriage or the date of acquisition, whichever is the later. This same valuation is necessary to determine the extent of property subject to unequal sharing under ss.7(3)(a) and (b), that is, the difference between the earlier valuation of the original (exempted) property and its value at the time of trial. Practical limitations will obviously attend the acquisition of back-dated values. In practice the courts have to rely on the expert witnesses of one side or the other for this information.

The second area in which the issue of valuation arises involves the question as to the time for valuation of property caught by the remaining paragraphs of s.7(3) and/or property encompassed by s.7(4). The obvious alternatives are the date of trial or the date of separation. The first would appear to be the more logical choice since it is at the date of trial that the values are easiest to assess. Indeed s.8(f), which lists as one of the matters to be considered in a distribution the question of whether property was acquired when the spouses were living separate and apart, supports this interpretation. In Groenweg v Groenweg<sup>26</sup>, however, Quigley J. valued the property as of the date of separation, being of opinion that there was nothing in the Act which made it obligatory to value assets at any particular date and that complete discretion was left with the court in this regard. This interpretation has been criticized by Professor McLeod as introducing unnecessary uncertainty into the division of marital assets by means

of the valuation date<sup>27</sup>. He points out that a loose interpretation of the valuation date could lead to more litigation as it would discourage parties from dividing assets when that division turns on the valuation of the divisible assets. In contrast to Groenweg, subsequent cases have invariably chosen the date of trial as the date of valuation. In Mazurenko v Mazurenko<sup>28</sup>, Stephenson J.A. expressed as a general principle that valuation should be assessed at trial, although he emphasised that his statement was not conclusive on this point. In Goetjen v Goetjen<sup>29</sup>, Dixon J. also chose the date of trial as the date of valuation, regarding Mazurenko as express authority for this choice:<sup>30</sup>

It is clear from the judgment of Stephenson J.A. in Mazurenko v Mazurenko.... that the time for valuation of the property should be that of the date of trial and not the time of separation.

In the light of these decisions, the decision as to valuation in Groenweg v Groenweg loses much of its impact. The facts of the case, indeed, probably influenced the decision to a large extent. Quigley J. was satisfied that there had been no economic co-operation between the spouses since the date of separation and that no pre-separation activity substantially affected the value subsequent to separation. It was in this light that he ordered an equal distribution of all assets valued as of the date of separation. Even in these circumstances, it seems that the approach of the Alberta Court of Appeal would have been to value the property as of the date of trial. In Stewart v Stewart<sup>31</sup> it was suggested that the proper course in such a case would be to value the marital property as of the date of trial and then award an unequal division of the property. It seems, accordingly, that the date of valuation in Alberta decisions will be that of the date of trial in most, if not all, circumstances.

Post-separation assets

Section 7(1) gives the court power to "make a distribution between the spouses of all the property owned by both spouses and by each of them". Theoretically, therefore, property obtained by either spouse after separation will be subject to distribution under the Act unless that property falls within one of the exemptions mentioned in s.7(2). In practice, however, it is unlikely that a court would order an equal distribution of such property, at least where the non-owning spouse has made no contribution to the acquisition.

Two different types of property may fall under this head:

- (a) Increases in the value of existing marital property after the spouses have separated;
- (b) New property acquired since separation.

(a) Increased value of pre-separation assets

It has already been noted that the courts in general will choose the date of trial as the date at which assets ought to be valued. In Mazurenko v Mazurenko<sup>32</sup>, Stephenson J.A. suggested that a non-owning spouse should share equally with the owning spouse in any increase in the value of property between the time of separation and the time of trial where that increase was due largely or solely to inflation. Where the increase was due to the efforts of one spouse only, however, he recognised that a departure from the usual equal division of property might be appropriate. He explained:<sup>33</sup>

The Court must, in my view, look at the relevant facts under s.8 and then ask itself if it would be unjust or inequitable

to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what was expected of each or attributable to the other factors in s.8. In establishing the presumption I take the legislature to have decided that in ordinary cases equality is the rule.

This reasoning implies that the onus will be on the party asserting that there should be an unequal division to prove that an equal distribution would be unfair. What precise degree of proof is required is not certain. In Stewart v Stewart<sup>34</sup> the husband proved that from 1978 ( the date of separation of the spouses ) to September 1981 ( the date of trial ), he alone had contributed to a 50% increase in the net worth of a family business. In the circumstances the Court of Appeal affirmed the decision of the trial judge who had ordered an unequal division of the business assets. The husband's contribution in Stewart was particularly obvious. It is probable that it is this type of strong evidence that will be required by the courts before they will be prepared to make an unequal distribution of post-separation increases in value under s.7(4).

(b) New property

New property acquired after separation will not necessarily be distributed equally between the spouses at trial. Where the property has been acquired after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation, the court, after taking the matters in s.8 into consideration, can distribute such property in a manner it considers just and equitable<sup>35</sup>. There is no presumption of equal sharing in such a case. The division to be made is in the discretion of the court. Where property is acquired



after separation but before a decree nisi etc. has been obtained, the property is shareable under s.7(4), to which a presumption of equal sharing applies<sup>36</sup>. Even in this instance, the court is entitled to make an unequal distribution. Section 8(f) specifically mentions that the court should have regard to "whether the property was acquired when the spouses were living separate and apart" in making a distribution under the Act. There appear to have been no reported instances to date in which the issue of post-separation property has arisen for discussion. It seems likely, however, that where post-separation property has been acquired solely through the efforts of one spouse, with moneys acquired since separation, a court would not include that property in a distribution under the Act. Where the property had been acquired through the use of pre-separation marital assets, the situation would be different. Section 8(c) mentions as another factor to be taken into consideration in a distribution, "the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of property". If post-separation assets were acquired through the use of pre-separation marital property, it is submitted that s.8(c) would have a bearing on the question of their distribution. In these circumstances there would be no necessity to trace the marital property into the new assets. The fact of direct or indirect contribution to the new acquisitions would be sufficient to establish a prima facie right to a share in them.

The provisions of s.8(c) afford protection to a non-owning spouse in the event that pre-separation assets are disposed of by the owner-spouse after separation but prior to trial and new assets acquired in their stead. What of the situation where pre-separation

property has been sold after separation and the proceeds spent by the trial date? It seems that in such a case the non-owning spouse would have the option of relying on s.8(1), the fact that a spouse has dissipated property to the detriment of the other spouse, in order to claim an unequal division of the remaining assets. Alternatively, application may be made under s.10 of the Act. This section allows the court to include as part of the value of the marital property, or even to recapture, property that has been given or transferred for less than sufficient consideration, with a view to defeating a claim under the Act. It is apparent, however, that a court will not lightly entertain a claim under this head and that all legal forms must be complied with in this regard. Thus in Nay v Nay<sup>37</sup> the Court of Appeal set aside that part of the trial court judgment in which a sale to the defendant husband's father was said to fall within s.10. The trial judge, Egbert J., had held that the purchaser ought to have known that the sale had been made with a view to defeating the wife's claim and that, accordingly, the defendant's interest remained credited to him. The Court of Appeal found, however, that Egbert J. had failed to give the father the rights granted to him, as a defendant, under the Rules of Court. The Rules of Court relating to a statement of claim applied to a notice given to a donee or a transferee pursuant to s.10 of the Matrimonial Property Act.

#### Onus of proof

One practical difficulty which has arisen in the interpretation of the Matrimonial Property Act concerns the question of the onus of proof. Under the classification described in s.7, each category appears

to call for a different onus of proof. The issue of the onus of proof is not discussed in the Act. The categories, however, are phrased in such a way as to suggest that:

- (a) The owner spouse bears the onus of proving that property is exempt under s.7(2);
- (b) The non-owner spouse bears the onus of proving his or her entitlement to property described in s.7(3);
- (c) The owner spouse bears the burden of proving that an equal division would be unjust and inequitable under s.7(4), thereby rebutting the presumption in favour of an equal division of assets under this head.

The contrasting onusses of proof will obviously have a bearing on how a court will apply the criteria listed in s.8 and so decide in what proportion the marital property should be divided. If the assumptions made above are correct, then with respect to property falling within subsection (3), the s.8 factors are to be used to determine what the distribution should be, whereas in respect to property falling within subsection (4), the factors are to be used to rebut the presumption of equal sharing.

Initial cases under the Act appear not to have given due consideration to the different burdens of proof. In Haminuke v Haminuke<sup>38</sup>, one of the earliest cases to be decided under the new legislation, the total assets of the defendant were described as being distributable under s.7(3). The property, however, was expressly stated to have been acquired by the parties while they were living together. On this basis the assets should have been distributed under s.7(4), unless they could be categorised as falling within the enumerated subsections of s.7(3).

Having failed to classify the property correctly, the court could not accordingly have determined whether the appropriate onuses of proof had been satisfied. By contrast, later cases have recognised the importance of a correct categorization. Thus in Baker v Baker<sup>39</sup>, Purvis J. noted:<sup>40</sup>

The importance of classifying the property for distribution under s.7(3) or (4) is that under s.7(4) there is a discretion to divide equally with the burden of proof on the party who seeks an unequal distribution.

### Sharing of debts

A question which has yet to be touched upon by the courts is whether the net losses of a spouse are shareable at trial. This issue is relevant both under s.7(4), in relation to a spouse's overall debt situation, and under s.7(3), in relation to the decreasing value of a piece of exempt property.

It is not evident from the provisions of the Matrimonial Property Act whether s.7(4) would include the sharing of the debts of a spouse whose total asset position is a negative one at the time of distribution. The word "property" normally suggests a "credit" as opposed to a "debit" financial status, so that while a spouse would be entitled to share in debts owed to his or her spouse, he or she would not normally expect to bear a share of that partner's obligations to others. It is arguable that, as the legislation made no specific provision for the sharing of the debts and liabilities of a spouse, such debts should not be included in assessing the asset situation of each spouse at the time of trial. In practice the question is likely to be of academic interest only, for the courts could, if necessary, order an unequal distribution of the remaining marital assets under s.8 in

order to compensate the debtor spouse.

Section 7(3), at first sight, seems to countenance some sharing of losses. The section describes the difference between the value of an exemption attributed to a piece of property under s.7(2) and the market value of the same property, or of property substituted for it, either in exchange or acquired with the proceeds of its disposition, at the time of the trial. It is obvious that during a period of declining market values, this difference could constitute a loss.

No case has yet been reported in which an owner spouse has alleged that the non-owning spouse ought to share in a loss under s.7(3)(a). It seems extremely unlikely that a court would grant such an order, particularly since the non-owner spouse would not be awarded a share in the asset itself by virtue of s.7(2). The situation may be different where there is evidence that the non-owning spouse is responsible for the depreciation in some way. In this event it seems probable that the onus under s.7(3) will move from the non-owner spouse to the owner spouse, to prove that the non-owner spouse ought to share in the difference between the value of the exemption and the (depreciating) market value of the same property at trial.

#### Section 9 - distributions under the Act<sup>41</sup>

Once the court has determined that a distribution is to be made under s.7, it is given wide powers under s.9 in order to effect the distribution and apply the determined proportion to the actual assets owned. These powers are broadly defined in s.9(2) as including an order

to pay money or transfer property, an order to sell or divide the proceeds from the sale of the property, or an order declaring that a spouse has an interest in property. Early cases indicated a certain reluctance on the part of the courts to exercise their powers in this regard. In Marquardson v Marquardson<sup>42</sup>, for example, there was an obvious reluctance on the part of the court to interfere with an on-going business and the court deliberately avoided taking action which might have resulted in the business being wound up. Instead, H.J. MacDonald J. elected to allow relief to the wife under the Divorce Act<sup>43</sup>, by providing her with a lump sum and periodic maintenance. This decision has been strongly criticized by Peter Lown<sup>44</sup>, particularly as there appears to have been an absence of any substantial evidence as to the tax liability which might have been incurred by the husband if he were forced to sell, a factor with which the court expressed itself much concerned. In subsequent cases the courts have been more willing to order a sale and division of specific assets. Nevertheless, the courts are still loathe to order a division of an on-going economic unit where it appears that this would constitute an undue burden on the owner spouse, as where it would necessitate a sale of the business. The preferred course in these circumstances seems to be, if possible, to allow the owner spouse time to arrange finance while maintaining the economic unit. This was the approach taken in Mergl v Mergl<sup>45</sup>. In this case the court declined to order a sale of the husband's farmland. Instead it ordered that the wife be entitled to \$80,000, plus interest, constituting a charge on the land with time for the husband to arrange such a payment. Similarly in Fox v Fox<sup>46</sup>, another case concerning farm property, where both parties wished that the farm be retained and that the defendant husband remain on the farm, the husband was ordered to pay \$60,000 to

his wife. He was permitted to stay on the farm and retain the income from it but was to hold the property as trustee for himself and his wife. In Hegel v Hegel<sup>47</sup> the solution chosen by the court was to award the wife the husband's interest in a section of farm property, subject to a crop share lease to him. In Earl v Earl<sup>48</sup> a somewhat similar approach was taken. In order to prevent the disruption of the farming operation, the husband was permitted to retain the majority of the lands, subject to a ten year mortgage in favour of the wife to secure \$160,000 under the judgment, and the lands transferred to the wife were ordered to be leased to the husband for an identical ten year term on the basis of the terms of prevailing agricultural land leases in the area.

There appear to have been no reported decisions since Marquardson in which other types of business concerns have been similarly dealt with under s.9. Given the wide-ranging definition of "property" within the Matrimonial Property Act, which in Komili v Komili<sup>49</sup> was held to include the husband's unincorporated accountancy business and a computer used therein, it is probable that the courts will eventually have to decide whether alternative sharing arrangements would be appropriate for such business concerns. Having regard to their willingness to devise such arrangements in cases concerning farm property, it is likely that they will be equally prepared to make alternative distributions in relation to business enterprises.

Some concern may perhaps be experienced by the courts when faced with the distribution of business assets which are held by an incorporated company. It is unclear as yet whether the courts will be willing to "lift the corporate veil" in these circumstances and treat the assets

of a company as belonging personally to the spouse who had control of that company. The only reported case touching on this issue to date is Gabriel v Gabriel and Keith of London Borough<sup>50</sup>. In this instance the wife had joined as co-defendant to her action a company in which her husband owned 95 shares and she owned 5. The company had a total of 100 shares and the husband and wife were the sole shareholders and directors. After having had cited to it a number of authorities commenting upon the nature of corporate personality, the court declared that the issue it had to decide was whether or not it could deal with the assets of the company, represented by the shares, or merely the shares themselves. In other words, the court had to decide whether it would pierce the corporate veil in connection with an application under the Matrimonial Property Act. The court ultimately decided that it did not have this power, particularly as there had been no allegation of an attempt to conceal, which is one of the few grounds on which the courts will take such action in civil cases<sup>51</sup>. In arriving at this decision the court was much impressed by the fact that the wife, as director and shareholder, would in fact have access to all the records of the company and was therefore in a position to present evidence to the court as to the assets of the company. With that information the court could make direction as to what was the property of the parties, namely the shares, and could, if it were equitable to do so, direct either party to transfer any of the shares to the other.

It is uncertain what the position of a court would be if a spouse was not, in fact, in a position to ascertain the assets of a company or to evaluate the worth of corporate shares belonging to the other. In such a case it is possible that the husband could be required to



disclose the company's assets or that the court could make the company a party to the action. If there was any evidence of fraud or concealment of the corporate assets, the court would probably be willing to join the company as co-defendant under s.10.

It may be necessary for a court to join the company as a co-defendant in other circumstances. Thus even if the court decides to by-pass the company and simply order a transfer of shares, the co-operation of the company would still be necessary in order to stamp the requisite forms, register the transfer and issue the new share certificate. It could be argued that the court would have power to direct the company in this regard under s.9(3)(f), which empowers the court to make any order which, in the opinion of the court, is necessary.

The Matrimonial Home

The matrimonial home and household goods used in connection with it are dealt with under Part II of the Matrimonial Property Act, which confers a wide-ranging discretion on the court to order interim and permanent possession of the properties.

Section 1(c) of the Act defines "matrimonial home" as property:

- (i) that is owned or leased by one or both of the spouses,
- (ii) that is or has been occupied by the spouses as their family home, and
- (iii) that is
  - (A) a house, or part of a house, that is a self-contained dwelling unit,
  - (B) part of business premises used as living accommodation,
  - (C) a mobile home,
  - (D) a residential unit as defined in The Condominium Properties Act, or
  - (E) a suite.

No cases have yet been reported in which the definition of the matrimonial home has been discussed. One question as yet to be determined is whether a matrimonial home can ever lose its character as such. The definition in s.1(c) describes a matrimonial home as one "that is or has been occupied by the spouses as their family home". It thus seems that once a property has at any time been occupied as a family residence, it remains a matrimonial home to the date of trial, even if it has not actually been used as the family residence for many years.

Another question as yet to be decided by the courts is the length of residence required to establish a property as the matrimonial home.

For example, would a summer cottage occupied three months out of every year qualify under s.1(c)? If not, how extended a residence is required to render a house a matrimonial home? Is the intention of the spouses relevant in this regard? These questions are all left unanswered by the Act and have yet to be dealt with by the courts.

Household goods are defined at s.1(b) of the Act as personal property:

- (i) that is owned by one or both spouses, and
- (ii) that was ordinarily used or enjoyed by one or both spouses or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or aesthetic purposes.

This is the sole area in which the "user test" is employed by the Matrimonial Property Act. As with the matrimonial home, the definition of "household goods" has not yet arisen for discussion in any of the reported decisions of the Alberta courts. The definition is framed broadly enough to include items such as heirlooms, works of art, personal clothing or jewellery and property used in connection with a hobby, items which under similar legislation in other provinces are specifically excluded from distribution<sup>52</sup>. Whether the Alberta courts will in practice exclude such property from orders made under this part of the Act remains to be seen.

Footnotes to Chapter I

1. Report No. 18, Matrimonial Property, Edmonton, August 1975.
2. R.S.A. 1980, c.M-9.
3. (1979), 9 R.F.L.(2d) 358, at p.359 (Alta. C.A.).
4. Supra, n.2, s.8.
5. Alta. Q.B., Veit J., Edmonton, July 8, 1982 (unreported).
6. S.7(2).
7. S.7(3).
8. S.7(4).
9. (1981), 23 R.F.L.(2d) 113; Alta. L.R.(2d) 357; 30 A.R. 41 (Alta. C.A.).
10. [1980] 2 S.C.R. 834; 117 D.L.R.(3d) 257 (S.C.C.).
11. (1981), 20 R.F.L.(2d) 289 (Alta. Q.B.).
12. Alta. Q.B., Calgary, September 19, 1980 (unreported).
13. (1981), 27 A.R. 341 (Q.B.).
14. S.7(3) provides that the court may distribute, as it considers just and equitable, property acquired by a spouse by gift from the other spouse.
15. (1982), 24 R.F.L.(2d) 21 (Alta. Q.B.).
16. Supra, n.9.
17. Ibid, p.121.
18. (1981), 15 A.L.R.(2d) 339; 23 R.F.L.(2d) 37 (Q.B.).
19. Mr. E.F. Anthony Merchant, in an annotation to the case of Bains v Bains, (1981), 17 R.F.L.(2d) 193, at p.195 (Sask. Q.B.).
20. Supra, n.18, at p.344.
21. Ibid, p.345.
22. (1982), 24 R.F.L.(2d) 44 (Alta. Q.B.).
23. (1981), 23 R.F.L.(2d) 57 (Alta. Q.B.).
24. Ibid, p.63.
25. (1982), 26 R.F.L.(2d) 233 (Alta. Q.B.).

26. (1981), 22 R.F.L.(2d) 322 (Alta. Q.B.).
27. See annotation to Groenweg v Groenweg, supra, n.26, at pp.322,323, per Professor McLeod.
28. Supra, n.9.
29. Supra, n.23.
30. Ibid, p.61.
31. (1982), 37 A.R. 57 (C.A.).
32. Supra, n.9.
33. Ibid, p.120.
34. Supra, n.31.
35. S.7(3)(c).
36. One of the anomalies in the Alberta statute is the fact that property acquired after a decree nisi of divorce falls within the category of distributable property (s.7(3)(c)) whereas property acquired after the parties have commenced living separate and apart but before a decree nisi of divorce has been obtained falls to be dealt with as divisible property under s.7(4).
37. (1982), 34 A.R. 221 (C.A.).
38. (1980), 10 A.L.R.(2d) 226 (S.C.).
39. (1982), 24 R.F.L.(2d) 21 (Alta. Q.B.).
40. Ibid, at p.23.
41. This section is not intended to be an in-depth analysis of the manner in which the Alberta courts exercise their discretion in matrimonial property cases. It is sought merely to indicate that, although property may be prima facie shareable, the courts may decline to order its distribution where division would constitute an undue burden on the owner spouse.
42. (1980), 10 A.L.R.(2d) 247 (Q.B.).
43. R.S.C. 1970, c.D-8.
44. The Matrimonial Property Act, One Year of Operation: Peter J.M. Lown, (1980) 18 Alta. L. Rev. 317, at pp.321-2.
45. (1981), 15 A.L.R.(2d) 278 (Q.B.).
46. (1981), 21 R.F.L.(2d) 165 (Alta. Q.B.).
47. Alta. Q.B., Calgary, May 28, 1981, Kirby J., (unreported).

48. Alta. Q.B., Calgary, August 16, 1982, Kirby J., (unreported).
49. (1982), 24 R.F.L.(2d) 158 (Alta. Q.B.).
50. (1980), 14 R.F.L.(2d) 174 (Alta. C.A.).
51. For more discussion as to when a court will "lift the corporate veil", see Gore-Brown on Companies, 42 ed, (1972), at.p.6.
52. For example, under s.2(e) of the Marital Property Act, 1979 (Sask), c.7-6.1.

## Chapter 2 - British Columbia

The Family Relations Act<sup>1</sup> was passed by the Legislative Assembly of British Columbia in 1978 and became effective on March 31, 1979, except for s.47, s.50 and a portion of s.61(1). Amendments to several sections of the Act were passed by the Legislative Assembly in July 1979<sup>2</sup>. These amendments and the previously unproclaimed sections of the Act came into force on September 14, 1979<sup>3</sup>.

Reforms in the old system of separate property had been initiated in British Columbia before the inception of the 1978 statute. In 1972, s.8 of another Family Relations Act<sup>4</sup> was proclaimed in force in British Columbia. It provided:

8(1) Where the court makes an order for dissolution of marriage or judicial separation or declaring a marriage to be null and void and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or the child of a spouse of the marriage.

(2) Where the court makes an order under subs.(1), it may order that the property be sold and direct the disposition of the proceeds.

In some of the early cases under this section, counsel submitted that the provision was not intended to effect any changes in the substantive law. The courts nevertheless proceeded as if s.8 did give them the power to make considerable inroads into the existing matrimonial regime of separate property. This expansive view of s.8 was endorsed in the British Columbia Court of Appeal decision in

Deeleuw v. Deeleuw<sup>5</sup>.

Following on the implementation of s.8 of the 1972 Act, a Royal Commission under the chairmanship of Berger J. was appointed in December 1973<sup>6</sup>. That commission submitted its report on matrimonial property in March 1975. The report rejected the retention of the separate property approach and recommended the adoption of "full and immediate community of property". The commission took the view that such a community property approach better reflected the contemporary view of marriage. It did not reduce its recommendations to draft legislation.

The report of the Royal Commission probably served to stimulate a desire to change the law governing matrimonial property. It could not be said, however, that the Family Relations Act of 1978 was based on the recommendations of the Royal Commission. In fact the new legislation has, if anything, restricted the powers which the courts had been exercising under the s.8 provisions of the 1972 Act. Under the 1972 Act a judge was given no legislative guidelines as to the property which might be covered by the statute, nor was there indicated a list of factors which a court could consider in the exercise of its discretion. The new legislation deals with these matters, and more, in substantial detail.

#### The Family Relations Act, 1978

Matrimonial property is the subject of Part 3 of the Family Relations Act, which includes ss.43 to 55. The basic principle of



Part 3 is that upon the breakdown of a marriage, evidenced by certain events specified in s.43 (separation agreement, order for dissolution of marriage, order of nullity, declaratory judgment that the spouses have no reasonable prospect of reconciliation), each spouse becomes entitled to an undivided one-half interest in the family assets as a tenant in common. The term "family assets" is defined in ss.45 and 46. Section 48 makes provision for the signing of separation agreements and s.51, recognising that a division of assets under s.43 or a marriage agreement may be unfair, permits the court to make an unequal apportionment.

The effect of the Family Relations Act upon matrimonial property law in British Columbia is that the doctrine of separate property is retained until the occurrence of one of the events enumerated in s.43. After the occurrence of one of the s.43 events, there is a community of property with respect to "family assets". The legislation resembles most closely the matrimonial reform legislation in Ontario<sup>7</sup> in this regard. From time to time, accordingly, parallels will be drawn between the two regimes to illustrate differences in substance or interpretation and possible future approaches which may be taken by the British Columbia courts.

#### Family Assets

Once an entitlement to share in family assets has arisen by virtue of s.43, it is important to determine which property belonging to the spouses falls into this class of assets. Sections 45 and 46 of the Family Relations Act deal with this issue. They provide as follows:

45(1) Subject to s.46, this section defines family assets for the purposes of the Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting the generality of subs.(2), the definition of family assets includes

(a) where a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation; or

(ii) an interest in the trust owned by the spouse;

(b) where property would be a family asset if owned by a spouse, property

(i) over which a spouse has, either alone or with another person, a power of appointment in favour of himself; or

(ii) disposed of by a spouse but over which the spouse has, either alone or with another person, a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution where that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; or

(e) a right, share or interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family assets applies to marriages entered into and property acquired before or after March 31, 1979.

46(1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In s.45(3)(e) or subs.(1), an indirect contribution includes savings through effective management of household or child-rearing responsibilities by the spouse who holds no interest in the property.

The definition of family assets may thus be divided into three

categories:

- (i) those assets which fall within the general definition;
- (ii) those assets specifically included by definition; and
- (iii) business assets which, although generally excluded, may become family assets through a direct or indirect contribution by the other spouse.

(i) General definition

The general test as to whether an item of property is a family asset is whether the property "is ordinarily used by a spouse or a minor child of either spouse for a family purpose"<sup>8</sup>. The term "ordinarily used" is not defined in the statute and this raises a number of questions. Does the phrase mean that an objective test should be applied in this regard? Does the section refer to how such property would be ordinarily used by most families or does it require an examination of how the family in question used such assets? Logic would dictate that the latter approach is the correct one. There appears to be only one reported instance in British Columbia where this point was specifically raised. In Elsom v Elsom,<sup>9</sup> Locke J. had to classify, among other items, a boat which was used by both spouses for a trip lasting 7 to 10 days in each of four years of marriage, and otherwise by the husband alone. In holding that the boat constituted a family asset, he noted:<sup>10</sup>

If this family unit had stayed together and prospered, and the young boy had grown up to ordinary course with two parents, considering the interest Elsom has and obviously will retain in his English origin, interests and enterprises, I cannot but think that this boat constituted part of what would be called the ordinary lifestyle of a comparatively wealthy family... The unit is now broken; but up to the time of separation I think the boat was used as I have indicated, above, though less

frequently than would have taken place in the future. I repeat the boat was ordinarily used for a family purpose and is property owned by one spouse and qualifies as a family asset within s.45(2) of the Act.

What Locke J. seems to be saying here is that the frequency with which an asset is used is not of primary importance. What is important is that the particular asset, when used, should be mostly used for a family purpose rather than any other purpose. In reaching his conclusion in this case, he quoted with approval the decision of Steinberg U.F.C.J. in the Ontario case of Taylor v Taylor<sup>11</sup>: "...ordinary user must mean user in the course or the customary mode of life of the person concerned and should be contrasted with special or occasional or casual user" (emphasis added).

Clearly special or occasional use would not be sufficient to constitute ordinary user within the terms of the British Columbia Act. Thus in Robertshaw v Robertshaw<sup>12</sup> it was held that a single day trip to a recreational property was not sufficient to render that property a family asset. The court in this instance did not make any specific reference to what constitutes "ordinary use", however. It is submitted that the definition in Taylor v Taylor may appropriately be applied in British Columbia.

An aspect of the definition which has caused far more difficulty for the courts concerns what is meant by use "for a family purpose". Whereas the Ontario legislation specifically delineates the family purposes which render property a family asset (shelter, transportation, household, educational, recreational, social or aesthetic)<sup>13</sup>, the term "family purpose" is not defined in the British Columbia legislation.

No court has yet attempted to provide a comprehensive definition of "family purpose" under the British Columbia Act. Such a reluctance is understandable as it would be virtually impossible to predict all the possible combinations of situations which might arise in this regard. In such circumstances it might well be thought wiser to treat this matter on a case by case basis. Unfortunately, the courts have not always been consistent in their interpretation of similar fact situations when assessing whether or not assets may be regarded as having been used for the requisite purpose.

One of the instances in which such inconsistency has been apparent relates to property acquired for investment or insurance purposes. Can such property be regarded as being used for a family purpose if it is not actually "used" but is merely regarded as an asset of potential use? In Bateman v Bateman<sup>14</sup> one of the assets in dispute was the husband's life insurance policy. In holding that this was not a family asset, Catliff L.J.S.C. noted:<sup>15</sup> "As there was no evidence that this life insurance policy is "ordinarily used by a spouse for a family purpose" (and I do not pretend to know what such evidence might have been), I decline to hold that the husband's interest in such insurance policy is a family asset". This case seems to imply that actual user of an asset is required under s.45. In this respect it echoes the reasoning of the Ontario cases dealing with pension plans. The courts in Ontario have consistently held that such plans are not family assets because, while a spouse would enjoy the security of knowing that such a pension was there, it was not being "ordinarily used and enjoyed" for a family purpose while it remained unpaid<sup>16</sup>.

A somewhat contrary position to that expressed in Bateman was taken in Sinclair v Sinclair<sup>17</sup>. Here the husband had purchased a condominium as a tax shelter and as an investment. Provenzano L.J.S.C. held that the condominium was a family asset. He explained:<sup>18</sup>

The tax shelter feature would reduce the respondent's current income tax liability by permitting certain reductions related to the condominium from his income. I would see this as a benefit to his family, as making more disposable income available to them for living purposes. The investment aspect, I surmise, would be the hope that the return on the money put into the condominium by the respondent would be greatly enhanced in resale. In this way, I assume, the respondent sought to increase his estate for the security of himself and his family in the future years. It might therefore be argued for these reasons that the interest in the condominium is a family asset by reason of s.45(2), because it is property owned by the respondent and ordinarily used by him for a family purpose.

This decision appears totally at odds with the decision in Bateman v Bateman, and no further cases have been reported in which this issue has been discussed. It is interesting to note, however, that in Danish v Danish<sup>19</sup> Toy J., without further comment, declared an insurance policy belonging to the husband to be a family asset, despite the fact that the policy was not due to fall to the beneficiary for another eleven years. There was no indication in the reported decision as to how exactly this policy was used (for example, whether it was used as security for a loan which was in turn used for family purposes), but it appears to have been similar in nature to the life insurance policy at issue in Bateman v Bateman.

A second issue which has given rise to some dispute in this area is whether expensive jewellery and furs can qualify as family assets. The first reported case dealing with this topic was Jarvis v Jarvis<sup>20</sup>. One of the assets in dispute here was an expensive fur jacket bought by the

husband for the wife to wear at the annual dinner dance being given by the husband's employers. Verchere J. remarked that:<sup>21</sup> "In the light of the spouses' childless life together", such a use seemed a "legitimate family purpose". It is not clear what relevance the couple's childlessness had in this regard, or what difference the presence of a child would have had on the issue. Nor was it made clear whether an expensive fur jacket, bought for a specific occasion, was to be regarded differently from a similar jacket bought simply as a gift, or whether the value of the jacket of itself meant that it ought to be regarded as a family asset.

In Peskett v Peskett<sup>22</sup> the court seemed to assume the latter position. In discussing the status of an expensive ring owned by the wife, MacDonald L.J.S.C. commented:<sup>23</sup> "I suppose this would ordinarily be classed as a family asset". He did not go into the issue in any depth, however, and ultimately held that the ring should vest solely in the petitioner wife as it had been a gift from her grandmother.

A note of restraint against a blanket approach in this area was sounded in Simpkins v Simpkins<sup>24</sup>. The wife in this case owned some expensive jewellery and furs and counsel for the husband urged that they be considered family assets. Shepperd L.J.S.C. noted:<sup>25</sup>

There was no suggestion that these were acquired as family investments or for use by any member of the family other than the wife. Section 45 of the Family Relations Act .... defines a family asset as "property ordinarily used... for a family purpose". With respect, I fail to see how jewellery and furs were used "for a family purpose" unless one argues that to dress the wife in fine furs and expensive jewellery is a family purpose. I hold that these items are not family assets but belong to the wife.

In Basi v Basi<sup>25a</sup>, a similar approach was taken by Tyrwhitt-Drake L.J.S.C., who held that gold and other jewellery which came to the wife, in accordance with the custom of India, at the time of the marriage of the parties, was her separate property and not a family asset. The jewellery and gold had been for her personal use.

Hauptman v Hauptman<sup>26</sup>, the latest reported decision in this area, indicates a return to the Jarvis approach. Once again, the assets in question consisted of expensive jewellery and furs. McLachlin L.J.S.C. found that they were family assets because of the specific purpose for which they had been acquired:<sup>27</sup>

The evidence discloses that they were bought in part for the creation and maintenance of harmony in the family unit. Another reason was the importance, particularly to Dr. Hauptman, of making a favourable impression on colleagues and friends: this was a family which not only wished to live well, but to be perceived as living well. These purposes were not personal to Mrs. Hauptman; rather they were family purposes.

It is possible to reconcile these different authorities if one accepts as a general rule that where jewellery or other items of expensive apparel are purchased for purposes of personal adornment only, then they do not constitute family assets. If the assets are purchased for some other reason, which can be regarded as being connected with the whole family, then they do not constitute family assets. Even with such a rule, the question of what constitutes a family purpose is likely to cause some difficulty. For example, how does one distinguish between the purpose indicated in Hauptman and the situation where a husband purchases an item of expensive jewellery for his wife's birthday? Would the latter purchase be regarded as having been made "for the creation and maintenance of harmony in the family unit"?



It is interesting to note that in the corresponding Manitoba legislation, items of personal apparel are specifically excluded from distribution<sup>28</sup>. It is submitted that such an approach should in general be adopted by the British Columbia courts, with the proviso that where such an item has been purchased as an investment it should fall within the definition of family asset.

More complex than the foregoing issues, perhaps, is the question of whether an asset which is used by only one member of the family, or at least is not used by all, may nevertheless be a family asset. This question is important in classifying assets purchased after separation and also in the classification of assets used by only one member of the family in the course of a hobby.

Unlike the Ontario legislation, which requires that property be ordinarily used or enjoyed by "both spouses or one or more of their children" for one of the family purposes enumerated in the Ontario Act<sup>29</sup>, the British Columbia legislation requires only that the property be used by "a spouse" for a family purpose. Despite the broader terms of reference, the courts in British Columbia have sometimes required that property should be used for a purpose connected with the whole family. The most obvious example of this may be seen in Robertshaw v Robertshaw (No. 2)<sup>29a</sup>. Fawcus J. here held that a boat and recreational property owned by the husband were not used for family purposes because the wife, as opposed to the husband, had never used them during the marriage. This factor should clearly not have been regarded as definitive, given the wording of the statute. It is submitted that the definition employed in McLennan v McLennan<sup>30</sup> presents a more accurate

view of the approach which should have been taken. In this case the meaning of "family purpose" was expressed as:<sup>31</sup> "a purpose connected with the whole family, not merely one or more individuals in it. While property may actually be used by only one member of the family, the purpose for its use must be related to the family group, which ceases to exist in normal circumstances when the spouses separate". Despite this broader interpretation, initial cases under the Act continued to follow a narrow approach. In Beynon v Beynon<sup>32</sup>, the court held that a painting and some lithographs, which had been owned by the husband prior to marriage, were not family assets despite the fact that they were brought into the matrimonial home. It is not clear from the reported judgment, however, whether it was the fact that the property was owned prior to marriage or the fact that the prints were not "appreciated" by the wife which was the determining factor. Fischer L.J.S.C. contented himself with saying:<sup>33</sup> "Clearly, these items being objets d'art are of value in the eye of the beholder and the original beholder was the respondent". The same criticism can be levelled against Stammler v Stammler<sup>34</sup>, a decision referred to by Fischer L.J.S.C. to support his conclusion. In the latter case Taylor J., without discussion, assumed that non-revenue producing, commercial property acquired by the husband before marriage was not a family asset. He did not make clear whether he reached this conclusion because the property had been acquired before marriage or because no revenue was available from the property during marriage to be used for a family purpose.

Subsequent cases were more specific. In Mayuk v Mayuk<sup>35</sup> Spencer L.J.S.C. held that the husband's photographic equipment was not a family asset. He explained:<sup>36</sup> "On the evidence, it was used solely by the

husband as a hobby and with the intention of preparing himself to pursue photography as a business. This never happened". In Simpkins v Simpkins<sup>37</sup> a similar line was taken. With regard to the husband's collection of swords, Sheppard L.J.S.C. noted:<sup>38</sup> "...the husband owns some swords, the collection of which has been his personal hobby. There is no suggestion that any other member of the family is interested in this hobby. I hold that this collection is not a family asset". Neither of these cases considered the argument that a hobby could, in itself, be regarded as being a family purpose, nor does the argument appear to have been made to the court. Yet if the purchase of a fur jacket in Hauptman for the "creation and maintenance of harmony in the family unit" was regarded as a family purpose, it is submitted that a similar argument could be made for hobbies. This argument was, in fact, accepted in Papineau v Papineau<sup>39</sup>. In holding here that the husband's stamp collection was a family asset, Esson J. reasoned as follows:<sup>40</sup>

In my view, the subject matter of a hobby carried on during marriage, even though it is the hobby of one spouse to the virtual exclusion of the other, should be considered a family asset on the basis that the hobbies of each partner to the marriage can fairly be regarded as a family purpose.

This case is the more compelling because the husband had been collecting stamps since his youth and had accumulated the bulk of his collection before marriage. There was evidence, however, that the wife had assisted her husband somewhat by bringing home stamps from work, though it was evident that she had not contributed much to the collection in terms of value. It could have been argued, therefore, that the hobby was not solely the interest of the husband. McLachlin L.J.S.C. did not see cause to make such a distinction in Hauptman v Hauptman<sup>41</sup>, where he expressly applied the reasoning in the Papineau case to hold that

photographic equipment in the possession of the husband and used solely by him as a hobby was a family asset.

Neither Hauptman nor Papineau referred to the earlier cases of Mayuk v Mayuk and Simpkins v Simpkins. There thus exist two diametrically opposed lines of authority on this question, each of equal standing. The latest case on this topic appears to be Hollinger v Hollinger<sup>42</sup>. Cowan L.J.S.C. here intimated that in considering whether a hobby constituted a family asset, each case must depend on its own facts. In this case the husband's gun collection was held to be a family asset because, although primarily the concern of the husband, it was displayed in a case or cabinet in the home, and to that extent, was an object of ornament in the family home and thereby used for a family purpose. This reasoning seems to indicate a return to the Mayuk and Simpkins line of authority and shows once again the difficulty being experienced by the courts in attempting to define "family purpose"<sup>42a</sup>.

A related issue is the question of whether property acquired after the spouses have separated may be classified as a family asset. While the Ontario legislation requires that the use of a family asset take place "while the spouses are residing together", there is no similar requirement in the British Columbia legislation. Theoretically, therefore, in British Columbia an asset acquired after a couple have separated by one spouse and used by that spouse and a minor child of either spouse for a family purpose could be classified as a family asset. This would explain the reasoning in Bandiera v Bandiera<sup>43</sup>, one of the early cases on the section, although the facts are not entirely in point. The asset in dispute here was the matrimonial home. This home

had been occupied by the spouses and their only child during the course of the marriage. After separation, however, and before the introduction of the Family Relations Act, 1978, the wife, by signing a quit claim deed, conveyed all her interest in the matrimonial home to her husband. The house was thus not factually "new" property, although it probably can be legally so regarded. Since the separation the husband, the couple's child and another woman had been residing in the matrimonial home. When the wife claimed a share in the house the husband argued that the home was not a family asset because at the time of the new Family Relations Act coming into force it was being used for a family purpose by the new family, consisting of the husband, child and another woman, of which the wife was not a member. Hyde L.J.S.C. dealt with this argument as follows:<sup>44</sup>

I am unable to agree with (the husband's counsel's) reading of s.45(2). In my view, it is quite clear from the clear wording of the section that if any of either (1) the husband, (2) the wife, or (3) the minor child Sean is ordinarily using the matrimonial home for a family purpose, i.e., a residence, then it constitutes a family asset at the date of the dissolution of the marriage if it is then owned by either or both of the spouses, whatever may have been the state of the title prior to the 31st. March, 1979. This property was being ordinarily used by the husband and the child as a residence as of the date of the divorce hearing and constitutes a family asset at that date.

The difficulty with this approach, it is submitted, is that it gives too broad an interpretation to the word "family". A more restricted interpretation was applied by Catliff L.J.S.C. in McLennan v McLennan<sup>45</sup>. As already noted, Catliff L.J.S.C. defined family purpose in this case as "a purpose connected with the whole family, not merely one or more individuals in it. While property may actually be used by only one member of the family, the purpose for its use must be related to the family group, which ceases to exist in normal circumstances when spouses separate (emphasis added)". He quite properly went on to say

that "it is possible that, notwithstanding separation, property may be used for a purpose connected with both separated parts of the family, for example, the post-separation purchase of recreational property for use by the whole family, though not necessarily at the same time". The narrower interpretation of "family" certainly appears more logical and is, it is submitted, the better approach. There is support for this interpretation in other cases. In Robertshaw v Robertshaw (No.2)<sup>46</sup> the court held that post-separation property was not a family asset. Fawcus J. contented himself with holding that furniture acquired by the wife after separation was not a family asset because it had been used only by her. While this reasoning is ambiguous, it is consistent with the McLennan approach that once a family has separated, property acquired by either spouse will not generally be regarded as a family asset unless it is used by both parts of the original family for a family purpose. Likewise in Boldick v Boldick<sup>47</sup>, furniture purchased by the husband and cars purchased by both spouses after separation were held not be family assets without any express reason being given for this conclusion. Once again, however, the McLennan reasoning would apply.

In British Columbia, use by a minor child of either spouse is sufficient to render property a family asset. This may be contrasted with the Ontario definition, which requires use by the spouses "or one or more of their children". It would appear that in British Columbia use by a minor child from a previous marriage or relationship of one of the spouses would be sufficient, notwithstanding that the child has never been legally adopted by the other spouse. There have been no reported cases on this issue as yet, however.

The cases on s.45(2) are clearly unsatisfactory. Not only is there doubt as to the precise meaning of the phrase "ordinarily used... for a family purpose", there are also different lines of authority regarding its meaning in similar fact situations. Until some clarification is received from the Court of Appeal or the legislature, it will be impossible to predict in advance how a court will classify certain assets even where previous cases have dealt with similar assets.

(ii) Property specifically included

The general definition of family assets in s.45(2) is followed by s.45(3), which specifically includes five classes of property within the definition of family assets. The first four of these classes are discussed below.

(A) Shares in a corporation or an interest in a trust.

Section 45(3)(a) provides that where a corporation or trust owns property that would be a family asset if owned by a spouse, a share in the corporation or an interest in the trust owned by the spouse is a family asset. The apparent legislative intention behind this provision is to prevent spouses from defeating the purpose of the legislation by placing the ownership of property in the hands of a corporation or trust controlled by the spouse. A similar provision exists in the Ontario Act<sup>48</sup>. It is important to note that the asset in question must be used for a family purpose in order to be caught by this section. A mere share or interest of a spouse in a corporation or trust that owns business assets will not automatically qualify. Thus

in the Ontario case of Bregman v Bregman<sup>49</sup> the court held that a painting which was owned by the husband's corporation but displayed in the family home was a family asset. If the painting had not been used by the family but had instead been displayed in the husband's office, it would not have been so regarded.

In British Columbia, unlike Ontario, it is the share in the corporation or the interest in the trust which becomes the family asset, and not the asset itself. This raises an interesting question. If only some of a corporation's property is used for a family purpose but the husband owns all the shares in the corporation, do all the shares become family assets or only a percentage of them equal to the value of the "family" property? For example, a car valued at \$20,000, ordinarily used for a family purpose, is owned by a corporation in which the husband owns all 100 shares and the corporation has a net worth of \$200,000. Do all the shares become family assets or only ten of them (the proportionate value)? The latter view is the more logical. This view may be supported by pointing out that the legislation uses the words "a share" in a corporation rather than "all the shares". Similarly, it refers to "an interest" rather than "the interest" in a trust. Even if the courts did not adopt this interpretation, however, the owner of the share or interest could apply for judicial reapportionment pursuant to s.51. There have been no reported decisions on this point as yet and it is unclear what line the courts will choose to follow.

(B) Property over which a spouse can exercise a power of appointment.

Under s.45(3)(b)(i), if a spouse has a power of appointment



exercisable in favour of himself with respect to property which would be a family asset under the general definition, such property is considered to be a family asset. Once again, the property must be used for a family purpose in order to qualify under this head.

(B<sub>2</sub>) Property conditionally disposed of by a spouse.

Where property would be a family asset if owned by a spouse but the spouse has disposed of the property subject to a power to revoke the disposition or a power to use or control the disposition of the property, the property will be regarded as a family asset in which the other spouse is entitled to share<sup>50</sup>. As with ss.45(3)(a) and (b)(i), this provision has received no attention from the courts to date.

(C) Money in a savings institution account.

If an account in a savings institution is ordinarily used for a family purpose, then by virtue of s.45(3)(c), it is deemed to be a family asset.

In Bidniak v Bidniak<sup>51</sup> the court refused to classify as a family asset money placed on deposit by the husband out of his salary and \$10,668.36 from a joint savings account. This decision was reached notwithstanding the fact that the joint savings account was held to be a family asset. The reasoning behind the case seems to be that the money on deposit was not "used". It therefore did not comply with the requirement of s.45(2) that it be used for a family purpose.

A joint savings account was also discussed in Russell v Russell<sup>52</sup>, where it was held to be a family asset. The name in which an account is held and the signing authority for the account are irrelevant, however. The only prerequisite for such an account to be classified as a family asset is that the account be with a savings institution and that it be ordinarily used for a family purpose. It may be questioned, in fact, whether it was necessary to include s.45(3)(c) as a separate head at all. It would appear that s.45(2) would in any event operate so as to include money in an account which was used for a family purpose.

(D) Rights under annuities, pensions, home ownership or retirement savings plans.

Section 45(d) includes as a family asset a right of a spouse under an annuity or pension, home ownership or retirement savings plan. The section does not specify that such pension or plan must be used for a family purpose. This fact was interpreted by the court in Murray v Murray<sup>53</sup> as evidence that pensions were family assets by definition and that no "use" had to be proven with regard to same. The reasoning was expressed succinctly by Catliff L.J.S.C. in Bateman v Bateman<sup>54</sup>, in rejecting the husband's plea that such use must be proven:<sup>54a</sup>

I have difficulty conceiving how a retirement savings plan could be used for a family purpose while it remains a savings plan. Once cashed the proceeds may be so used, but then the savings plan no longer exists. I point out that if the asset described in subs.(3)(c) were also subject to the general words in subs.(2) there would be no need for their express inclusion in subs.(3)(c).

This line has been followed in numerous subsequent cases and is now firmly established. In Mayuk v Mayuk<sup>55</sup> Spencer L.J.S.C. pointed

out the logical conclusion of this approach. It has already been noted that in general the courts are reluctant to classify post-separation property as family assets, as they will not normally have been used for a family purpose. In Mayuk the wife had acquired two pension plans since separation out of her post-separation salary. Spencer L.J.S.C. noted that:<sup>56</sup> "(the) fact that she has created both plans after the separation and from wages earned since then does not assist her since, strangely, the wording of s.45(3)(d) makes no reference to when the plan is created. It is a family asset simply because it is there and because it is owned by a spouse". In the circumstances, however, he reapportioned the plans pursuant to s.51 so that they vested entirely in the wife upon payment by her to her husband of \$1 each for his interest in each of them.

More will be said later on the complex issues of division and valuation of pensions. For the moment it may be noted that pension plans are not included within the scope of the Ontario legislation. Indeed the Ontario Court of Appeal in St.Germain v St.Germain<sup>57</sup> has held that, in general, pension plans do not constitute family assets.

(iii) Business assets and joint ventures.

Although these assets are dealt with in separate sections of the legislation<sup>58</sup>, it is convenient to discuss them together as they both involve the conversion of "non-family assets" owned by one spouse into family assets by virtue of a direct or indirect contribution made by the other spouse. Section 45(3)(e) provides that any right, share or interest of a spouse in a venture to which money or money's worth has been contributed by or on behalf of the other spouse is a family asset.

Section 46 is framed in exclusionary terms. It excludes from the definition of family assets property which is used for business purposes and fulfills the conditions of s.46. First, the property must be owned by the business spouse to the exclusion of the other spouse. Second, the property must be used "primarily" for business purposes. Third, and most importantly, the non-business spouse must not have made any direct or indirect contribution to either the acquisition of the property in question or to the operation of the business.

A discussion of s.45(3)(e) involves both the issue of "contribution" and an analysis of the scope given to the term "venture". A literal interpretation of the section would appear to include any family-operated business to which both spouses had contributed. In practice, the courts have been very liberal in their interpretation of what qualifies as a "venture". In Robertshaw v Robertshaw<sup>59</sup>, one of the earliest cases decided on this section, Fawcus J. concluded as follows:<sup>60</sup>

...I think the word "venture", whose ordinary meaning might well exclude many businesses, as used in s.45(3)(e) must be interpreted so as to include any business.

Accordingly he held that the husband's medical practice fell under this head. The court also held that leasing and managing an upstairs suite was a joint venture.

The issue of whether a medical practice may be considered a venture under this section has arisen in many cases. In Jackh v Jackh<sup>61</sup> Esson J. expressly followed the Robertshaw decision in this regard. He also held that a court was entitled to give a spouse an interest in a medical practice even where that spouse was not a member of the

College of Physicians and Surgeons, having concluded that this course of action was not prohibited under the Medical Practitioners Act<sup>62</sup>.

The issue of whether a law practice could be considered a family asset under this head arose in Piters v Piters<sup>63</sup>. The court held that a law practice could not be considered a family asset because of the provisions of the Barristers and Solicitors Act<sup>64</sup>, which provides that the practice of law can only be carried on by a member of the Law Society of British Columbia. The court was careful to restrict its decision to the actual law practice, leaving open the possibility that shares in a holding company used to own the physical assets of a law practice could be regarded as family assets in appropriate circumstances. Even so, the decision was not popular. In Ladner v Ladner<sup>65</sup>, McKay J. noted:<sup>66</sup>

I should mention that I have not dealt with the question of whether the husband's interest in three law partnerships can be considered as family assets. This matter came before Locke J. on a point of law before the trial. He held in written reasons that the husband's interest in law partnerships is not capable of being a family asset within the meaning of the Family Relations Act. In so deciding he felt bound by, although he did not agree with, an earlier decision of His Lordship Judge Wetmore L.J.S.C. in the case of Piters v Piters.

Similar disquiet was expressed by Sheppard L.J.S.C. in Underhill v Underhill<sup>67</sup>. He did hold, however, that Piters did not prevent the court from awarding the spouse an interest in a holding company which owned assets belonging to the law practice. Sheppard L.J.S.C. stated firmly:<sup>68</sup>

Clearly the shares in Albion are a business asset. Clearly the petitioner (wife) made direct and indirect contribution to their acquisition by signing the mortgage on the matrimonial home (which provided the money for their initial purchase) and in managing the household. In my view, under these circumstances, the rationale of the decision in the Piters and Ladner cases

should be confined to law partnerships and not be extended to companies which do not practice law...

Although it may not be possible to award a spouse an interest in a law practice if she does not have legal qualifications, it is unclear why the court in Piters did not consider offering the wife some compensation instead of such an interest. As with Indian land<sup>69</sup> or property held by the director of the Veterans' Land Act<sup>69a</sup>, although the "res" cannot be attached, compensation could be ordered in appropriate circumstances. Alternatively the court could order that the remaining assets be divided unequally. There seems no logical reason why a doctor's practice and a dentist's practice<sup>69b</sup> can be attached, but not a lawyer's.

The term "venture" is not restricted to business ventures and has on occasion been held to include portfolios of family investments.<sup>70</sup> In Russell v Russell<sup>71</sup> the court held that certain mining shares and other business interests were joint ventures. The shares had been purchased by the husband for the spouses' mutual economic enhancement with funds drawn from a joint savings bank account or the husband's account, which was regarded as an extension of the savings account. In Sinclair v Sinclair<sup>72</sup> the court held that the purchase by the husband of a condominium in Alberta as a tax shelter constituted a venture within s.45(3)(e) as an alternative to Provenzano L.J.S.C.'s finding that it was a family asset under s.45(2). Perhaps one of the more interesting family assets, so found, has been an education. In Wolverton v Wolverton<sup>73</sup> Trainor J., in the course of dealing with the division of family assets under the Family Relations Act, stated:<sup>74</sup>

I should mention here that one of the things of value acquired by the wife during the marriage which is a real asset to her and of no worth to her husband is her education in the Fine

Arts. That education coupled with the opportunities she had to travel, equip her to participate in many ventures not otherwise possible. In my view this is no less a family asset than the dental practice of the husband.

Obviously the husband here could not be awarded a share in his wife's education. Its value was, however, considered in persuading the court to award an unequal division of assets. As suggested earlier, there seems no reason why a similar approach should not be adopted when dealing with a law practice.

A more complex question, and one which has caused much litigation, is the question of what constitutes "a direct or indirect contribution" by a spouse so as to render a business asset a family asset under ss.45(3)(e) or 46. Direct contributions are relatively easy to establish. Nevertheless it seems that not every contribution, no matter how direct, will be sufficient. If a court considers that a wife has already been more than adequately compensated for her contribution and the contribution has been small, the property may not be considered a family asset. An example of this may be seen in Andrew v Andrew<sup>75</sup>. The court found here that the wife had worked for approximately ten weeks in her husband's medical practice and that the work was not difficult. In these circumstances it was held that the wife had not proven a contribution sufficient to justify a finding that the practice was a family asset. On the other hand it appears that the spousal contribution need not be substantial. In Robertshaw v Robertshaw<sup>76</sup> an argument was made that the wife should not be considered to have made a contribution to her husband's medical practice as she had made such contribution as an employee and had been paid for her work. Fawcus J. rejected this argument:<sup>79</sup>

...the fact that she was paid for her work, whether reasonably

well paid or otherwise, is, it seems to me, irrelevant. The fact is, and I so find, that she did make a contribution to the operation of the business.... I find nothing in the wording of s.45(3)(e) or s.46(1) of the Act which indicates any intention on the part of the legislature that her contribution should not be considered merely because it was made by her as an employee.

In Fennings v Fennings<sup>78</sup> the wife had also been paid for her work, this time in her husband's milling company. She was nevertheless found to have made a direct contribution and the company was held to be a family asset.

Where money has been contributed to a business, that will obviously be regarded as a direct contribution. Other contributions have included the use of a wife's equity in the family home, albeit without cost to her and for brief periods of time<sup>79</sup>. A direct contribution can also be made so as to convert post-separation business assets into family assets. So in Johnson v Johnson<sup>80</sup> the husband had made investments after separation by borrowing from the bank. The evidence established that Mrs. Johnson contributed to her husband's credit at the bank and indeed that he had asked her not to tell the bank of the separation lest it jeopardise his credit position. Thus the connection between the acquisition of the assets and Mrs. Johnson was established and they were held to be family assets. It is unclear whether every post-separation contribution would be so regarded. If, for example, the parties separated and the wife then started to work for the husband's company for three years prior to the application for divorce and division of property, would she be entitled to a share in the business assets accumulated since the separation? A literal interpretation of the section would suggest that such a course is open to her. On the other hand it could be argued that



the contribution was made strictly qua employee and not qua wife. This distinction is rather nice and was not accepted in regard to assets acquired and contributions made during marriage in Robertshaw. The precise point has yet to come before the courts and it is unclear how they would respond.

The question of what amounts to an indirect contribution by a spouse presents even more difficulty. The term "indirect contribution" is defined in s.46(2) and includes "savings through effective management of household or child-rearing responsibilities by the spouse who holds no interest in the property". One of the first issues to arise before the courts in this regard was whether such "savings" had to be proven or whether they could be inferred. In Fennings v Fennings<sup>81</sup> the respondent husband argued that "savings" could not be presumed to flow from "effective management" and that the wife had not proven actual savings. Catliff L.J.S.C. nevertheless inferred that the wife did make savings through her effective management of the household and cited examples of where the wife had made clothes for the husband's daughter. More specific evidence of savings was tendered in Sinclair v Sinclair<sup>82</sup>, where the wife was able to account for monthly household expenditure over past periods. In Littlewood v Littlewood<sup>83</sup> Wetmore L.J.S.C. suggested that s.46(2) involved two separate tests; that "savings through effective management" is one test and a contribution through child-rearing responsibilities another. In this instance there was no factual evidence of savings through effective management. The wife had, however, assumed the entire responsibility for raising the children over a period of two years while the husband devoted himself to his business and this was held to satisfy the second part of the test, being more than the

"normal child-rearing responsibilities". The court left open the question of whether normal child-rearing responsibilities would be sufficient to constitute an indirect contribution. In Simpkins v Simpkins<sup>84</sup> the question of whether something out of the ordinary was required of a wife in this regard again came up for consideration. Sheppard L.J.S.C. noted:<sup>85</sup>

I am urged by counsel for the husband to find that there was no indirect contribution by the wife (to the husband's business) because she had not produced proof of "savings through effective management of household or child-rearing responsibilities". That is to say, if I understand counsel correctly, that the wife had not shown, for example, that she had opened a bank account and periodically deposited savings from her household budget which were then held throughout the marriage or made available to the husband for investment in the business. Indeed, counsel went even further and urged me to find that far from establishing any savings the wife was a spendthrift who was continually urging her husband to spend more on foolish luxuries.

With respect, I reject that interpretation of s.46(2). Where a wife, as in this case, has carried out household and child-rearing responsibilities over a period of time (in this case some thirteen years) I think it is to be inferred that these activities were performed effectively and in a manner to produce savings for the family unless evidence is led to the contrary. Here there has been no evidence that through substantial periods of the marriage the husband has been forced to employ other people to carry out these activities because of the ineffectiveness or sloth of the wife.

This reasoning, if correct, reverses the burden of proof in these cases to a substantial degree. The onus would no longer be on the wife to prove she made effective savings but on the husband to prove she did not. In Johnson v Johnson<sup>86</sup>, however, Taylor J. rejected this idea and held that "the onus must be on the wife to satisfy the court that her stewardship of the household funds was prudent and resulted in business assets being accumulated"<sup>87</sup>. This marks a substantial retreat from the Simpkins case. It is thus still unclear what degree of savings or effort must be proven to satisfy s.46(2). It seems probable that in

most instances there will have to be substantial evidence of ineffectiveness on the part of the spouse relying on s.46(2) before the court will be satisfied that no savings could have been made. In Johnson v Johnson the evidence was that the wife had misappropriated household funds which she had then used for gambling. In these circumstances it is not suprising that the court would not infer that any pecuniary advantage had accrued to the husband from her management of household and child-rearing facilities. In anything other than extreme cases, however, actual savings will be extremely difficult to prove. As a matter of practicality, accordingly, it may be necessary for the court to infer such savings in normal circumstances.

An even more vexed question is whether proof of savings through management of household or child-rearing responsibilities is of itself sufficient to establish an indirect contribution. There are two general lines of authority on this in British Columbia. They raise the issue of whether an indirect contribution from a wife's effective management of household or child-rearing responsibilities is to be assumed or whether she must prove that they resulted in a contribution to her husband's property or venture. In the earlier cases there was often evidence of both direct contribution and a contribution which may have fallen under s.46(2), so the matter was never discussed in detail<sup>88</sup>. In Samuels v Samuels<sup>89</sup>, however, Catliff L.J.S.C. held that although the wife had made a contribution as a wife and mother, the contribution did not have the necessary connection with the property in which she claimed an interest. He explained:<sup>90</sup>

What I think the wife must prove is that her contribution had some connection, albeit in only a general way, with the property in which she seeks an interest. That some connection is required seems clear from s.46(1) which excludes business assets where

the non-owning spouse makes no contribution to "the acquisition of the property" or "operation of the business"...This seems also the sense of s.45(3)(e) which constitutes as a family asset a spouse's interest in a venture "to which money or money's worth was contributed by the other spouse..."

Assuming the wife has proved her "effective management" as described in s.46(2), there is no evidence that such management contributed in any way to the operation of the Saskatchewan properties. By such management she did not free her husband to deal with them, as they were managed by his brother and not by him. To find this asset a family asset it would, I think, be necessary to hold that business or venture assets are family assets whenever a non-owning spouse shows simply that she has been a good wife and mother without any need to prove a link between the activities of the wife and the asset in question. I do not construe s.45(3)(e) and s.46 in this way. In the ordinary case it may not be at all difficult for a wife to show her indirect contribution, via s.46(2), to her husband's business assets. Her role as a housewife and mother facilitates his preoccupation with his business. But that is not the case here. In my view, the wife has not satisfied the onus on her to prove that she made a contribution to her husband's interest in the Saskatchewan properties, which accordingly, I find, is not a family asset.

While Samuels insists that there must be some connection between the asset in question and the indirect contribution, it did at least leave open the possibility of that requirement being proven by the fact of the husband having more time to devote to his businesses because of his wife's activities in the home. Blockberger v Blockberger<sup>91</sup> took a stricter approach. In holding that Mrs. Blockberger's housekeeping duties did not assist her husband in the operation of his business, Gould J. remarked:<sup>92</sup>

The trend of British Columbia decisions seems to be towards the principle that when the wife carries out adequately wifely and motherly duties, she frees the husband to advance his fortunes in the business world and that to the extent that his fortunes are advanced, she is entitled prima facie to one-half of the advance, because her indirect contribution has taken the asset out of the exception in s.46(1), and brought it within the definition of family assets in s.45(3)(e): a right, share or interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse". The first flaw in the above proposition is that it assumes that the husband would be carrying out "effective

management of household and child-rearing responsibilities" if his wife did not do so. I see no jurisdiction for that assumption. To assume that such would occur is to be blind to the ordinary and expected conduct of the Western Canadian husband. The second and the larger flaw in the proposition is the assumption that "effective management of household and child-rearing responsibilities" by a wife invariably must make an indirect contribution to the acquisition or operation of the husband's business .... or invariably must constitute an indirect contribution to a husband's "right, share or interest in a venture"... The Act does not say or connote that. All it connotes is that "effective management of household or child-rearing responsibilities" may, can, not, must, constitute an indirect contribution. There must be some connection between the wife's conduct and the asset in question.

A contrary view was put forward by Spencer L.J.S.C. in Vance v Vance<sup>93</sup>. Having referred to Blockberger, he continued:<sup>94</sup>

With great respect, I incline to the view that by effectively managing the household or child-rearing, the wife relieves the husband of a concern that would otherwise be his. That is not to say that he would himself necessarily assume these obligations, but that he would be burdened with the responsibility of ensuring that somehow they were discharged.

On the facts in Vance (the wife had actively encouraged the husband in his business endeavours and hosted a number of business parties for him), he distinguished Blockberger and found that the wife did contribute indirectly to the husband's business career.

Elsom v Elsom<sup>95</sup> was more specific. Again the wife here was only able to prove a contribution to her husband's business assets by virtue of her role as a wife and mother, being one of that class described by Locke J. as: "...ordinary satisfied and reasonably happy individuals whose efforts sustain themselves, their husbands, the household, and perhaps constitute 75% of the families in British Columbia"<sup>96</sup>. The couple had one child and the husband spent considerable time during the marriage commuting between England and Canada on business trips.

In deciding whether or not the wife's efforts satisfied the requirements of s.45(3)(e), Locke J. specifically rejected the Blockberger v Blockberger approach and preferred the statement of Spencer L.J.S.C. in Vance v Vance, quoted above. He concluded:<sup>97</sup>

In the instant case, with the husband shuttling back and forth between England and Canada throughout the whole of the marriage, I cannot see how, particularly after the child arrived, she did not relieve him of "concern" at one place or another. Prima facie her share is 50%.

Vance v Vance was also preferred over the Blockberger decision in Wagner v Wagner<sup>98</sup>. McDonald L.J.S.C. here intimated that by merely establishing his or her own responsibility for or involvement in the household management or child-rearing activities of the family, the spouse claiming an interest in business assets or a venture owned by the other spouse has established, by virtue of s.46(2), a prima facie case. That case could be met by the other spouse establishing that such involvement was not "effective" or that no "savings" resulted or that the contribution of the claiming spouse did not have any connection, direct or indirect, with the business or venture in question. Even if the facts so proved were not sufficient to overcome the prima facie case arising from the operation of the statute, they might have a direct bearing on the factors enumerated in s.51 and result in the court awarding an unequal distribution of business assets.

Although the Vance approach seems to be the one being followed at present, it may be questioned whether such an approach is correct. Although home and child care may amount to an indirect contribution under s.46(2), they clearly do not in all cases. If some connection between the contribution and the assets to be shared is not established,

any substance behind the family asset/non-family asset (business asset) distinction is removed. It is interesting to note the approach of the Ontario courts to the comparable legislation in Ontario. Although the language of the statute is different, s.46 compares with s.8 of the Ontario statute. In both Leatherdale v Leatherdale<sup>99</sup> and Young v Young<sup>100</sup>, the Ontario courts established that home and child care, without more, are not acceptable contributions. What must be proven is that the wife, by her assumption of more than her fair share of household responsibilities, enabled her husband to acquire or operate his business acquisitions.

It has already been noted that a wife can, through her direct contribution, acquire an interest in post-separation business assets. The question arises as to whether an indirect contribution through household management and child-rearing responsibilities could have the same effect. Logically there seems no reason why it should not. In many cases the wife will continue to take major control and responsibility for rearing the children after the spouses separate.

This point was raised, although not settled, in Tratch v Tratch<sup>100a</sup>. McLachlin L.J.S.C. admitted that Mrs. Tratch had performed household and child-rearing responsibilities after the separation, although they were diminished by reason of the husband's absence and the increasing independence of the children. He felt that there would often be situations where such a post-separation activity could fall under s.46(2). In the case at hand, however, he decided that this factor ought more properly to be dealt with in connection with reapportionment and left it for consideration there.

Tratch v Tratch is not conclusive on this point. McLachlin L.J.S.C.'s comments were obiter. Furthermore, in Tratch the post-separation assets had been acquired from the proceeds of or on the security of earlier, pre-separation assets. There was therefore a strong case that they be taken into consideration in a distribution even apart from the wife's post-separation contribution. A literal interpretation of the Family Relations Act nevertheless supports the view that an indirect contribution after separation should give the wife some interest in post-separation assets under s.46(2). The statute does not purport to insist that an indirect contribution will only be effective if made while the spouses are still living together. Whether this was an error on the part of the legislative draftsman is another question.

#### Valuation

The Family Relations Act does not mention any specific date at which assets are to be valued. In practice the courts have proved very flexible in their approach to this issue.

One of the earliest cases on the issue of valuation was Thu v Thu<sup>101</sup>, where the assets at issue included land and the matrimonial home. Davies L.J.S.C. held that the proper date at which to value these assets was the date of trial. The date of trial was also chosen as the date of valuation in Mills v Mills<sup>101a</sup>, where Esson J. noted:<sup>101b</sup>

...Unless the circumstances are such as to make an equal division unfair, the principle of equality requires the use of values current at the time of the division.

This date does not hold true in every instance. The Court of



Appeal has affirmed that the date of valuation need not be fixed at the date of the triggering event under s.43 or the date of trial but can be any other appropriate date. This was first asserted by the Court of Appeal in Rutherford v Rutherford<sup>102</sup> and repeated by McDonald J.A. in Williams v Williams<sup>103</sup>.

The date of separation will in many instances be the appropriate date of valuation since the non-owning spouse will generally have made no contribution to the assets since that date. So in Demetrick v Demetrick<sup>104</sup> it was held that since the wife had made no contribution to the husband's veterinarian practice, his partnership or his retirement savings plan since the date of separation, the valuation of these assets should be determined as of that date. In Smith v Smith<sup>105</sup>, however, it was held that the date for the valuation of assets must clearly be the date when the principles of equity of interest may be maintained, in other words, the date that an order is given pursuant to the Family Relations Act. The facts of the case were that the couple worked in commercial fishing and the value of the husband's boat and commercial fishing licence had decreased since the parties had separated. The court pointed out that the wife had been able to keep her earnings since separation without sharing. If the husband's assets were to be valued as of the date of separation she would, in effect, be obtaining a share in the respondent's income, which was calculated on an annual basis. The decision was thus clearly based on its own facts.

One asset which has caused particular difficulty in regard to valuation is the pension. As already mentioned, pensions qualify as family assets by definition under s.45(d). Unfortunately, in the vast

majority of cases, a number of years will elapse between the triggering event in s.43 or date of application to the court and the time the pension will be realized. The dilemma the court faces in these circumstances was expressed by Taylor J. in Belcher v Belcher<sup>106</sup>:

The dilemma results, I think, from the fact that the statute treats pension plan benefits in the same way as assets already in existence, and it contemplates a once-and-for-all division of such assets at the time of the "triggering" event which terminates the family relationship. But pension plan assets are not a form of realized personal property which can be disposed of and divided at any time. Such a plan is not really an "asset" in the conventional sense at all; in such a case as this it is merely a possible source of income which may be received in the future and out of which one spouse may be able to support the other during their retirement.

A second difficulty in this regard results from the fact that the courts are understandably reluctant to award a spouse a 50% interest in a pension to which the other spouse has been contributing alone for a number of years after the separation.

A large number of cases have been heard in which the issue of division of pension plans has arisen for discussion. It is not proposed to embark upon an in-depth analysis of these cases. They are too numerous and too complex. The Court of Appeal, however, has given an important decision which deals extensively with the division of pensions in British Columbia and an examination of its conclusions gives some indication of the complexities involved and the approach which it has directed be taken to them.

In Rutherford v Rutherford<sup>107</sup> the most important part of the decision in the Court of Appeal deals with pension rights. At the time of the trial in November 1979 the husband had over 37 years of service

with the provincial government although he was only 53 years of age. Under the relevant provincial superannuation legislation the retirement benefit is calculated by multiplying the years of service, up to a maximum of 35 years, times 2%, times the highest average 5 years salary of the employee. Thus the husband had already reached the highest possible percentage - 70%. Despite this, he could not receive his pension benefit until age 55. Furthermore, he could elect to continue working after age 55 and not retire until either age 60 or 65, thereby increasing the last of the above multiples.

At the time of trial the husband was 53. The trial judge held that the pension was a family asset and declared that the wife held an undivided one-half interest in the pension as tenant in common as of the date of their separation in 1976. He declined to make further orders in regard to the exact value of the pension or as to how it should be divided. He suggested that the parties could agree to a method of dividing up the monthly pension cheque when the husband eventually retired. In the absence of such agreement, the court would make an order for division when the time arose. If the husband chose not to retire at age 55, he indicated that the wife could apply for maintenance.

By the time the case was decided in the Court of Appeal in September 1981, it was apparent that the husband had chosen to continue working and that he was not going to retire at age 55. This fact and the possibility that he might not retire until age 65 (another 10 years) raised interesting questions as to the nature of the wife's right and in particular her right to realize on the part of the pension that belonged to her.

Seaton J.A. wrote an extensive judgment with which both Nemetz C.J.B.C. and Craig J.A. largely concurred. He rejected the husband's argument that the pension was not a family asset because it was not a present right, being not yet payable. He also rejected the argument that the Family Relations Act, being general legislation, could not control specific pension legislation.

A third issue raised was as to when the wife's interest in the pension plan should have been quantified. The trial judge had used the date of the separation of the parties in 1976 as the date on which the calculation was to be made. He had used the date of the order dissolving the marriage as the triggering event under s.43. The husband sought to support the trial judge's use of the date of separation as the date of evaluation on the basis that there was a kind of "separation agreement" or arrangement which the husband argued qualified as a separation agreement under s.43, even though the arrangement between the parties was not in writing and did not appear to have been a formal agreement. Seaton J.A. rejected the argument that the arrangement was a separation agreement. Nevertheless he took the view that the date for evaluation could be moved back to the date of the separation in 1976, even though the triggering event did not occur until the order dissolving the marriage in 1979, on the basis that under ss.51 and 52 there was a discretion to move the date for the evaluation and that it was proper in this case to do so.

Fourth, an issue arose as to whether the husband should be obligated to pay any money to the wife if he elected to keep working, bearing in mind that the wife had been held at trial to be an owner

as a tenant in common as to part of the pension plan. Could she compel her husband to pay her any money until he elected to retire? If so, was it proper to refer to those payments as maintenance or should they be called something else? In answering this question, Seaton J.A. held that if the appellant husband held up the pension, a portion of the right to which is owned by the respondent wife, then the husband should be required to pay compensation to the wife, but not maintenance. The compensation would be the amount she would receive if he had retired. He concluded that if Mrs. Rutherford elected to take the immediate pension, Mr. Rutherford would be obliged to pay her an amount equal to her share of the pension she would have received if he had retired at age 55. If she preferred to wait, he suggested she should be allowed to elect any date compatible with the plan to begin to enforce such payments. For example, it appears that if she chose to wait until the husband reached 60 and was still working, she could get her interest as calculated on his retirement benefits as if he had retired at age 60.

A fifth issue involved determining the share of the pension plan to which the wife was entitled as of the date of separation in 1976. Seaton J.A. recognised that there may be cases where there are other valuable assets when it may be appropriate to allow the spouse who has earned the pension to retain it and to compensate the other spouse by directing either the transfer of other assets or a cash payment in an amount equal to the non-employee spouse's share of the pension. In Rutherford, however, the other assets of the parties did not make such an approach feasible.

In Rutherford, there were three kinds of voluntary contributions.

First, Mr. Rutherford during the marriage had paid money into his pension fund on a purely voluntary basis as a way of saving extra money for retirement. The Court of Appeal held that the wife was entitled to a share in that money. Secondly, he had paid money into the fund on a voluntary basis after their separation. In regard to this group of contributions the court noted that if these contributions came from family assets they would be shareable, otherwise not so. The last kind of contribution - those early contributions which were reclassified because of the contributions made during the 36th. and later years of service - these were classified as new payments and were held not to be shareable because they were not earned before the separation. Counsel were left to work out the precise figures in regard to all voluntary contributions. In regard to the division of the obligatory contributions, Seaton J.A. noted:<sup>108</sup>

In normal circumstances the division would be based on the number of years contribution. But that is not appropriate here because after the 35th year the pension has been fully earned. The denominator therefore should be 35 years, regardless of the number of years employment in excess thereof. The evidence suggests that the 35 year mark was about one-half year after the separation. Her share is therefore one half multiplied by  $34\frac{1}{2}$  divided by 35. That leads to a factor of .493.

Finally, the respondent wife sought an order to the effect that the Superannuation Commissioner must treat the wife as a pensioner and as such provide to her all of the rights and options given to the employee husband. Seaton J.A. rejected such an order, feeling that involving the Superannuation Commissioner and others in family litigation should be avoided for reasons of time and cost. He did hold, however, that this was a proper case to declare that Mr. Rutherford be a trustee of Mrs. Rutherford's share of the pension.

The decision in Rutherford v Rutherford has not yet resolved all pension issues. The variety of pension plans and the different factual positions in which the parties may find themselves will ensure a certain amount of future litigation over pensions. In particular, the Court of Appeal did not consider the position should Mr. Rutherford remarry. Presumably, the second Mrs. Rutherford would also be held entitled to share in some part of the pension. It is unclear how a court would approach such a situation, or indeed what options would be open to a court in this regard under the legislation. The statute would appear to have given insufficient thought to the issues which could arise as a result of the blanket inclusion of pensions under s.45(d).

Changing character of assets.

Family assets depend in general for their characterization on the requirement that they be ordinarily used for a family purpose. If a court finds that at one time assets were used for a family purpose, the interesting question arises whether a change in use can alter their identity as family assets. The answer will depend in part on the date at which the court chooses to characterize the matrimonial property, that is, whether it characterizes them at the date of separation or s.43 triggering event. A further difficulty arises with regard to after acquired or post-separation property. It has already been submitted that in general the court will not include post-separation assets as family assets. The situation may be different, however, where the after acquired property has been purchased with the proceeds of sale from what would have been regarded as a family asset.

It seems at least that where property was used for a family purpose at the time of separation, the fact that user has changed since then will not affect the characterization of the property as a family asset. The point was explained by Catliff L.J.S.C. in Fennings v Fennings<sup>109</sup>:

Section 43 of the Act entitles each spouse to an interest in each family asset when an order for dissolution of marriage is first made. The question then is whether or not the family assets to which the parties are entitled are only those which exist as such at the date of the triggering event set out in s.43 - in this case the order for dissolution of marriage. There is as yet apparently no express authority on this point. Mr. Warren refers me to ss.51(c) and 52(2)(c) of the Act. Section 51(c) includes as a test of a fair division the date when property was disposed of. But the s.51 criteria does not apply at all unless there is first a division under s.43, i.e., there already exist family assets to be shared. Section 52(2)(c) allows the court to order compensation where property has been disposed of. In Jarvis v Jarvis, (1979), 14 B.C.L.R. 324 (S.C.), Verchere J. held that a husband's post-separation expenditure did not come from family assets. From this it may be inferred that compensation may be ordered for the disposal of family assets, but this will hardly apply if instead of disposal, the ordinary use of these assets has merely been changed from a family to a non-family purpose.

Nevertheless it is clear from the cases which have so far been decided under the Act that the court has included as family assets property which has been used for a family purpose, but is no longer. After a separation (but not a triggering event "separation agreement" under s.43) these assets are often used exclusively by one spouse or the other for separate purposes and not for a family purpose. Nevertheless they are included as family assets, the implied assumption being that once an asset has achieved the status of a family asset it does not easily lose such status... If this were not so the result could be disastrous for one or other of the spouses. A husband who owned the family home could sell it shortly before trial and by using the proceeds for a non-family purpose deprive his wife of an interest in the proceeds. Such a result would obviously defeat the purpose of s.43. Similarly family assets which comprise a venture interest (s.45(3)(c)) or a business interest (s.46), because of a spouse's contribution, do not cease to be family assets, in my view, because the contribution has ended before the triggering event.

Cases since decided have followed the proposition that once an asset has been characterized as a family asset, it does not lose that characterization simply because the spouses have separated and user of



the asset has then changed.

Property acquired by spouses after separation but before the triggering event in s.43 are not generally regarded as family assets<sup>110</sup>. Where, however, the new property has been acquired from the proceeds of sale from a family asset, the situation may be different. The latter situation must be discussed in relation to the effect of a sale of family assets by the legal owner.

The Family Relations Act retains the concept of separate property while the spouses are living together. It is only upon marriage breakdown that a spouse becomes entitled to a share in the family assets, irrespective of their legal ownership. Accordingly each spouse is free to dispose of his or her assets during the subsistence of the marriage. Where a spouse has disposed of assets after an entitlement to share in them has arisen under the Family Relations Act, s.52(2)(c) comes into operation. This section empowers a court to order a spouse to pay compensation to the other spouse where property has been disposed of. Catliff L.J.S.C. explained in McLennan v McLennan<sup>111</sup>:

...while property acquired after separation is not a family asset, the means by which such property is acquired - money or assets- may have constituted family assets or potential family assets so that a claim for compensation for the disposition of property (under s.52(2)(c)) would remain. I thus construe "property" in s.52(2)(c) to refer to family assets or potential family assets.

Difficulty may arise in the operation of this section where not only has the property been disposed of, but the proceeds of sale have also been spent. In Brayford v Brayford<sup>112</sup>, for example, the husband had disposed of some stocks after separation to pay off his debts. The wife

sought to be compensated for her share in the stocks, which were regarded as having been family assets. Provenzano Co. Ct. J. noted:<sup>113</sup>

...I must say that I find that there is no stock that comprises a family asset. It is not here, it is not present today and it has been disposed of and so therefore it is not necessary for me to consider that and when s.51 refers to a division other than 50-50, it says that the court may consider the date when property was acquired or disposed of; I would refer to s.51, which gives the court discretion and authority, where property has been disposed of, to order that spouse to pay compensation to the other spouse. Now, that means, as I see it, that if there is a family asset that has been disposed of and money has been put in the bank, the court can say that he or she should pay back a certain percentage of it to the other side, but the proceeds of that asset or sale or disposition must be in existence. I do not think it means that if the money is taken and spent on a big party or on a holiday, that the party has to account for it unless it can be subject to the trust findings of the relevant trust nature.

The danger with this reasoning, it is submitted, is that a spouse might dispose of his assets indiscriminately after separation and before trial, and yet not be required to pay compensation to the other spouse if he had no available assets. The court in Royer v Royer<sup>114</sup> rejected the notion that any such activity would be tolerated by the courts. The husband in this case was in a net liability position at the time of trial as a result of his "wheeling and dealing". He had indiscriminately disposed of both family assets and non-family assets after separation. The court found that as a result it was impossible to determine which pre-separation and potential family assets were disposed of to acquire post-separation assets. It was satisfied, however, that there were some assets so dealt with. The husband proved that he no longer had any assets at trial that could be physically divided and shared with the petitioner wife. The court was also satisfied that he could work and get out of his debt situation:<sup>115</sup>

I am ...satisfied that given some time, and I ...refer to his expertise in borrowing money, he can get out of his present

overencumbered financial position and salvage an appreciable amount of cash or credit...

Pursuant to the provisions of s.52(2)(c), therefore, it was held that the petitioner should be compensated as far as it was possible and reasonable to do so, and the husband was ordered to pay her \$6,400.

In Wagner v Wagner<sup>115a</sup> an even stronger line was taken. McDonald L.J.S.C. took the view that the absence of an improper motive in transferring a family asset to a third person does not prohibit an order for compensation under s.52(2)(c) and that a spouse was not at liberty to give a substantial asset as a gift except at the risk of facing an order for compensation. Thus where the husband had transferred his interest in a company to his son after the separation, though not with the intention of defeating his wife's claim to a share in the company, he was nevertheless ordered to compensate the wife pursuant to s.52(2)(c).

Apart from compensation awards, the courts have in some instances employed the doctrine of tracing where family assets have been converted into non-family assets after separation through sale or exchange. In Treacher v Treacher<sup>116</sup> it was held that the cash proceeds of mortgages secured or assets to which the wife had indirectly contributed, realized after separation, were family assets. Likewise in Fennings v Fennings<sup>117</sup> it was held that conversion of a family asset to a different asset after separation results in the second asset being considered a family asset. These cases were expressly approved in Tratch v Tratch<sup>118</sup> by McLachlin J., who held here that business assets acquired after separation from interests which were

family assets under s.46 were also family assets. The Court of Appeal adopted this doctrine in Burnham v Burnham<sup>118a</sup>, awarding the applicant wife a one-half interest in a boat purchased after separation by her husband with the proceeds of pre-separation family assets. No authorities were cited in the reasons for judgment, however. MacDonald J.A. simply noted that this was a case of a trustee taking trust funds and investing them in a new venture. The trust, therefore, continued.

No legislative guidelines have yet been established as to when a court should use the tracing doctrine in these circumstances, nor has there been a consistent approach from the courts in this regard. At present it seems that each set of facts will be determined according to the policy of the particular court hearing them. It is to be regretted that the Court of Appeal in Burnham failed to give any direction in this matter.

Another aspect of characterization concerns whether a family asset ever loses its character as such apart from where it has been sold or exchanged for another asset. This point was dealt with tentatively in Worobieff v Worobieff<sup>119</sup>. In dealing with the issue of whether the petitioner wife had lost her interest in the former matrimonial home when she had given her share as a gift to her husband at separation, Taylor J. said:<sup>120</sup>

I have concluded, on a reading of Part 3 as a whole, that probably no agreement short of a separation agreement in writing will suffice to remove a former "matrimonial asset" from the purview of s.43, and the Deed here was not a separation agreement.

The correctness of this decision has been questioned<sup>121</sup>. It

might well be thought, indeed, that where a husband and wife have separated and the wife, without outside pressure, decides to transfer her interest in certain family assets to her husband, that action ought to be regarded as having changed the status of those assets.

Worobieff v Worobieff has been referred to in the recent case of Gowanlock v Gowanlock<sup>122</sup> as indicating the trend towards a concept of "once a family asset, always a family asset". Selbie C.J.S.C. indicated here that nothing can be done to the asset itself or the proceeds from it, subject to the provisions of s.43(3)(a) and (b), that will take from it this essential character. This dogmatic approach may cause uncertainty in some instances. For example, where spouses decide to settle their financial affairs out of court and reach an agreement (not a separation agreement), as to who should get what property, it seems it would still be open to one spouse to have this agreement set aside in court and a redistribution ordered. The purpose of the law should be to avoid unnecessary litigation. It is therefore submitted that in this type of situation the agreement of the spouses should stand, unless there is evidence of fraud or undue influence, or one spouse has not been informed of his or her legal rights in the matter.

The Matrimonial Home

The ownership and division of the matrimonial home is not the subject of special provision in the Family Relations Act. In most instances, the matrimonial home will be a family asset since it will have been ordinarily used for a family purpose. Consequently, in the absence of a marriage agreement or a separation agreement, each spouse will be entitled to a one-half interest in the matrimonial home as a tenant in common upon the happening of a s.43 event. Either spouse may, of course, apply for a judicial reapportionment of interests.

One interesting question which has arisen in relation to the matrimonial home is the effect of the Family Relations Act where the matrimonial home has been purchased under the Veteran's Land Act<sup>123</sup>. Where property is purchased under this statute, an amount of money is loaned to the purchaser by the director of the Veteran's Land Act by way of a mortgage on the property. Title to the property is placed in the name of the director, which title is transferred into the name of the purchaser on repayment by him of the original loan. In Ontario the courts have not hesitated to deal with property in the name of the director under the equivalent Ontario matrimonial legislation. So in Re Whitely<sup>124</sup> the Ontario Court of Appeal held that the vesting of title in the director is more a matter of form and ought not to interfere with the substantive rights of the spouses in relation to the property.

In Harper v Harper<sup>125</sup> the Supreme Court of Canada declined to deal with the application of the British Columbia Family Relations Act, 1972 (now repealed and replaced by the 1978 Family Relations Act), to

property held by the director of the Veteran's Land Act, since the property had, prior to the appeal, been transferred to the husband. In the British Columbia Court of Appeal, however, it had been held that the provincial Family Relations Act could have no application to land held by the director, on the grounds that as long as the property remained in the name of the director, the veteran had no interest in the property capable of division.

There have been a number of decisions under the 1978 Family Relations Act in which property in the name of the director of the Veteran's Land Act has been among the assets in dispute. In Dresen v Dresen<sup>126</sup> Davis L.J.S.C. dealt with such property by ordering that it be sold and the proceeds divided 60-40 after the director had been paid. No reference was made to the decision in Harper, however, and the case does not contain any examination of the complexities involved.

Property in the name of the director was also held to be a family asset in Christensen v Christensen<sup>127</sup>, as falling within the provisions of s.45(3)(b)(ii). No reference was made to the Court of Appeal decision in Harper and the question of what should be done with the property was deferred pending valuation by the registrar.

In Arnason v Arnason<sup>128</sup> Huddart L.J.S.C. examined this issue more closely. After a discussion of the provisions of the Family Relations Act, he concluded that there was nothing in the provisions of the Veteran's Land Act which prohibited the application of the provincial legislation. Accordingly he decided that property in the name

of the director could be the subject of a claim by a spouse under the Family Relations Act and held that each party was entitled to a one-half interest in that asset. He again was not referred to the Court of Appeal decision.

The court in Wright v Wright<sup>129</sup>, however, took a contrary line to the above cases. Cashman L.J.S.C. held that he did not have the power to order the husband to pay the director of the Veteran's Land Act and put the property up for sale, nor could he order the director to do so since he was not a party to the proceedings and the provisions of the Veteran's Land Act made it extremely doubtful that that would be possible in any event. He did make an order under s.52(2)(c) of the Family Relations Act and held that the wife was entitled to an order for compensation from the husband in the amount of \$56,500 (one-half of the equity in the property).

The precise position of the courts on this question is now unclear. Possibly the Court of Appeal decision in Harper could be distinguished as it concerns the 1972 legislation and not the Family Relations Act of 1978. Such a distinction is extremely questionable, however. If Harper is still good law, then with the exception of Wright v Wright, the reported cases on this question mentioned above have been incorrectly decided.

Bearing in mind the conflict between the Ontario decision in Re Whitely and the British Columbia decision in Harper, it is to be regretted that the Supreme Court of Canada did not take the opportunity to rule on the issue. The point is clearly a policy decision of general



application which does not turn on the facts of any particular case. There could, therefore, be no danger of adversely affecting the position of the courts in future cases. The certainty which could have resulted from a general statement outweighs the disadvantage of deciding the issue on anything other than the narrowest possible grounds.

Footnotes to Chapter 2

1. S.B.C. 1978, c.20, now R.S.B.C. 1979, c.121.
2. Attorney-General Statutes Amendment Act, 1979 (B.C.), c.2.
3. B.C. REG. 407/79.
4. S.B.C. 1972, c.20, now repealed by the Family Relations Act, 1978.
5. (1978), 3 R.F.L.(2d) 347 (B.C.C.A.).
6. B.C. Reg. 477/73.
7. The Family Law Reform Act, 1978 (Ont), c.2, now R.S.O.(Ont), c.152.
8. S.45(2).
9. (1982), 35 B.C.L.R. 293 (S.C.).
10. Ibid, p.306.
11. (1978), 6 R.F.L.(2d) 341, at p.353 (Ont. U.F.C.).
12. [1980] 2 W.W.R. 215 (B.C.S.C.).
13. Supra, n.7, at s.3.
14. (1979), 10 R.F.L.(2d) 63; 102 D.L.R.(3d) 375 (B.C.S.C.).
15. Ibid, p.68.
16. For example, St. Germain v St. Germain (1980), 14 R.F.L.(2d) 186 (Ont. Co. Ct.).
17. (1980), 13 R.F.L.(2d) 352 (B.C.S.C.).
18. Ibid, p.357.
19. (1981), 19 R.F.L.(2d) 398 (B.C.S.C.).
20. (1980), 14 R.F.L.(2d) 1; 14 B.C.L.R. 324; 9 F.L.D. 324 (S.C.).
21. Ibid, p.6.
22. (1980), 14 R.F.L.(2d) 134 (B.C.S.C.).
23. Ibid, p.145.
24. (1981), 29 B.C.L.R. 339 (S.C.).
25. Ibid, p.343.

- 25a. B.C.S.C. April 7, 1981, Victoria 80/628 10928 (unreported).
26. (1982), 32 B.C.L.R. 119 (S.C.).
27. Ibid, p.122.
28. The Matrimonial Property Act, R.S.M. 1978, c.M45, s.3.
29. Supra, n.7, s.3(b).
30. (1981), 17 R.F.L.(2d) 44; 20 B.C.L.R. 193 (S.C.).
31. Ibid, p.49.
32. (1981), 23 B.C.L.R. 209 (S.C.).
33. Ibid, p.213.
34. (1979), 14 B.C.L.R. 57 (S.C.).
35. (1981), 25 B.C.L.R. 57 (S.C.).
36. Ibid, p.61.
37. Supra, n.24.
38. Ibid, p.343.
39. (1982), 31 B.C.L.R. 363 (S.C.).
40. Ibid, p.365.
41. Supra, n.26.
42. B.C.S.C. March 16, 1982, Vancouver 5942-02583 (unreported).
- 42a. Note also the case of Doyharcabel v Doyharcabel, B.C.S.C., June 24, 1982, Vancouver A8028068 & 5936/D142593, (unreported). Sheppard L.J.S.C. here held that the wife's piano was a family asset, despite the fact that she was the only one who had played it, since her husband had enjoyed listening to her play, and accordingly it had been used for a family purpose.
43. (1979), 13 B.C.L.R. 327 (S.C.).
44. Ibid, p.333.
45. Supra, n.30.
46. Ibid, p.46.
47. (1980), 11 F.L.D. 97 (B.C.S.C.).
48. S.3(b)(ii).
49. (1978), 28 O.R.(2d) 722 (Fam. Law Div.).

50. S.45(3)(b)(ii).
51. (1979), 10 F.L.D. 140 (B.C.S.C.).
52. (1979), 9 F.L.D. 194 (B.C.S.C.).
53. (1979), 9 F.L.D. 81 (B.C.S.C.).
54. Supra, n.14.
- 54a. Ibid, at p.67.
55. Supra, n.35.
56. Ibid, p.63.
57. Supra, n.16.
58. S.45(3)(e) and s.46.
59. Supra, n.12.
60. Ibid, p.142.
61. (1981), 18 R.F.L.(2d) 310; 22 B.C.L.R. 182 (S.C.).
62. R.S.B.C. 1960, c.2L4.
63. [1981] 1 W.W.R. 285; 19 R.F.L.(2d) 217; 20 B.C.L.R. 393 (S.C.).
64. R.S.B.C. 1979, c.26.
65. (1981), 20 R.F.L.(2d) 243 (B.C.S.C.).
66. Ibid, p.251.
67. (1981), 21 R.F.L.(2d) 21; 25 B.C.L.R. 155 (S.C.).
68. Ibid, p.32.
69. For example, Sandy v Sandy, (1979), 9 R.F.L.(2d) 310 (Ont. H.C.).
- 69a. R.S.C. 1970, c.V-4.
- 69b. Wolverton v Wolverton, (1980), 24 R.F.L.(2d) 33 (B.C.S.C.).
70. For example, Mayuk v Mayuk, supra, n.35.
71. B.C.S.C. May 16, 1979, Vancouver D728161 (unreported).
72. Supra, n.17.
73. Supra, n.69a.
74. Ibid, p.38.

75. (1980), 16 R.F.L.(2d) 129 (B.C.S.C.).
76. Supra, n.12.
77. Ibid, p.220.
78. (1980), 12 R.F.L.(2d) 74; 11 B.C.L.R. 267 (S.C.).
79. Littlewood v Littlewood (1980), 19 B.C.L.R. 299 (S.C.).
80. B.C.S.C. February 15, 1982, Vancouver A802734 (unreported).
81. Supra, n.78.
82. Supra, n.17.
83. Supra, n.79.
84. Supra, n.24.
85. Ibid, p.348.
86. (1982), 24 R.F.L.(2d) 70; 30 B.C.L.R. 115 (S.C.).
87. Ibid, p.76.
88. For example, McDonald v McDonald (1981), 27 B.C.L.R. 247 (S.C.).
89. (1981), 22 R.F.L.(2d) 402 (B.C.S.C.).
90. Ibid, pp.406,407.
91. (1981), 23 R.F.L.(2d) 177; 30 B.C.L.R. 78 (S.C.).
92. Ibid, p.186.
93. (1981), 23 R.F.L.(2d) 397; 31 B.C.L.R. 216 (S.C.).
94. Ibid, p.402.
95. Supra, n.9.
96. Ibid, p.310.
97. Ibid, p.314.
98. B.C.S.C. March 16, 1982, Vancouver 5036/D140202 (unreported).
99. (1980), 31 O.R.(2d) 141 (C.A.).
100. (1981), 21 R.F.L.(2d) 388 (Ont. C.A.).
- 100a. (1981), 30 B.C.L.R. 98, at p.108 (B.C.S.C.).
101. (1980), 12 R.F.L.(2d) 289 (B.C.S.C.).

- 101a (1981), 20 R.F.L.(2d) 197 (B.C.S.C.).
- 101b. Ibid, at p.197.
102. [1981] 6 W.W.R. 485; 23 R.F.L.(2d) 337; 30 B.C.L.R. 145 (C.A.).
103. (1982), 26 R.F.L.(2d) 325 (B.C.C.A.).
104. B.C.S.C. February 5, 1981, Vancouver 5938-01860 (unreported).
105. B.C.S.C. March 18, 1981, Vancouver D909338 (unreported).
106. (1981), 19 R.F.L.(2d) 352, at p.358; 24 B.C.L.R. 277 (S.C.).
107. Supra, n.102.
108. Ibid, p.205.
109. Supra, n.78, at pp.77,78.
110. See infra, pp.48,49.
111. Supra, n.30, at p.47.
112. (1981), 17 R.F.L.(2d) 143 (B.C.Co. Ct.).
113. Ibid, pp.147,148.
114. (1981), 20 R.F.L.(2d) 85; 24 B.C.L.R. 104 (S.C.).
115. Ibid, p.58, per Washington L.J.S.C.
- 115a. Supra, n.98.
116. (1979), 10 R.F.L.(2d) 216 (B.C.S.C.).
117. Supra, n.78.
118. Supra, n.100a.
- 118a. (1982), 28 R.F.L.(2d) 205 (B.C.C.A.).
119. (1980), 11 F.L.D. 35 (B.C.S.C.).
120. Ibid, p.37.
121. The New Matrimonial Property Legislation in British Columbia: The First Year, by Keith B. Farquhar, 15 U.B.C. Law Rev. 1 at p.38.
122. B.C.S.C. January 12, 1982, Vancouver 5-9-44-004834 (unreported).
123. R.S.C. 1970, c.V-4.
124. (1974), 4 O.R.(2d) 293 (Ont. C.A.).
125. [1979] 5 W.W.R. 289 (S.C.C.).

126. (1980), 13 R.F.L.(2d) 97 (B.C.S.C.).

127. (1981), 19 R.F.L.(2d) 240 (B.C.S.C.).

128. (1982), 32 B.C.L.R. 292 (S.C.).

129. B.C.S.C. September 18, 1981, Vancouver 5920/003621 (unreported).

### Chapter 3 - Manitoba

The move towards matrimonial property reform in Manitoba suffered a number of setbacks before finally reaching fruition in the form of the Marital Property Act<sup>1</sup>. The sequence of events preceding the new legislation began with a working paper of the Manitoba Law Reform Commission<sup>2</sup>. In its working paper, the Commission recommended the enactment of legislation providing that on marriage breakdown there should be equal sharing of all assets acquired by the spouses during marriage, with the exception of the marital home. It was proposed that there be automatic joint ownership of the latter, regardless of when it had been acquired. The Commission also proposed that gifts (including inter-spousal gifts), inheritances and damage awards should be excluded from sharing. No suggestion was made that the court be given any discretion to vary the equal sharing regime, although it was proposed that couples be permitted to contract out of the legislation.

The Law Reform Commission published its Report on Family Law in February 1976, having received written submissions and having held public hearings throughout Manitoba on its working paper. The recommendations in the report corresponded broadly to those in the earlier paper, the only difference arising in the marital home. It was now recommended that if the marital home had been purchased prior to marriage, it should not be subject to sharing unless it had been acquired in specific contemplation of marriage. The report also recommended that the application of the proposed regime to already existing marriages be limited to some extent, by suggesting a six month period during which



married persons could opt out of the scheme. If a couple decided to opt out, the new regime would apply only to property acquired by those persons after the enactment of the legislation, and the court would have a discretion as to how to deal with property acquired before the legislation came into force. A similar provision was recommended to apply to those persons who moved into Manitoba after the legislation came into effect. Apart from these provisions the court was to be given no discretion to vary the equal sharing of assets.

The two most controversial issues after publication of the Report were whether judicial discretion ought to be allowed in a regime providing for forced sharing of marital property and the extent to which such a regime ought to apply to already existing marriages. When Bill 61, the Marital Property Act, was enacted by the Manitoba legislature in June 1977, its provisions applied to all spouses, whether married before or after the coming into force of the legislation. No provision was made for unilateral opting out, although the court was given a discretion with respect to the sharing of assets other than the marital home where equal sharing would be grossly unfair or unconscionable. Spouses did, however, have the option of opting out by mutual agreement. The Bill distinguished between family and commercial assets. There was to be instantaneous equal sharing of the former, including the marital home, and deferred equal sharing of the latter. The Bill excluded from sharing assets acquired by a spouse before marriage, unless the asset was used in a manner indicating it was shareable. Also excluded from sharing were personal apparel, gifts, inheritances and damage awards.

The new law was to have taken effect on a day fixed by proclamation, but no sonner than January 1, 1978. Before the Act could be proclaimed, however, the N.D.P. government that had passed it was defeated in a general election and the new Conservative government repealed the legislation. It then appointed a review committee of three lawyers to review Bill 61 and to make recommendations for its amendment. In its report of March 1, 1978, the committee identified some major difficulties in the Bill, such as the lack of any residency requirement ( the legislation on its face appeared to apply to everyone everywhere ), and the difficulties that would be caused by instantaneous as opposed to deferred sharing of assets. The committee failed to come to any unanimous decision with regard to retroactivity and judicial discretion.

Shortly after the report of the review committee was published, the government introduced the Marital Property Act<sup>3</sup>. The Act received Roayl Assent on January 20, 1978, and was proclaimed in force as of July 1978.

#### The Marital Property Act

The Act is based on the principle of equal sharing of assets.

The preamble to the Act reads:

Whereas marriage is an institution of shared responsibilities and obligations between parties recognised as enjoying equal rights;

And whereas it is advisable to provide for a presumption, in the event of the breakdown of the marriage, of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage....

That principle is expressed throughout the Act subject to exceptions which are either stipulated or left to the discretion of the court. Spouses covered by the Act are defined in s.2.

Assets to which the Act applies<sup>3a</sup>

Section 3 of the Marital Property Act provides that the Act shall apply to all assets of a spouse as defined in s.2, unless the asset is specifically excluded from application. "Asset" is defined as any real or personal property or legal or equitable interest therein, but does not include any article of personal apparel. The term "personal apparel" is not defined in the Act and may pose difficulties in future cases where, for example, the ownership of an item of expensive jewellery is in dispute. In Berman v Berman<sup>4</sup> counsel argued that a diamond ring valued in excess of \$35,000 was personal apparel and therefore excluded from the application of the Act. The court eventually decided that the Act did not apply to the couple by reason of a property agreement previously entered into by them. The issue remained unsolved as the section did not have to be interpreted. It could have been argued in this instance that the ring had been purchased as an investment. If this type of argument were to be successful it would be necessary for the court to look to the purpose for which the ring had been acquired, for example, whether it had been acquired for aesthetic purposes or as an investment. In the absence of any direct evidence on this point then the value of the ring would probably become highly relevant. This in turn would raise questions as to the value at which an item ceases to be "personal apparel" and becomes shareable. To date there have been no further reported decisions on this section and it is unclear how the courts will deal with the

provision.

Where the Act applies to an asset, s.6(6) provides that it also applies to the proceeds of sale of the asset, and to any asset acquired in exchange for, or with the proceeds of sale of, the asset. Proceeds from an insurance claim for loss or damage to an asset are considered proceeds of sale for the purpose of the Act<sup>5</sup>.

A distinction is drawn in s.1 between "commercial assets" and "family assets". A "commercial asset" is defined as:<sup>6</sup>

An asset that is not a family asset, including rights under an insurance policy, life or fixed term annuity policy, accident or sickness insurance policy, pension scheme or plan, and any investment holding including deposits with a bank, trust company, credit union or other financial institution other than in a savings account, chequing account or current account ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes but not including savings bonds or deposit receipts intended to be used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.

A "family asset", on the other hand, means:<sup>7</sup>

....an asset owned by two spouses or either of them and used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes including, without restricting the generality of the foregoing,

- (i) a marital home,
- (ii) money in a savings account, chequing account or current account with a bank, trust company, credit union or other financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and savings bonds and deposit receipts intended to be used for those purposes,
- (iii) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the asset,
- (iv) an asset over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse, if the asset would be a

family asset if it were owned by the spouse, and  
(v) an asset disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to use or dispose of the asset, if the asset would be a family asset if it were owned by the spouse.

As a general rule, family assets and commercial assets are to be shared equally between the spouses<sup>9</sup>. The distinction only becomes relevant in determining:

- (a) whether a non-shareable asset has been converted into a shareable asset;<sup>10</sup>
- (b) a spouse's right to the use and enjoyment of an asset;<sup>11</sup>
- (c) the extent to which the court has a discretion to vary the equal division of assets<sup>12</sup>.

The effect of the distinction in these areas will be discussed further where relevant. For the moment, discussion will centre on the manner in which certain assets have been classified by the courts.

It is clear from the definition of "family" and "commercial" assets that the vital question in determining the class into which an asset may fall is the question of its use. Items such as household furniture and cars used for family purposes obviously fall within the class of family assets as they are used "for transportation, or for household, recreational, social or aesthetic purposes..."<sup>13</sup>. Equally, an apartment block, retail business or medical practice would fall within the commercial asset category. In many cases under the Manitoba Act the parties have agreed at trial to a specific categorization and the court has not had to deal with the matter at all. Thus in Jones v Jones<sup>14</sup>, an application for the division of marital assets, it was

evident that the parties considered the husband's truck and sand buggies, driven by the husband on a contract basis, to be commercial assets. The court accordingly dealt with the case in view of that agreement and understanding without further inquiry. In disputed cases the court will look to the use of the asset and will not be influenced by what an asset is called. Thus in Roschuk v Roschuk<sup>15</sup> it was held that although the husband's roofing business was referred to as a "family business", it was, in nature, a commercial asset. Deniset J., having noted that one must examine the nature of the asset, found that the most important asset of the business was based primarily on goodwill:<sup>16</sup>

By that I mean the reputation of the husband as a "roofer", the amount of business he can now expect and, foremost, his industry in carrying on personally and getting others to work for him...He should not be deprived of his tools of work and ability to earn income.

Roschuk v Roschuk, in fact, is one of the few cases in which a court has made a specific determination as to the classification of each item of marital property. The court classified as "family assets" the marital home, the contents of the marital home, a family car, a boat, motor and trailer, and a homemade camper, two burial crypts and a savings bank account created mostly by deposits of the family allowance cheques of the children. Into the category of "commercial assets" Deniset J. put a vacant lot near the marital home which was in the joint names of the spouses<sup>18</sup>, property which had been in the name of the husband and which was sold by him prior to trial<sup>19</sup>, property which was being used in conjunction with the roofing business and articles and equipment such as motor vehicles, tools, materials and accounts receivable also used in conjunction with the roofing business. The reported case gives no indication of the reasons for the classification

of assets, other than those connected with the husband's roofing business, as commercial assets.

Cases decided subsequent to Roschuk rarely make mention of the distinction between commercial assets and family assets, apparently not viewing the distinction as important unless it is decided to vary the general rule of equal division of commercial assets by virtue of the discretion under s.13(2)<sup>20</sup>. Thus in the Queens Bench decision in Hull v Hull<sup>21</sup> the assets involved included substantial business assets of the husband acquired as a result of his talent as a hockey player with the Winnipeg Jets Hockey team. These assets included a farming and cattle operation and co-ownership of the Winnipeg Jets Hockey Club. Other assets involved included a marital home, a home in Big Island, a Manitoba farm and a substantial amount of furniture. Having listed all the property owned by the parties, Deniset J. continued:<sup>22</sup>

Under the Marital Property Act the ultimate division must be equal, unless the court sees fit to exercise its discretion for any of the reasons set out in s.13(1) and (2)... I do not see any financial or other circumstances which would influence me to steer away from this equal division.

No attempt was made to categorize any of the relevant assets. On an appeal from this decision to the Court of Appeal<sup>23</sup> the appellate court noted that one of the issues in dispute concerned the order for an equal division of "commercial assets". However it did not specify which assets fell into this class, contenting itself with approving the trial decision that "an equal division cannot be regarded as grossly unfair, unconscionable or inequitable".

Cases in which an asset will be specifically classified, as

already noted, have generally arisen only where the court has decided to exercise its discretion under s.13(2) to vary an equal division. Thus in Isbister v Isbister<sup>25</sup> the court held that a pension plan belonging to the husband fell within the definition of "commercial asset", being specifically included as such under s.1(b), and went on to decide that it should not be distributed between the parties for reasons which will be discussed later. No attempt was made to classify the other items of marital property subject to distribution. Similarly in Geisel v Geisel<sup>26</sup> the court expressly followed Isbister in holding that a pension was a commercial asset subject to unequal distribution and then went on to divide the remaining "marital assets" equally, without specifying into which class those assets fell.

Although the courts to date have paid scant attention to the issue of classification, the issue can, as noted earlier, be important. It is thus necessary to consider what assets may be, and indeed have been, classified by the courts as commercial assets.

Reported cases indicate little difficulty is experienced in classifying assets once a court has directed its attention to the question. In many cases it will be patently obvious into which category an asset ought to be placed as s.1(b) in particular specifically includes many assets. Thus in Isbister v Isbister<sup>27</sup> a pension plan was classified by definition as being a "commercial asset". In other instances an asset by its nature will clearly be discernible as being a commercial asset, as where the asset involved is a business enterprise. In Schnerch v Schnersch<sup>28</sup> the court held that a hotel which had originally been run by both spouses was a "commercial asset" as the husband earned his livelihood from the enterprise. Similar reasoning was used by the court



in Roschuk v Roschuk<sup>29</sup> in holding that the husband's roofing business was a commercial asset.

A question with which the courts have not yet been faced is how to classify a registered home ownership plan. At first sight such a plan would appear to be the same as an investment or pension plan and so should fall within s.1(b). Yet it could also be regarded as money in a trust company intended to be used for household purposes. This would bring it within the class of family assets. Closer examination of s.1(b) and (d) deepens the confusion. Section 1(b) and (d)(ii) state that money in a trust company or other financial institution will only be regarded as a family asset if the account is "ordinarily used" for household purposes. A registered home ownership plan is not being ordinarily used for any purpose, although it is intended to be used for household purposes at some time in the future. However, s.1(b) and (d)(ii) use the words "intended to be used" to refer to "savings bonds or deposit receipts". It is not clear whether a registered home ownership plan would fall within this specification.

Another question yet to be confronted by the courts is how an asset which has a dual purpose and is used partly for recreational purposes and partly for business purposes will be classified. An example of such an asset might be where a car is used predominantly for company business but is occasionally used to transport the children to and from school. Section 1(d) requires that an asset be "used" for transportation. Classification in this case will depend, therefore, on how the word "used" is defined. If the word is defined loosely then even occasional use as described in this example would be sufficient

to satisfy the requirement. If the word is defined as meaning "ordinarily used", then more than this occasional use will be required.

It is not clear whether the character of an asset may be changed by subsequent usage. An example of this would be where a painting was originally bought as an investment, thus making it a commercial asset, but was later hung in the marital home, thereby bringing it under the "aesthetic purpose" category in s.1(d). It may be that s.15 of the Marital Property Act would be relevant here. This section deals with the closing date for the inclusion of assets in an accounting under the provisions of the Act. Three alternative dates are available, either (a) the date fixed by agreement of the parties, or failing agreement, (b) the date when the spouses last cohabited, or (c) the date when an application is made by either spouse for an accounting and division of assets under the Act. This section does not specifically cover the date at which assets ought to be characterized, nor is the point dealt with in any other provisions of the Act. It is likely, however, that for this purpose the courts will look to the date when the spouses last cohabited. It seems logical to classify an asset according to how it was being used by the family when the spouses were last living together<sup>29a</sup>.

#### Exclusions

A number of assets are specifically excluded from the operation of the Act. Section 4(1) excludes from its provisions assets acquired by a spouse:

(a) while married to but living separate and apart from the other

spouse, or

(b) while married to a former spouse, or

(c) while unmarried.

There are two exceptions to this exclusion. Firstly, s.4(2) provides that, "notwithstanding clause 1(c), this Act applies to any asset acquired by a spouse prior to but in specific contemplation of the marriage to the other spouse".

This provision was discussed by the court of Queens Bench in Gifford v Gifford<sup>30</sup>. In this case the defendant wife had acquired shares in a corporation prior to marriage to, but while living with, the plaintiff husband. The defendant was at the time still married to her first husband. The plaintiff alleged that these shares had been acquired in specific contemplation of marriage and that in spite of s.4(1)(b), s.4(2) made the Act applicable to those shares.

Morse J. referred to s.4(1) and noted that s.4(2) provided that "notwithstanding clause 1(c), assets acquired in specific contemplation of marriage are subject to the Act". He concluded that, in view of the clear wording of s.4(1), s.4(2) had application only when the particular asset acquired in specific contemplation of marriage is acquired by a spouse while unmarried. As the defendant was still married to her former spouse when she acquired the shares in question he held that s.4(1)(b) governed and that the Act did not apply to the shares.

In the event that he was wrong in his interpretation of s.4(2) and that the section extended to all assets acquired in specific

contemplation of marriage, irrespective of the marital status of the owner spouse, Morse J. decided that there was no evidence to suggest that the shares had been acquired in specific contemplation of marriage at all. The wife had been involved in the formation of the company in which she held shares and wished to become a shareholder before she had formed any intention of marrying the plaintiff. This fact in itself was sufficient to withdraw the assets from the Act's provisions.

The second exception to the exclusion in s.4(1) appears in s.4(3)(a) and (b). This exception is to the effect that, although assets acquired outside of marriage and cohabitation are not subject to sharing, any appreciation or depreciation which occurs while a spouse is married to and cohabiting with the other spouse shall be considered in assessing the assets of that spouse. In addition, any income derived from the assets while the spouse was married to and cohabiting with the other spouse is subject to the Act<sup>31</sup>.

Under s.7, gifts, trusts, benefits and inheritances from third persons are excluded from the Act's provisions unless they were conferred with the intention of benefitting both spouses. Income from or appreciation or depreciation of such assets are likewise excluded<sup>32</sup>. As these provisions exclude only assets from third persons, inter-spousal gifts are still subject to sharing.

Section 7 was discussed in Simpkins v Simpkins<sup>33</sup>. The court here concluded that the evidence did not show that legacies left to the husband by his father were intended to benefit both spouses. In so deciding it was noted that the father had provided for a gift over to

his son-in-law in the event that a legacy left to his daughter failed. No similar provision for a gift over to the daughter-in-law was made in this case in the event that the gift to the defendant husband should fail.

In Isbister v Isbister<sup>34</sup> the Court of Appeal explained that property acquired by inheritance is not subject to sharing even if it has been used for a family purpose. The assets involved in this case comprised an investment portfolio which consisted of funds inherited by the wife from her first husband. All investments were made in the wife's name, although she was willing to share the income and part of the capital with her second husband. The court held that the investment portfolio was not a family asset subject to distribution. Monnin J.A. noted:<sup>35</sup>

This was the wife's inheritance, and it was not devised nor bequeathed to her with the intention of benefitting both spouses. As a matter of fact upon the death of the first spouse, the second spouse was unknown to the parties.

The court accordingly reversed the decision of the trial judge, Solomon J., who had held that the asset in question had become part of the family assets because the parties intended to incorporate the assets into a family estate<sup>36</sup>.

An interesting gloss on the interpretation of s.7 was introduced in Dixon v Dixon<sup>37</sup>. In this case the wife had received a gift of money from her parents prior to marriage and had placed the money in a bank account. The court held that this asset was an asset in the hands of the wife prior to marriage and not a gift within s.7(1). The asset, therefore, fell under s.4 and, as the money had appreciated in value, an equal

sharing of the appreciation was ordered. P.P. Ferg Co. Ct. J. reasoned as follows:<sup>38</sup>

...The husband argues that s.7(1) only applies to gifts made during the course of the marriage and the gift does not fall within the qualifications provided in the section as benefitting both spouses. The section speaks of assets "acquired by a spouse", so it must be interpreted as meaning an asset acquired after or during the marriage. Such an asset, then, does not attract the sharing of an appreciation. The next subsection (3) of s.7 is in essentially the same terms, but for an inheritance, and it must be interpreted as an inheritance received during marriage. Accordingly, this account, or asset, must be regarded as an asset in the hands of the wife prior to marriage, and not a gift within s.7(1), therefore placing it within s.4(3)(a)...with the effect of requiring any appreciation to be shared.

This interpretation clearly runs counter to the decision reached in the Isbister case. The Court of Appeal in the latter instance, however, did not have its attention drawn to the niceties of the section's language. The interpretation in the Dixon case appears correct on the strict wording of s.7.

It is unclear whether wedding and anniversary presents would be excluded under the provisions of s.7. In the Dixon case, P.P. Ferg Co. Ct. J. argued that by definition (referring to the definition of family assets contained in s.1(d), "items owned by (the husband) prior to marriage and brought into the home and items brought into the home by the wife and owned by her, and whether given to her as shower gifts, or wedding gifts, or to either of them or whatever, once "used", immediately become "family assets" and must be shared equally"<sup>39</sup>. This argument fails to take into account the fact that "(a) non-shareable asset does not become a shareable asset because it would, if shareable, be a family asset"<sup>40</sup>, and the reasoning, therefore, is highly suspect. No reported cases have been heard on this point as yet. In England the law in this

area was laid down in Samson v Samson<sup>41</sup>. It was here held that there was no principle of law that wedding presents are joint presents to both spouses. If there is evidence of intention on the part of the donor, that may determine whether the gift belongs to one spouse or both, but, if there is no evidence, the inference may be drawn that gifts from relatives or friends of a spouse were gifts to that spouse. It is possible that the Manitoba courts would apply this general rule of intention in similar cases.

Yet another exclusion is contained in s.8(1) of the Manitoba statute. This section provides that the Act does not apply to damage awards, settlements or insurance claims for personal injuries except to the extent that the proceeds are compensation for loss to both spouses. In Dixon v Dixon<sup>42</sup> it was held that worker's compensation payments were not exempt pursuant to s.8(1), since they were not a damage award, a settlement or an insurance claim for personal injury or disability. Instead they were intended to replace lost wages. Accordingly a lump sum awarded to the husband under the Worker's Compensation Scheme was ordered to be shared equally. This interpretation seems logical because if a spouse were working and receiving the income for whose loss he has been compensated, that income would be subject to the Act.

Section 9 excludes from the provisions of the Act any asset that has already been shared equally between the spouses, or that is acquired by one spouse from the other by virtue of a sharing of assets under the Act. In Tycholiz v Tycholiz<sup>43</sup> the court held that a home held in joint tenancy by the spouses had already been shared equally within the

meaning of s.9 and, accordingly, was not subject to the Act. Although the decision was appealed to the Manitoba Court of Appeal<sup>44</sup>, the appellate court made no reference to the effect of s.9, but dealt instead with the question of postponing the husband's right to sell the home. The Court of Appeal in Isbister v Isbister<sup>45</sup>, however, followed the approach of the trial judge in Tycholiz and held that a jointly owned marital home and jointly owned realty in British Columbia were assets already shared equally and therefore were excluded from the application of the Act by virtue of s.9.

Little attention has been directed to date to the question of how property which is jointly owned, or indeed falls outside the Act's provisions for any other reason, should be distributed. In only one instance has the matter been touched upon at all. Marauda v Marauda<sup>46</sup> concerned, among other property, land inherited by the husband from his father. The land was exempt under s.7 but the wife claimed that she should be entitled to a share in it by virtue of a constructive trust. As the wife had been held entitled to share in other marital assets Kirby J., for the Court, held that there was no evidence to support a finding of a constructive trust. He went on to say:<sup>47</sup>

By this decision I do not mean to say that there will never be a situation in which assets owned by one spouse and falling outside the operation of the Marital Property Act will be subject to a constructive trust. I am simply saying that on the facts of this case, there is nothing to entitle the applicant to the declaration which she seeks.

It seems clear that only in exceptional cases would the courts attempt to go outside the Act's express directions as to what assets are to be shared between the spouses. On the other hand if a court is faced with a situation where, for example, the only asset owned by a



married couple is a home brought into the marriage by the husband and in his sole name, the court may feel that an equal distribution of the appreciation of its value, as provided for by s.4(3)(a) and (b), would not be enough to compensate the wife for her years of service to the marriage. In such an instance it is important that the courts have an extra-statutory power to ensure that justice is done.

Where an asset is excluded under the Act, the proceeds of sale of such asset are also excluded, as is any asset acquired in exchange for the excluded asset unless the proceeds are used to acquire a family asset or the asset acquired in exchange is a family asset. Similarly, although income from gifts, inheritances or trust benefits is usually excluded from sharing, if the income is used to acquire a family asset then that asset is subject to the Act<sup>49</sup>. This is one of the areas in which the distinction between "family assets" and "commercial assets" becomes important. An example will illustrate. A husband inherits land from his father, such inheritance being intended to benefit the husband only. This land would be exempt from the provisions of the Act by virtue of s.7. If the husband sells this property and uses the proceeds to purchase shares in a corporation, then those shares would be equally exempt as they would constitute commercial assets. If, on the other hand, the proceeds had been used to purchase a holiday home for the family, then the holiday home would be subject to sharing as it is a family asset. The exclusion in s.7(5) has been strictly interpreted by the courts and it has been held that in order to convert an excluded asset into a shareable asset the original asset must have been actually sold or exchanged for another. In Simpkin v Simpkin<sup>50</sup> the property in dispute was a corporation set up by the husband's father

and given to the husband prior to marriage. It was thus exempt under the provisions of s.4(1). The couple's life together was financed from income paid to the husband from the corporation, the income being used to purchase, for example, food, shelter, airline tickets, theatre tickets and sporting gear. The wife argued that the whole of the income which the capitalized assets of the corporation might reasonably be expected to realize if sold in the open market constituted a family asset, on the basis that part of it had been used for a family purpose. The income already spent on purchasing family assets was admitted by the court to have been converted into a family asset. Wilson J., however, refused to extend the exception in s.7(5) to cover that income which had not already been used to acquire family assets, in other words, the income remaining unspent in the corporation. He stated:<sup>51</sup>

Section 4(5), to my mind, was intended to deny the exemption otherwise enjoyed as to income arising from and paid to a spouse from an exempt asset where that income is used to purchase a family asset, for example, a painting, an automobile, a house etc. The income so used that much, but no more, is to be taken into account by the division of assets provided by Part II of the Act, subject of course to s.9, whereby to the extent the "family asset" so purchased has already been shared, e.g., food eaten, tickets used or the subject of a property settlement caught by s.9, in which the asset otherwise so identifiable disappears from the accounting contemplated by Part II.

The decision in Simpkin was specifically approved by O'Sullivan J.A. in Smith v Smith<sup>52</sup>. The Court of Appeal here reversed a decision at trial which had held that a farm owned prior to marriage by the husband had become a family asset by reason of the fact that it had been used by the family. The farm itself was exempt under s.4(1). The trial judge, however, had stated that the farm was lived on by the family and operated on a day to day basis to provide the necessities of life for the whole family, it was no longer a commercial asset. It had instead

become a family asset and as such the applicant wife was entitled to an equal division. O'Sullivan J.A. corrected the trial approach and noted:<sup>53</sup>

I think the learned trial judge was in error in looking at the Act in this way. The test for distinguishing commercial assets and family assets is one thing; that test is applicable to shareable assets. What the learned trial judge might have considered, if he thought he should deal with the character of the farm in this case, was not whether it was a family asset as opposed to a commercial asset, but whether it was shareable or non-shareable. A non-shareable asset does not become a shareable asset because it would, if shareable, be a family asset, but if the non-shareable asset is not sold it remains non-shareable (except, of course, for possible appreciation in value).

"Use and enjoyment" - S.6

The Marital Property Act does not provide for instantaneous sharing of assets, but rather for a deferred sharing which comes into play only on marriage breakdown. Section 6(1) of the Act provides that no provision in the Act vests title to or interest in any asset of one spouse in the other spouse and nothing in the Act has any effect on the owner's ability to deal with the asset. The effect of this section was discussed in Clark v Clark<sup>54</sup>, where it was held that a lis pendens as authorised under s.87(1) of the Queen's Bench Act<sup>55</sup> could not issue on land which comes within the purview of an action under the Marital Property Act. The reason was that a lis pendens would prevent a title-holding spouse from dealing with his property as provided by s.6(1).

The rights of ownership affirmed in s.6(1) are not all encompassing. Under s.6(3) spouses are given equal rights to the use and enjoyment of any asset that is ordinarily used or enjoyed by both of them. With respect to the marital home, however, this right of use and enjoyment is subject to any court order giving exclusive possession of the marital

home to one spouse<sup>56</sup>.

Section 17 authorises a spouse to apply to the Court of Queens Bench, in the event of a breach of any provision of the Act, for an order or judgment with respect to the application. It would appear that through the combined forces of s.6(3) and s.17, a spouse could apply for an order of possession or use of any family asset. Such an order, of course, would not exclude use by the other spouse. It should also be noted that the rights of use and enjoyment contained in s.6(3) extend only to family assets. The classification of assets will therefore be very important in any dispute under these sections.

No decisions on this area have been reported to date.

#### Distributions under the Act<sup>56a</sup>

The Marital Property Act provides that each spouse has the right to have his or her assets divided equally upon the happening of certain specified events<sup>57</sup>. Under subss.(1) and (2) of s.13, however, the court is given a discretion to vary the equal division of assets. Under s.13(1) the court may vary an equal division if satisfied that a division of the assets in equal shares would be grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature or value of any of the assets. With regard to commercial assets, the court may have regard to the fact that a division of the assets in equal shares would be clearly inequitable having regard to any circumstances the court deems relevant. In Marks v Marks<sup>57a</sup> Hamilton J. explained that the

test is whether, having in mind the principles of shared responsibilities and obligations set out in the Act, the presumption of equal sharing and the different tests for the division of family and commercial assets, it would be clearly inequitable to divide the commercial assets on an equal basis. In the case at hand he noted that where a wife played no part in the operation of a farm, and performed less than her fair share of the overall responsibilities and obligations of the marriage, this might not justify an unequal division of family assets, but did justify unequal division of the farm assets (commercial assets).

In making a distribution under the Act a court must use a dual approach. It must first decide which assets are shareable and which are not. Non-shareable assets are those expressly excluded under the Act<sup>58</sup>. If an asset is found to be non-shareable then the question of whether it is a family asset or commercial asset is irrelevant. It cannot be included in an accounting under the Act unless it has been sold or exchanged within the meaning of s.7(5) or there has been an appreciation or depreciation within the meaning of s.4(1).

Once the court has discerned which assets are shareable it must then decide whether these assets should be divided equally between the spouses or whether it should exercise its discretion and order an unequal division. As noted already, the discretion which the court may exercise is broader in respect of commercial assets than it is for family assets.

Reported cases indicate that a case must be very well made out before a court will be prepared to depart from the presumption of

equal sharing. In Sawchuk v Sawchuk<sup>59</sup> Kennedy Co. Ct. J. ordered an equal division of funds accumulated in a husband's registered retirement savings plan, rejecting the husband's submission that there should be an unequal division because the wife, who was physically and emotionally ill during the five years of cohabitation, did not make any contribution to the asset. The court referred to the discretionary power available to it under s.13(1), therefore implying that it regarded the savings plan as a family asset. No express statement as to characterization was made. The asset should, in fact, have been treated as a commercial asset, as it is expressed to be under s.1(b), but it is probable that the court would not have been influenced by this fact, as it concentrated on contribution rather than characterization. It found that the wife had contributed to the family as much as possible. As both parties had contributed to the best of their respective abilities, the court felt that the wife should not be penalised for her illness. Hull v Hull<sup>60</sup> is another instance of the strength of the presumption of equal sharing. As indicated previously, the assets here included a substantial fortune earned by the husband as a result of his singular talent as a hockey player. The wife had contributed nothing financially to the amassing of this fortune, having devoted herself to her role as a wife and mother. No specific finding was made by the court as to which of the assets of the family were "family" or "commercial" in nature. It is clear, however, that at least some of the assets must have been of a commercial type. It was thus open to the court to order an unequal division under s.13(2). Instead the Court of Appeal decided that an equal division was not grossly unfair, unconscionable or inequitable and accordingly approved the trial decision ordering an equal division<sup>61</sup>.

An unequal division on the basis of non-contribution was made in Kozak v Kozak<sup>62</sup>. In this instance the court refused to give a wife a share in her husband's employment pension plan where she had made no contribution to the plan and had left her husband and children to live with another man. This was clearly an extreme case as the wife, in the view of the court, had made no contribution to the family whatsoever. It is important to note also that the court was able to exercise the s.13(2) discretion in this regard, as the employment pension was recognised as being a commercial asset under s.1(b).

It is apparent that the only reported decisions to date in which a court has exercised its discretion to order an unequal division have all involved commercial assets. Even here, however, the courts appear not to depart from the presumption of equal sharing unless the inequity or unfairness which would be rendered thereby is clearly manifest. An example of such a circumstance may be seen in Roschuk v Roschuk<sup>63</sup>, where the Court of Queens Bench decided it would be inequitable to interfere with the husband's roofing business. The relevant assets were divided in such a way as to prevent the necessity of such interference. Similarly in Schnerch v Schnerch<sup>64</sup> it was held that the prejudice that the sale of the husband's hotel would mean to the lifestyle of the husband and the two sons for whom he was responsible, taken against the terms on which the hotel operation was begun (it was originally run as a family business), meant that to admit the wife to an equal share in the commercial assets, either by sale of the operation or by transfer of a 50% share to her, would mean the "unreasonable impoverishment" of the husband. The court therefore exercised its discretion under s.13(2) and refused to award the wife any share in the property in question.

## Valuation of Assets

Only those assets owned by the spouses at the "valuation date" will be included in an accounting under the Act. The "valuation date" is a date agreed upon by the spouses or, failing agreement, the date when the spouses last cohabited or the date of the act of dissipation of a spouse which created a right to a division of assets under s.12(e). In the latter instance, if the spouses continue to cohabit after the relevant act or omission, the date an application is made under the Act is the relevant date<sup>65</sup>.

The value of an asset for the purpose of an accounting is its fair market value at the valuation date, in other words, the amount the asset might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer<sup>66</sup>. This definition has created difficulty in the realm of pensions. In Isbister v Isbister<sup>67</sup> Monnin J.A. discussed this question. Having referred to s.27 of the Pension Benefit Act<sup>68</sup> and s.10(1)(b) of the federal Pension Benefits Standards Act<sup>69</sup>, which prohibit the assigning of pensions, he continued:<sup>70</sup>

How anyone can place any market value on a pension fund or scheme in light of these two sections is difficult to fathom. There is not likely to be any market value for funds which are so clearly, by statute, unassignable, unable to be charged and free from seizure, execution, attachment, and any transaction which purports to assign, anticipate or give as security such moneys, is declared to be void. Who in his right mind would want to purchase such an asset? Without a purchaser it is not possible to put a price on same or to value it for the purpose of division or accounting of assets. Consequently, s.1(b) of the Marital Property Act, which purports to include in commercial assets, rights under a "pension scheme or plan" is not likely to result in any accountable value.

Bearing this in mind, he felt it would be unfair to expect the



husband here to compensate his wife for something which is independent of him until he has reached retirement age, which no-one can be certain of reaching because employment may cease, the pension fund may be bankrupt, or death may arrive prior to retirement.

In Marauda v Maraуда<sup>71</sup>, Kroft J. declared that as long as Isbister v Isbister remained law, the fact that pension benefits could not be given any accountable or market value as of the date of separation meant they could not be considered when making a division of assets under the Act. He did feel, however, that the benefits might at some future date be relevant in determining a lump sum or periodic maintenance.

A partial solution to the difficulties encountered in these cases was reached in Geisel v Geisel<sup>72</sup>. In this instance the guaranteed portions of the husband's pension were divided equally, the value of such portions being clearly ascertainable. The portions payable after the guaranteed period expired were not taken into account, however, on the basis that their value could not be ascertained.

The consequences of the Isbister decision are severe, as they preclude a spouse from sharing in pension benefits of the other spouse, which will often be one of the most valuable assets available to the family. To compound matters, the decision appears to have been made in the absence of any detailed attention being paid to available solutions. Monnin J.A. in Isbister failed to follow British Columbia decisions on the question of evaluation as expounded in Rutherford v Rutherford<sup>73</sup> and Belcher v Belcher<sup>74</sup>. In the Rutherford case the husband, a

provincial civil servant, had contributed to, and would be entitled to receive when he reached retirement age, a pension pursuant to the Pensions Public Service Act<sup>75</sup>. At the time of the trial proceedings in November 1979, the husband was 53 years of age. Under the above-mentioned Act, he could retire at the age of 55, 60 or 65 at his own election. The amount of the pension benefits would be based upon the average of his last five years' salary. By the time the case was decided in the Court of Appeal in September 1981, it was apparent that the husband had chosen to continue working and that he was not going to retire at age 55. On the question of the wife's right to realize on the part of the pension held to belong to her, Seaton J.A. decided that if the appellant husband held up the pension then he should be required to pay compensation to the wife. The compensation would be the amount she would have received if he had retired. He concluded that if Mrs. Rutherford elected to take the immediate pension, Mr. Rutherford would be obliged to pay her an amount equal to her share of the pension she would have received if he had retired at age 55. If she preferred to wait, he suggested that she should be allowed to elect any date compatible with the plan to enforce such payments.

In the Belcher case, the husband's pension entitled him to a monthly sum on retirement, a cash surrender if he terminated employment, and a death benefit. The court followed the approach laid down in Rutherford, noting the dilemma which faces a court in these situations:<sup>76</sup>

The dilemma results, I think, from the fact that the statute treats pension plan benefits in the same way as assets already in existence, and it contemplates a once-and-for-all division of such assets as at the time of the triggering event which terminates the family relationship. But pension plan assets are not a form of realizable personal property which can be disposed of and divided at any time. Such a plan is not really an "asset" in the conventional sense at all; in such a case as this it is merely a possible source of income which may be received in the

future and out of which one spouse may be able to support the other during their retirement.

Once again, the court resolved this dilemma by deferring any division of the pension rights until such time as the benefits became payable, protecting the wife's interest in the meanwhile by designating her as a beneficiary.

Little reference was made to these cases in Isbister v Isbister. Monnin J.A. commented that British Columbia and Saskatchewan decisions on pension rights must be carefully scrutinised, but gave no explanation for this comment. Although the scheme of the British Columbia legislation is different from that of the Manitoba statute, that difference should not preclude the application of the procedure adopted in Belcher to a Manitoba case. Monnin J.A. noted, however, though without further discussion, that he had read both Belcher and Rutherford before arriving at his own decision.<sup>76a</sup>

#### Sharing of debts

The Marital Property Act makes some provision for the sharing of the debts and liabilities of a spouse. Section 10 provides that the debts and liabilities of a spouse will be deducted from the total inventory of that spouse in an accounting. Subsection (1) does not permit a deduction so as to result in a negative value, except by court order<sup>77</sup>. Similarly, although assets acquired before marriage are not subject to the Act, any depreciation in their value that occurs during cohabitation is considered<sup>78</sup>, except that where the combined depreciation exceeds the combined appreciation, the excess depreciation

is not deducted unless so ordered by the court.

It appears that the court will generally only order that a depreciation be shared where the non-owner spouse has been awarded some share in the depreciating asset. Thus in Jones v Jones<sup>79</sup> all the "commercial assets" of the parties had gone to the husband. Among the remaining assets was an outstanding debt to a bank. The wife alleged that the indebtedness related to the purchase of a truck used by her husband for commercial purposes. The husband countered with the allegation that family debts were included in the indebtedness but refused to produce bank records and was unable to substantiate his allegations. The court held that, in view of the fact that the accounts were in the name of the husband, the greater onus was on him if he asserted that some of the debts related to both family and commercial assets. Accordingly the court held that the husband was responsible for the whole of the indebtedness to the bank.

The only other reported decision to date on the question of sharing debts is Geisel v Geisel<sup>80</sup>. The wife here had included in her inventory as a debt, legal fees incurred before the date of separation in connection with the couple's marital difficulties. The court refused to allow the debt to form part of the accounting as it would have the effect of compelling the husband to pay one-half of the solicitor-client costs of the wife. It was felt that the proper way to deal with such costs was by way of an award in the legal proceedings.

The Matrimonial Home

The definition of "family assets" in the Marital Property Act expressly includes a marital home<sup>82</sup>. "Marital home" is further defined in s.1(e) as:

property in which a spouse has an interest and that is or has been occupied by the spouses as their family residence and, where the property that includes the family residence is normally used for a purpose other than residential only, includes only the portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence, and where the property is owned by a corporation in which a spouse owns shares that entitle the spouse to occupy the property that spouse has an interest in the property.

This definition will in most cases be relatively simple to apply. Thus where a family home is located on farmland, the dwelling house and as much of the land as is used for residential purposes, for example, a vegetable garden, a play-area for the children, will qualify as a "marital home". Difficulties may arise with the definition when the property in question is used for both residential and non-residential purposes but the two uses are not easily attributable to different areas of the property. An example would be where the family has always rented out a floor of the house to a boarder or where the family lives above a corner grocery store which they operate. The question here becomes how to determine what portion of the value of the building and the land on which it is situated is residential. This issue will be particularly relevant where the court decides that an unequal distribution of assets should be awarded on the basis of its discretion under s.13(2).

Another question yet to be determined is whether a marital home can change its character. The definition in s.1(e) defines a marital home as being one "that is or has been occupied by the spouses as their family residence". If a family had occupied a cottage as their family residence at one time but later moved to a different residence and rented out the cottage, does that cottage still qualify as a "marital home"? Logic would dictate not, but the wording of the section is ambiguous.

Resolution of this question will depend in part on whether or not a family may own more than one marital home. The Manitoba Act does not address itself to this point. It is clear that more than one property may be occupied as a family residence, as where a couple have a summer and winter residence, both occupied by the family for extended periods of time. In such an instance it is likely that a court would regard both residences as falling within the category of marital home. Difficulties may arise in other circumstances as to the length of residence that is required for this purpose. For example, would a beach cottage used only on weekends be considered a family residence? If not, how extended a residence would be required in order to qualify a house as a marital home? All these questions are left unanswered by the Act and have not yet been touched upon by the courts.

A "marital home" is property in which a spouse has an "interest". Accordingly it was held in Hallett v Hallett<sup>83</sup> by Dewar C.J.Q.B. that a sale of the marital home could not be ordered where title remained in the name of the director of the Veteran's Land Act<sup>84</sup>. The director was registered owner of the land under an agreement by which the defendant

had possession subject to a stipulation that he held or occupied it as a tenant at will and that any assignment by him would not be valid. This decision was reached despite the fact that the agreement also provided for the reconveyance of the land to the defendant at some future date when the debt outstanding had been repaid.

One major setback to the division of the marital home has arisen from the interpretation of s.9 of the Marital Property Act. In Isbister v Isbister<sup>85</sup> the court held that jointly held realty is excluded from the provisions of the Act by reason of s.9, which excludes property "already shared equally"<sup>86</sup>. Monnin J.A. noted:<sup>87</sup>

I have already dealt with one issue, namely, s.9 of the Marital Property Act. Clearly, that statute does not apply to any asset that has already been shared equally between the spouses. In the absence of any claims that the shares are unequal, a title to real property in the joint names of the spouses means what it says, namely, that the property is shared by them. Either spouse can enforce this right by virtue of the Law of Property Act<sup>88</sup>. Since the Marital Property Act does not apply to such transactions, there is no need to bring such property into the accounting and division of the assets.

This decision has a profound effect on applications for the division of the marital home, many of which are now bought in the joint names of husband and wife.

It seems that the interpretation in Isbister came as some surprise to practising family lawyers in Manitoba. Certainly in Tycholiz v Tycholiz<sup>89</sup> the Court of Appeal had confirmed, without demur, an order of the trial court granting the wife sole possession of the jointly held marital home pursuant to s.10 and affirmed that the husband's rights under s.12 of the Marital Property Act could be postponed. The Isbister decision, however, was followed in Geisel v Geisel<sup>90</sup>. The husband in

this case had been well advised and had brought an application under the Law of Property Act. The court held that, as there was nothing making an equal division inequitable, an order for the sale of the property and division of its proceeds should be made.

It is extremely unlikely that the legislature intended that a jointly owned marital home should be exempt from the provisions of the Marital Property Act. The result of the courts' interpretation of s.9 will have the effect of removing from the protection of the Act what will, in the vast majority of cases, be the most important, and for some the only, family asset which they own. In its stead, the parties will now have to resort to an application under s.19 of the Law of Property Act for an order enforcing the sale of the jointly held property. This Act was not designed with marital disputes in mind and therefore does not contain many of the possession orders or other similar procedures available under the Marital Property Act. Although under the former Act a court may consider the question of unequal sharing if equity so demands, that is not enough to compensate. No cases have yet been reported in which an obvious difficulty has arisen in this regard. When such a case presents itself it will become all too apparent that different procedures will have to be pursued depending on in whose name title to the home lies.



Footnotes to Chapter 3

1. R.S.M. 1978, c.M45.
2. Manitoba Law Reform Commission, Working Paper on Family Law (1978).
3. Supra, n.1.
- 3a. Note the changes introduced in this regard by Bill 15 of 1982, discussed at n.29a below.
4. (1980), 12 R.F.L.(2d) 105 (Man. Q.B.).
5. S.8(2).
6. S.1(b).
7. S.1(d).
9. S.12.
10. Ss.6(5);7(5).
11. S.6(2)(3).
12. S.13.
13. S.1(d).
14. (1981), 6 Man. R.(2d) 346 (Man. Q.B.).
15. (1980), 12 R.F.L.(2d) 34 (Man. Q.B.).
16. Ibid, p.42.
17. Ibid.
18. The joint ownership of this property should have been exempted from the operation of the Act under s.9 - see further pp.107-109 infra. No explanation was given as to why this lot was classified as a commercial asset and there is no indication in the case as to the use, if any, to which the lot was put.
19. Again no explanation was given as to why this property should have been classified as a commercial asset.
20. See further, pp.112-115 infra.
21. (1981), 20 R.F.L.(2d) 12 (Man. Q.B.).
22. Ibid, p.28.

23. (1981), 22 R.F.L.(2d) 409 (Man. C.A.).
24. Ibid, p.413.
25. (1981), 11 Man. R (2d) 353; 22 R.F.L.(2d) 234 (Man. C.A.).
26. (1982), 24 R.F.L.(2d) 424; 14 Man. R.(2d) 182 (Q.B.).
27. Supra, n.25.
28. (1982), 13 Man. R.(2d) 277.
29. Supra, n.15.
- 29a. Since this chapter was first writted the Marital Property Act has been amended to ensure that pension benefits are considered as family assets. Bill 15, read for the first time in the legislature on March 12, 1982, amended the definition of "commercial asset" in s.1 of the Act so that it now means, simply, any asset that is not a family asset. The definition of family asset was also amended so as to include, specifically, rights under life, accident and sickness insurance policies, rights under an annuity policy and rights under a pension scheme or plan. Other amendments make it clear that when an asset is subject to the Act, the latter applies even if the asset consists of mere rights, whether present, future or contingent, and make special provision for the valuation of non-marketable assets. Bill 15 received Royal Assent on June 30, 1982. Isbister v Isbister, n.25, supra, and Geisel v Geisel, n.26, supra, have clearly been specifically affected by this new legislation, as a pension can no longer be dealt with as if it were a commercial asset. What other impact the legislation will have remains to be seen. It may be that the Manitoba courts will now feel prompted to specifically classify each asset as falling into either the family asset or commercial asset category. Given that the amendments operate so as to include as family assets, property that was previously included in the commercial asset category, however, it seems more likely that the distinction between the categories will be regarded as even less relevant than before.
30. (1981), 8 Man. R.(2d) 437 (Man. Q.B.). On appeal to the Court of Appeal, (1982), 13 Man. R.(2d) 152, the court affirmed that the shares should remain the property of the wife, but awarded the husband one-half of the appreciated value of the shares during the years of marriage.
31. S.4(3)(c). For an example of the operation of this section, see n.30, above.
32. S.7(4).
33. (1979), 1 Man. R(2d) 44 (Man. Q.B.), affirmed (1981), 20 R.F.L.(2d) 205 (Man. C.A.).
34. Supra, n.25.

35. Ibid, p.357.
36. (1981), 9 Man. R.(2d) 440 (Man. Q.B.).
37. (1982), 25 R.F.L.(2d) 266; 14 Man. R.(2d) 40 (Co. Ct.).
38. Ibid, p.268.
39. Ibid, p.270.
40. Smith v Smith, (1980), 3 Man. R.(2d) 206 at p.213; 18 R.F.L.(2d) 38 (C.A.).
41. 1960 1 All. E. R. 653.
42. Supra, n.37.
43. (1980), 17 R.F.L.(2d) 81 (Man. Q.B.).
44. (1982), 12 Man. R.(2d) 245 (C.A.).
45. Supra, n.25.
46. (1981), 11 Man. R.(2d) 420 (Q.B.).
47. Ibid, p.428.
48. S.4(5).
49. S.7(5).
50. Supra, n.33.
51. Ibid, p.49.
52. Supra, n.40.
53. Ibid, p.2=3.
54. Man. Q.B. August 3, 1979 (unreported).
55. Queens Bench Act, R.S.M. 1970, c.C280.
56. S.6(2).
- 56a. This section is not intended to be an exhaustive examination of discretionary judgments under the Marital Property Act. It merely seeks to indicate that although the Manitoba Act gives a wide definition to divisible property, the courts have on occasion exercised their discretion so as to narrow the definition. In so doing, Manitoba courts have sometimes reached conclusions that might have been reached in provinces that have a "family asset" and "contribution" definition.
57. S.12.

- 57a. Man. Q.B., July 29, 1982, Hamilton J. (unreported).
58. See *infra*, pp.102-111.
59. (1981), 11 Man. R.(2d) 334; 24 R.F.L.(2d) 250 (Man. Co. Ct.).
60. *Supra*, n.21.
61. *Supra*, n.23.
62. (1981), 10 Man. R.(2d) 435; 22 R.F.L.(2d) 377 (Q.B.).
63. *Supra*, n.15.
64. *Supra*, n.28.
65. S.15.
66. S.14(2).
67. *Supra*, n.25.
68. S.M. 1975, c.P82.
69. R.S.C. 1970, c.P-8.
70. *Supra*, n.28, at p.359.
71. (1981), 11 Man. R.(2d) 42 (Q.B.).
72. *Supra*, n.26.
73. [1981] 6 W.W.R. 485 (B.C.C.A.).
74. (1980), 19 R.F.L.(2d) 352 (B.C.S.C.).
75. R.S.B.C. 1979, c.318.
76. *Supra*, n.74, at p.358.
- 76a. Note the changes wrought in the Manitoba legislation by Bill 16 of 1982, discussed *supra* at n.29a. This new Bill overturns Isbister v Isbister insofar as that decision relates to pension rights.
77. S.10(2).
78. S.4(3).
79. (1981), 6 Man. R.(2d) 346 (Q.B.).
80. *Supra*, n.72.
83. (1982), 14 Man. R.(2d) 176 (Q.B.).
84. R.S.C. 1970, c.V-4.

85. Supra, n.25.
86. Infra, pp.107,108.
87. Supra, n.25, at p.449.
88. C.C.S.M., c.L90.
89. Supra, n.44.
90. Supra, n.72.

Chapter 4 - Newfoundland

In September 1967 the provincial Minister of Justice for Newfoundland set up the Newfoundland Family Law Study to examine the unsatisfactory state of local matrimonial law as it then existed. The Study issued fourteen project reports, the eighth such report concentrating on matrimonial property law<sup>1</sup>. This report recommended proprietary reforms in the law, being particularly influenced by the original recommendations made in 1967 by the Family Law Project in Ontario to the Ontario Law Reform Commission with respect to property rights between husband and wife and the right to occupy the matrimonial home. It recommended the retention of a separate property regime during marriage, to be replaced by a system of community of property tempered by judicial discretion when the marriage broke down or was dissolved.

Based on the principle, though not on the particulars, of this report, legislation was introduced into the Newfoundland Legislature in May 1978<sup>2</sup>. This legislation was being considered by the Committee of the whole of the Provincial House of Assembly when the House of Assembly was dissolved on May 25, 1979, for the purpose of holding a provincial election.

New legislation, similar to Bill 33 of 1978, was introduced into the provincial House of Assembly in October 1979<sup>3</sup>. This legislation, the Matrimonial Property Act, was eventually passed into law<sup>4</sup>. The Act received Royal Assent on December 14, 1979, and came into force on July 1, 1980. Substantive amendments to ss.4, 10 and 15 of the Act were passed

and assented to on June 5, 1980<sup>5</sup>. These amendments became effective as of July 1, 1980. There have been no changes made to the Act since that date.

### The Matrimonial Property Act

The basic principle of the Matrimonial Property Act is that "matrimonial assets"<sup>6</sup> acquired during the marriage are to be divided equally on marriage breakdown. Certain assets (for example, gifts and inheritances), are excluded from sharing. Business assets are dealt with separately in s.27 and may be shared if one spouse has made a financial or other contribution to the building up of those assets. The matrimonial home is dealt with under Part 1, which gives spouses special property rights and privileges in this regard.

#### "Matrimonial assets"

The purpose of the Matrimonial Property Act, as stated in s.3, is to:

- (a) recognise the contribution made by each spouse to a marriage,
- (b) give a one-half interest in the matrimonial home to each spouse,
- (c) provide for the deferred sharing of most other property acquired during a marriage, and
- (d) provide for judicial discretion in sharing business assets built up by a spouse during a marriage.

Part 11 of the Act deals with matrimonial assets and gives the court the power to divide such assets in equal shares between the spouses. The purpose of this Part of the Act is clearly set out in s.17 as follows:

17. The purpose of this Part is to recognise that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by each of the spouses, financial and otherwise, that entitles each spouse to an equal division of the matrimonial assets acquired during the course of the marriage.

"Matrimonial assets" are defined in ss.16(1)(b), (2) and (3),

which provide:

16(1) In this Part

.....

(b) "matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,

(i) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse and any appreciation in value of them during the marriage,

(ii) personal injury awards, except the portion of the award, if any, that represents compensation for economic loss,

(iii) personal effects,

(iv) business assets,

(v) property exempted under a marriage contract or separation agreement,

(vi) family heirlooms, and

(vii) real or personal property acquired after separation.

(2) In the case of a matrimonial home, matrimonial assets includes a matrimonial home acquired before the marriage, and notwithstanding subparagraph (i) of paragraph (b) of subsection (1), includes a matrimonial home acquired by gift, settlement or inheritance.

(3) Where before or after the coming into force of this Act property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property are matrimonial assets.

The first point of interest about the definition is that all real



property and all personal property acquired by either or both spouses during the marriage is said to be a matrimonial asset. There is no requirement that property must be used for any particular purpose in order for it to qualify as matrimonial property. The property need not be "used" at all, in fact. So in Badcock v Badcock<sup>7</sup>, one of the items of property in dispute was a house. The wife had overseen the building of the house but had refused to live in it at any time after it was built. The house was nevertheless held to be a matrimonial asset. It fulfilled the conditions of s.16(1)(b) that it be acquired during the marriage.

The fact that no prescribed usage is required in this sense means also that the courts do not face the difficulty of deciding whether an asset is being used for the correct purpose, in other provincial legislation often referred to as a "family purpose". One item which has caused difficulty in this regard in other provinces is property used for or collected as a hobby. In Hierlihy v Hierlihy<sup>8</sup> a coin collection belonging to the defendant husband was held to be a matrimonial asset as it had been acquired after marriage. The ease with which a Newfoundland court may reach a conclusion in such circumstances may be contrasted with the complexities faced by the British Columbia court in attempting to determine whether the hobby of one spouse could be regarded as being used for a family purpose. Conclusions of the British Columbia courts in this area have been confusing and conflicting. In Mayuk v Mayuk<sup>9</sup>, the Supreme Court held that a hobby did not constitute use for a family purpose while in Papineau v Papineau<sup>10</sup>, Esson J. held that it did.

As the term "matrimonial assets" in s.16(1)(b) refers to property acquired during the marriage (with the exception mentioned in s.16(2)), property owned by either spouse before marriage should not be included in this category. Thus in Badcock v Badcock<sup>11</sup> land acquired by the husband prior to marriage was held not to be a matrimonial asset. Even if such land had been used by the family during the marriage, that use would not have affected the status of the property.

The inviolability of pre-marital property also came up for discussion in Churchill v Churchill<sup>12</sup>. In this instance property owned by the wife prior to marriage was sold by her during the course of the marriage. The defendant husband claimed to be entitled to half the proceeds of sale. He argued that the proceeds constituted property acquired during the marriage and, therefore, that they were matrimonial assets. Inder J. rejected this argument. He held that as the original property had been exempt, the proceeds were also exempt.

An interesting situation could have arisen in Churchill if the proceeds had been spent and new property had been acquired in its place. Would that new property have been a matrimonial asset? Inder J. did not consider this possibility and it has not arisen for discussion in any reported case since. Arguably the new property could be regarded as a matrimonial asset. It could be asserted that the exemption in respect of pre-marital property extended only as long as that property exists in its original or at least some recognisable form (as in Churchill, where the original property was represented by the proceeds of sale). Once the original property has been converted into new property it no longer exists and the new property becomes property

acquired during the marriage. Equally it could be argued that if exempt property can be traced into its new form as proceeds of sale, then it can also be traced so as to extend the exemption to new property acquired from the old during the course of the marriage. It is unclear what approach the courts would be likely to take in this regard.

The definition of matrimonial assets in s.16(1)(b) is framed in illustrative terms. Matrimonial assets are said to include "all real and personal property acquired by either spouse...". "Includes" seems illustrative, but not all inclusive, of the type of property within its meaning. It is difficult to see what other types of property the section was intended to include, as the definition is framed in very broad terms. No case has yet been reported in which any alternative type of "matrimonial property" has been discovered.

Section 16(2) extends the definition of matrimonial assets to a "matrimonial home", notwithstanding that the matrimonial home was acquired by either or both spouses (i) before (rather than during) the marriage; or (ii) by "gift, settlement or inheritance" (which as a general rule would be one of the seven classes of property excepted by s.16(1)(b) from being "matrimonial assets").

The definition of matrimonial assets is further expanded by s.16(3), which defines as matrimonial assets shares in a corporation owned by a spouse where the corporation owns what would be matrimonial assets if owned by the spouse. The status of matrimonial asset only extends in this case to the number of shares having a market value

equal to the value of the benefit the spouse has in respect of the property in question. The subsection is interesting in two respects. First, as in the comparative British Columbia legislation<sup>12a</sup>, it is the share in the corporation which becomes the matrimonial asset, not the specific item of property. Second, the Newfoundland provision is phrased in such a way as to make it clear that not all the shares owned by the spouse in the corporation are necessarily covered. Only a percentage of them equal to the value of the matrimonial property becomes a matrimonial asset under the Act. In this respect the Newfoundland provision is better drafted than its British Columbia counterpart, which leaves this issue open to doubt.

The definition in s.16(1)(b) appears generally quite workable and reported cases do not indicate that any difficulties have been experienced by the courts in its interpretation. More difficulty is likely to be encountered in dealing with the seven classes of property exempted from the definition of matrimonial assets. These are:

(i) Gifts, inheritances, trusts or settlements received by either spouse during the marriage from a person other than the other spouse, and any appreciation in value of such property during the marriage.

This section only exempts gifts, etc., received from a third person. Inter-spousal gifts, therefore, still fall into the category of matrimonial assets if made during the course of the marriage. It is not clear what the situation would be if a spouse received a gift or inheritance covered by this section but decided to convert it into new property during the course of the marriage. Would that new property be

a matrimonial asset under s.16(1)(b)? The same argument made in respect of pre-marital property in this regard, supra, would apply equally here. It is interesting to note that in Churchill v Churchill the wife had acquired the pre-marital property by inheritance. Inder J. noted:<sup>13</sup>

If the property in Bishops Falls was acquired by the plaintiff before marriage, can the proceeds of sale of same after marriage be considered a matrimonial asset? Not in my opinion - under the provisions of s.16(1)(b)(i)..... (emphasis added).

It is uncertain whether the court was more impressed here with the fact that the original property had been acquired before marriage or the fact that it was acquired through inheritance, in reaching its conclusion.

(ii) Personal injury awards except the portion (if any) of such awards representing compensation for economic loss.

If one spouse were involved in an accident before marriage which resulted in an award for economic loss being made during the marriage, it seems that such an award would constitute a matrimonial asset. The circumstances of the case, of course, may be such that the court would effectively exclude the award by making an unequal distribution of the matrimonial property under s.20 of the Act.

(iii) Personal effects.

The term "personal effects" is not defined in the Matrimonial Property Act. Presumably it includes items such as clothing and jewellery. The courts may have difficulty in deciding whether certain items fall within this class in some cases. For example, if a wife receives

expensive jewellery from her husband during the course of the marriage, a question may arise as to whether the jewellery was intended purely for personal adornment or partly as an investment. Will the jewellery be regarded as the wife's personal effects or as an item of matrimonial property? The answer will depend on the interpretation placed by the courts on the phrase "personal effects".

(iv) Business assets.

"Business assets" are defined in s.16(1)(a) as follows:

- (a) "Business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose...

While business assets are excluded from the definition of matrimonial assets, they may be distributed in certain circumstances.

It is provided in s.27 that:

27. Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

- (a) direct the other spouse to pay such amount as the court orders to compensate the contributing spouse therefor; or

- (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

In Davis v Davis<sup>14</sup> Hickman C.J. followed the approach evinced

by the Ontario development in Page v Page<sup>15</sup> and Leatherdale v Leatherdale<sup>16</sup>

with respect to business assets. He noted:<sup>17</sup>

I am satisfied from the evidence that the plaintiff did not contribute to the business assets of her husband as contemplated by the Act. There is some evidence to suggest that early in the marriage, when the family were living over the haberdashery, the plaintiff would "tend shop" to enable the defendant to do some work outside the premises or go to his meals. On occasion, the plaintiff would go to the bank and make deposits on behalf of the business. For very obvious reasons, the plaintiff, as a devoted mother to a very large family, did not have the time to assist her husband in the business. The plaintiff testified that her father contributed \$2,500 to her husband's early business venture. In that regard, I accept the evidence of the defendant that his father-in-law gave him \$2,500 to enable him to purchase a relatively small house so that the former could live with his daughter and son-in-law, which he did, until his death. This does not constitute a contribution of "money or money's worth" to the business assets within the meaning of s.27 of the Act.

What is required under the Newfoundland Act, it seems, is a direct and fairly substantial contribution to the business assets by the non-owning spouse. Such a contribution was found to have taken place in Raymond v Raymond<sup>18</sup>. Hickman C.J. noted:<sup>19</sup>

It is clear from the evidence that both spouses contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation and improvement of the company. They sold their matrimonial home in Toronto in order to acquire sufficient funds to purchase the business; they both worked hard to make the business profitable up to the time of the breakdown of the marriage and neither took a salary from the business during that period. It was purely a joint venture and as far as realistically possible the business assets should be divided equally between both parties.

It would appear that an indirect contribution made by a spouse to her husband's business through effective management of household and child-rearing responsibilities would not easily meet the test of s.27, as the test has been interpreted by the courts in these cases.

(v) Property exempted under a marriage contract or separation

agreement.

Domestic contracts are dealt with under ss.31 to 44 of the Matrimonial Property Act. In Sheriff of Newfoundland v Hefferton<sup>20</sup> Noel J. confirmed that it was permissible for spouses to vary or exclude the application of the Matrimonial Property Act. In this instance the property in question was the matrimonial home. Noel J. found that the home had been properly excluded by agreement of the parties. He held that the husband had no interest in the home and dismissed the claim of his judgment creditor against it.

(vi) Family heirlooms.

As with "personal effects", this term is not defined in the Matrimonial Property Act. Some difficulty may be experienced in interpreting this term in certain circumstances. Assuming the Act is referring to heirlooms received by a spouse from his or her family, it may be wondered whether every item of property received from one's parents is to be regarded as a family heirloom or whether the item must have some specific sentimental value or must be of some specific antiquity. Where a spouse receives a family heirloom from his or her parents, most such property would probably be excluded under s.16(1)(b)(i) or on the ground that it was acquired prior to marriage, and this fact may circumvent difficulties with interpretation.

Increases in value of family heirlooms are not specifically excluded from the Act. It is not clear whether an increase in value which occurred during the marriage would be shareable as a matrimonial



asset. It should be noted that the Act specifically excludes increases in value in respect of gifts, etc., in s.16(1)(b)(i). It might be argued that if a similar result was intended in the case of family heirlooms it should have been expressly provided for in the legislation. This question has yet to be decided by the courts.

(vii) Real and personal property acquired after separation.

It is questionable whether it was necessary to include this exemption as a separate heading under the Act. Since the term "matrimonial assets" is defined as property acquired "during" the marriage, post-separation assets, it might be thought, would have been excluded automatically. Subsection (vii), however, gives a specific cut-off date beyond which property will not fall into the matrimonial asset category and is helpful in this regard.

While property acquired after separation is not regarded as a matrimonial asset, the means by which such property is acquired may have constituted matrimonial assets. In such a case the question arises whether the new property will be included in a division of the matrimonial assets. The only reported case on this issue to date is Hierlihy v Hierlihy<sup>21</sup>. In 1973 the defendant husband had negotiated a life insurance policy he had acquired and maintained during cohabitation with the plaintiff and realized therefrom \$4,000. He applied this sum towards a house trailer. A female acquaintance of the defendant and her children resided in the trailer from the time of its acquisition until 1975, when the defendant separated from his wife and took up residence in the trailer with them. In 1977 the house trailer

was sold and the proceeds used by the defendant to purchase land and premises, where he, his female acquaintance and her children then lived. Having recited these facts, Goodridge J. held:

The \$4,000 was a matrimonial asset that can be traced into the post-separation period. I am therefore including it in the matrimonial assets for the purpose of the decision.

The system of tracing used in Hierlihy is of obvious importance in protecting spousal interests after separation but before trial. The Newfoundland Act contains no specific provision for compensation in the event of matrimonial assets being disposed after separation and it is therefore important to have some safeguards in this area. It has yet to be seen how far the doctrine of tracing will be employed by the courts. If, for example, matrimonial assets are sold after separation and items of personal apparel purchased with the proceeds, would the court order a distribution of the new property or would that new property be exempt? Another situation which might arise is where the matrimonial assets have been spent on a holiday and nothing remains in their stead. Where there is evidence that one spouse had unreasonably impoverished or dissipated the matrimonial assets, the court may, under s.20, make an unequal division of the matrimonial assets remaining. What constitutes "unreasonable" in this regard has not yet been determined, but the courts are not likely to treat this section lightly. It is possible that they will require some evidence of malice or vindictiveness on the part of the disposing spouse before they will be prepared to act under s.20.

The Matrimonial Home

Part 1 of the Matrimonial Property Act introduces the concept of community of property into Newfoundland relating to the rights of husband and wife (and in prescribed circumstances to unmarried persons who cohabit<sup>23</sup>) to the matrimonial home. "Matrimonial home" is defined in s.4(1) as "the dwelling and real property occupied by a person and his or her spouse as their family residence and owned by either or both of them whether that occupation occurred before, on or after the commencement of this Act". This definition is expanded and clarified in ss.4(2) to (5).

(2) Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

(3) The ownership of a share or an interest of a share in a corporation entitling the owner to the occupation of a dwelling unit owned by the corporation shall be deemed to be an interest in the dwelling unit for the purpose of this Act.

(4) Where a dwelling has up to three apartments, those apartments are deemed to form part of the matrimonial home for the purposes of this Act.

(5) A dwelling includes a house, condominium, mobile home or trailer.

By s.4(6), a person and his or her spouse may have more than one matrimonial home.

A requirement of this section's definition of "matrimonial home" is that the home be "owned" by either or both of the spouses. The term "owned" was interpreted very broadly in Smith v Smith<sup>24</sup>. For

the four years following their marriage, the spouses lived with the wife's parents while their own home was being built on the husband's father's land. The husband's father contributed money, labour and materials toward the building of the house, but at all material times intended to convey it to the husband. The spouses lived in the completed house for the seven months prior to their separation but the husband still did not have legal title to the home when the case came on for trial. Montgomery J. held that the husband's interest therein should be divided equally by payment of one half its value to the wife. He noted that s.4 of the Matrimonial Property Act, in providing that a matrimonial home was a dwelling occupied as a family residence and "owned" by either or both spouses, should be interpreted as including the husband's interest in the property in question. He found that the only reason that the husband did not have registered legal title was that he and his father had colluded to prevent the wife from obtaining her interest in the home. In these circumstances, he felt, the wife was entitled to one half of the value of the home adjusted for the value of materials bought by the father for its construction. This decision may be contrasted with the Saskatchewan case of McGuckin v McGuckin<sup>25</sup>. Under the comparative Saskatchewan legislation<sup>26</sup> a matrimonial home is defined as property owned or leased by one or both spouses or in which one or both has or have an interest. In McGuckin the court held that the home lived in by the spouses was not a matrimonial home where title to the home was in the name of the husband's parents and the house was used by the spouses under a rental arrangement. There was evidence that the father intended to turn the house over to the spouses if things worked out. Carter J. stated:<sup>27</sup>

I find that the arrangement was, on a balance of probabilities, a rental arrangement with a promise to consider giving the

house to the young couple in the future.

He therefore felt that the husband did not have an "interest" in the house sufficient to constitute it a matrimonial home.

It is not clear how the facts in McGuckin would be interpreted by a Newfoundland court. The facts are not so very different from those in Smith v Smith, apart from an apparent difference in degree of parental intention.

It seems from the broad interpretation employed in Smith v Smith that the Newfoundland courts would interpret the word "owned" in s.4(1) to include the interest of a beneficiary spouse under a trust or a spouse's leasehold interest in premises used as a family residence. This is not clear from the terms of the definition itself. Section 2(2), however, directs that a liberal interpretation be applied to the Act so as best to effect its purposes, and a liberal interpretation of the word "owned", it is submitted, would include both leasehold and equitable interests in property.

No minimum period of occupation is required by the Act before a dwelling will be regarded as a matrimonial home. The only requirement is that the occupation be for the purpose of "family residence". In Barry v Barry<sup>28</sup> the court held that a house which had been occupied by the spouses for only four days before separation was a matrimonial home. Cummins D.C.J. explained his reasoning as follows:<sup>29</sup>

Counsel for the husband referred to the Ontario case of Taylor v Taylor, (1979), 6 R.F.L.(2d) 341. I do not consider that case relevant here because it was concerned with a condominium purchased for investment and recreational purposes and used

only a few times by the family. It was never the family home. Steinberg U.F.C.J. decided it was not the residence "around which a couple's normal family life revolves". There is no doubt in this case the family occupied the house. I conclude they occupied it as a residence because I think the word "residence" does not necessarily require a long period. If the new house was not the residence of the family while they occupied it, they had no residence at all during that period. Furthermore, I regard the new house as the last of a continuous series of matrimonial homes of the spouses that began in 1964 in Morring Cove with a house acquired from the plaintiff's mother at a bargain price of \$100. The plaintiff signed the mortgage on the house as guarantor months before the family took possession. The fact that a breakdown of the marriage occurred shortly after one home was substituted for another is immaterial considering the circumstances of the case; the express purpose of the Act; and the liberal interpretation which subsection (2) of s.2 says is to be applied to the Act to effect its purpose.

This reasoning largely echoes the decision of the Ontario High Court in El Soheny v El Soheny<sup>30</sup>, where a condominium occupied by a family for only two and a half weeks prior to separation was found to be a matrimonial home. As in Barry v Barry, the quality of user rather than the length of residence was the determining factor.

Although s.4(3) includes as an interest in a home, the ownership by one spouse of shares in a corporation which entitles him or her to reside in a dwelling unit, Raymond v Raymond<sup>31</sup> illustrated a difficulty which the courts may have to face in this type of situation. In this instance, the husband and wife had cohabited for two years and eight months in one of the units of a tourist cabin operation owned and operated by a company in which both spouses held shares. Hickman C.J., in rejecting the plaintiff wife's application to treat the cabin in which she and her husband lived as a matrimonial home, stated:<sup>32</sup>

...I do not feel such is a realistic approach, as I seriously doubt if one cabin, situate on land owned by the company, and accessible only over the company's land, would have any market value if isolated from the other assets of the company.

While the definition of matrimonial home may be sufficiently broad to include the cabin used as a family residence, a declaration calling for the disposition of same as a separate entity would reduce the assets of the company far beyond the strict value of that one cabin. Such a declaration would seriously damage the value of the business and would not benefit either party to this action. The Matrimonial Property Act must never be used as a tool of revenge between former spouses but rather, as an instrument to recognise the contribution of both parties to the marriage and in the event of a marriage breakdown, to allow for a fair and equitable distribution of the matrimonial assets in accordance with the Act.

In the circumstances, he treated the cabin lived in by the spouses as part of the business assets.

The Newfoundland courts have not yet had to deal with the question of whether a matrimonial home subject to the Veteran's Land Act<sup>33</sup> may be dealt with under the Matrimonial Property Act. Should the courts decide that the Veteran's Land Act precludes the operation of the provincial legislation, it seems that a spouse will not be left without any recourse. In Sutton v Sutton<sup>34</sup> Mahoney J. held that he could not make a judgment giving equal division of matrimonial property as such a judgment would have been unenforceable by reason of a Crown grant respecting the property which prohibited subdivision thereof. Instead he awarded a lump sum equal to the value of the matrimonial assets with provision for sale of the property in default of payment. It is submitted that such a solution could be adapted to compensate a spouse if it should be decided that the Veteran's Land Act applies so as to take a matrimonial home subject to its provisions outside the scope of the Matrimonial Property Act.

Unlike other items of matrimonial property covered in s.16(1)(b), a "matrimonial home" remains such whether or not it was acquired by gift,

settlement, inheritance or otherwise by one or both of the spouses prior to marriage<sup>35</sup>. The Act also seems to imply that a matrimonial home, once it has been occupied as a family residence, can never lose its status as a matrimonial home so long as one or both of the spouses owns an interest in it. Section 4(1) refers to property "occupied by a person and his or her spouse as their family residence ... whether that occupation occurred before, on or after the commencement of this Act". Further, as already noted, s.4(6) provides that a person and his or her spouse may have more than one matrimonial home. It would seem, therefore, that the principle "once a matrimonial home, always a matrimonial home" applies.



Footnotes to Chapter 4

1. See D. Day and R. Gushie, Family Law in Newfoundland (1973), c.6.
2. Bill 33, 1978 (37th General Assembly) (4th Session).
3. Bill 10, 1979 (38th General Assembly) (4th Session).
4. S.N., 1979, c.32.
5. The Attorney-General Statutes Amendment Act, 1980 (Nfld.), c.24, s.11.
6. Defined by ss.16(1)(b), (2) and (3) and 18(b), (c).
7. (1981), 22 R.F.L.(2d) 292; 32 Nfld. & P.E.I.R. 144; 91 A.P.R. 144 (T.D.).
8. (1982), 32 Nfld. & P.E.I.R. 1; 91 A.P.R. 1 (T.D.).
9. (1981), 25 B.C.L.R. 57 (S.C.).
10. (1982), 32 B.C.L.R. 363 (S.C.).
11. Supra, n.7.
12. (1981), 32 Nfld. & P.E.I.R. 225; 91 A.P.R. 225 (T.D.).
- 12a. The Family Relations Act, S.B.C., 1978, c.20, s.45(3)(a).
13. Supra, n.12, at p.237.
14. (1981), 31 Nfld. & P.E.I.R. 397; 87 A.P.R. 397 (T.D.).
15. (1980), 31 O.R.(2d) 136 (C.A.).
16. (1980), 14 R.F.L.(2d) 263 (Ont. H.C.).
17. Supra, n.14, at pp.405,406.
18. (1981), 31 Nfld. & P.E.I.R. 140; 87 A.P.R. 140 (S.C.).
19. Ibid, p.145.
20. (1982), 32 Nfld. & P.E.I.R. 378; 91 A.P.R. 378 (T.D.).
21. Supra, n.8.
22. Ibid, p.4.
23. S.32(2).
24. (1982), 26 R.F.L.(2d) 263 (Nfld. T.D.).

25. (1981), 10 Sask. R. 110 (Q.B.).
26. The Matrimonial Property Act, 1979 (Sask.), c.M-6,1, s.2(g).
27. Supra, n.25, at p.115.
28. (1982), 35 Nfld. & P.E.I.R. 91; 99 A.P.R. 91 (D.C.).
29. Ibid, p.100.
30. (1981), 17 R.F.L.(2d) 1 (Ont. H.C.).
31. Supra, n.18.
32. Ibid, pp.143,144.
33. R.S.C. 1970, c.V-4.
34. Nfld. T.D., No. C.B.236, November 1981, Mahoney J. (unreported).
35. S.5(a).

## Chapter 5 - Nova Scotia

Statutory reform of matrimonial law in Nova Scotia was initiated by the introduction of Bill 15, entitled "An Act Respecting the Property Of Married Persons", on February 17, 1978. This Bill was a short one, containing only fourteen clauses, and sought to implement a system of deferred sharing of property acquired by spouses during their marriage. It was, however, widely criticized. This criticism stemmed in particular from the fact that the Bill included within the property to be shared assets which had resulted solely from the efforts or involvement of one spouse. Many critics did not think that business assets should be included, for example. The Bill died on the order paper.

Despite this abortive legislative initiative and the lack of other legislative guidelines on the matter, the Nova Scotia judiciary took it upon itself to effect some manner of reform in this area. The rigours of the separate property regime were circumvented either by use of the constructive trust<sup>1</sup> or by making lump sum awards on divorce in an attempt to redistribute the matrimonial assets equitably<sup>2</sup>. Meanwhile the provincial Advisory Council on the Status of Women made various proposals for legislative change.

On June 5, 1980, the Matrimonial Property Act<sup>3</sup> and the Family Maintenance Act<sup>4</sup> were passed by the Legislature. Both Acts became effective as of October 1, 1980.

The Matrimonial Property Act

The Matrimonial Property Act is prefaced by a lengthy preamble, in which the purpose of the Act is laid out. It provides:

Whereas it is desirable to encourage and strengthen the role of the family in society;

And Whereas for that purpose it is necessary to recognise the contribution made to a marriage by each spouse;

And Whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

And Whereas it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

And Whereas it is desirable to recognise that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets.

In furtherance of this purpose the Act promotes a concept of equal sharing by spouses of the matrimonial assets on death, separation or divorce. The concept of equal sharing does not apply to business assets. In certain circumstances, however, assets owned by a business or owned through a corporation are affected by the Act. Sections 4(4), 13 and 18 all directly affect business assets.

Matrimonial Assets.

The meaning of the term "matrimonial assets" is set out in s.4(1) of the Matrimonial Property Act as follows:

4(1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage with

the exception of

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;
- (f) property excepted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.

Section 4 continues

4(2) Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money paid under an insurance policy is a matrimonial asset to the extent that it is made paid or payable in respect of a matrimonial asset.

4(3) For the purpose of clause (g) of subsection (1) spouses shall be deemed not to have resumed cohabitation where there has been a resumption of cohabitation by the spouses during a period or periods in aggregate not exceeding more than ninety days with reconciliation as its primary purpose.

4(4) Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation having a market value equal to the benefit the spouse has in respect of that property are matrimonial assets.

This definition at first sight appears relatively simple. The broad inclusion of all property seems akin to the definition of marital assets contained in s.16(1)(b) of the comparable Newfoundland legislation.<sup>5</sup> In fact it goes further than the Newfoundland legislation in that it includes property acquired before marriage as well as during marriage. It is only on consideration of the exceptions that the complexities of

the definition become apparent. The question of the distinction between "matrimonial assets" and "business assets" is one that has caused particular difficulty for the courts. Before embarking on an examination of this issue, however, something should be said of the other exceptions under s.4(1).

#### Gifts - S.4(1)(a)

Gifts, inheritances, trusts or settlements received by a spouse from a third party do not come within the term "matrimonial assets" unless they have been used for the benefit of both spouses or their children. The use to which property is put is thus relevant in this regard. So in Lawrence v Lawrence<sup>6</sup> a woodlot adjacent to the matrimonial home, given to the wife by her father and used for recreational purposes, was held by the Court of Appeal to have become a matrimonial asset. Similarly in McLean v McLean<sup>7</sup> furniture inherited by the wife was held not to be excluded from the definition of matrimonial assets since it had been used for the benefit of the family.

A difficulty may arise under this section in some situations. If, for example, a gift of \$100,000 was given to one spouse and the \$1,000 interest from such gift was used for a family purpose, would the whole \$100,000 become a matrimonial asset or merely the \$1,000? Were the money deposited in a joint bank account it would prima facie become a matrimonial asset by virtue of s.21(1)(b) of the Act. If it is deposited in the sole name of the donee spouse, however, the result is unclear.

Another question not yet encountered by the courts is how far the concept of use for the "benefit" of the family may be extended. If a wife is given a gift of a fur jacket which she wears to business functions in order to create a good impression on her husband's colleagues, would that be regarded as use for the benefit of the family<sup>8</sup>. Alternatively would it be regarded as the "reasonable personal effects of one spouse"? The limits of "use for the benefit of the family" have yet to be tested.

Damage awards and insurance policies - Ss. 4(1)(b) and (c).

This exclusion clearly includes damage awards or insurance proceeds for personal injuries. Section 4(2) makes clear that where matrimonial property has been damaged, proceeds of insurance or a damage award in respect of such property are matrimonial assets.

An issue which is the subject of some uncertainty is whether life insurance policies are excluded under s.4(1)(c). In Archibald v Archibald<sup>9</sup> Hallett J. decided on a literal interpretation of the section and held that life insurance policies were excluded. In Lawrence v Lawrence<sup>10</sup>, however, the Court of Appeal held that the husband's insurance policies were matrimonial assets. The court did not refer to s.4(1)(c) to provide some clarification, concentrating instead on the fact that "...entitlements to insurance benefits ... would not fall within the definition of business assets contained in the Act. They are not primarily held for the purpose of producing income or profit. They are in reality schemes for saving which divert present income to future use in time of peril or when the ability to earn income has passed..."<sup>11</sup>. By implication the

Lawrence decision has restricted the exclusion in s.4(1)(c) to money paid or payable in respect of other kinds of insurance, such as accident insurance. Whether a contrary decision would be reached on a closer examination of s.4(1)(c) has yet to be seen.

Personal effects - S.4(1)(d).

It is not clear how wide an interpretation will be given to this section. For example, will expensive jewellery and furs always be regarded as falling within the exclusion? If so, there is a danger of funds being put beyond the reach of the courts. The fact that s.4(1)(d) refers to the "reasonable personal effects of one spouse", however, suggests that there may be limits imposed in this regard.

The only instance in which the section has been employed to date is that of Lawrence v Lawrence. In the trial court<sup>12</sup> Morrison J. apparently treated a car used by the wife for business purposes as part of her reasonable personal effects. The Court of Appeal, however, treated the car as if it were a business asset. The approach of the Court of Appeal may cause unfairness in some instances. For example, if a husband has an expensive car which he uses for work and the wife an older car which she uses for family purposes, the husband could claim an exclusion for his car and then claim a half interest in his wife's vehicle. It is interesting to note the Ontario approach to this type situation. In Coburn v Coburn<sup>13</sup> both cars were held to be family assets under the Ontario statute<sup>14</sup> and thus equally shareable.



S.4(1)(f).

In Mason v Mason<sup>15</sup> the Court of Appeal affirmed that not every agreement will be sufficient to satisfy this head. In this instance the wife had signed a separation agreement in 1978, drafted by her husband's solicitor and without any independent legal advice, under which she gave up all claims against her husband in return for \$5,000. A plea of non est factum was accepted with respect to the separation agreement and the matrimonial assets were divided equally.

It remains to be seen how strict the courts will be in their interpretation of what constitutes a marriage contract or separation agreement. In the British Columbia case of Worobieff v Worobieff<sup>16</sup> the petitioner wife had given her share of the matrimonial home to her husband on separation by written agreement. Taylor J. nevertheless held that she had not lost her interest in the home on the grounds that nothing short of a separation agreement in writing would suffice to remove a former matrimonial asset from the purview of the Act. Whether the Nova Scotia courts would reach a similar conclusion on these facts is not yet clear.

Property acquired after separation - S.4(1)(g).

The exclusion of these assets speaks for itself and is a logical corollary to the definition of matrimonial assets as property acquired before or during marriage. It seems that even where the post-separation property is acquired with the proceeds of matrimonial assets, it will still be excluded, at least where the post-separation property constitutes

a business asset. In Archibald v Archibald<sup>17</sup> Hallett J. explained:<sup>18</sup>

From a practical point of view, the court can only value and classify the property of the spouses as being within the definition of matrimonial assets or not as of the date of the hearing of the application. However, if a spouse, between the filing of the petition for divorce and the date of the hearing of the divorce petition and the application for a division of property, were to convert what would have been matrimonial assets into business assets, that would be a factor to take into consideration in assessing whether or not to make an order under section 13 of the Act as the date and manner of the acquisition of the assets is a relevant consideration in assessing whether an order should be made under section 13.

Section 13 gives a court power to make an unequal division of matrimonial assets or to divide assets that are not matrimonial assets in appropriate circumstances.

Presumably this reasoning would also apply to post-separation property that is not a business asset. As the court can in any event act under s.13, the exclusion is not very important in these circumstances.

While assets acquired after separation are excluded from the definition of matrimonial assets under s.4(1)(g), an increase in value of existing assets is not. In Mason v Mason<sup>19</sup> the Court of Appeal included in its calculations not merely an increase in value since separation, but also an increase between the institution of proceedings and trial.

Business assets - S.4(1)(e).

"Business assets" are defined in s.2(a) as follows:

"Business assets" means real or personal property used or held for or in connection with a commercial, business, investment or other income or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or

similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.

The most important aspect of this definition is the element of "use". If property is used for a specified business purpose it will not fall within the definition of "matrimonial assets".

In Lawrence v Lawrence<sup>20</sup> Hart J.A. made some general comments about the distinction between matrimonial assets and business assets and advanced a somewhat impractical definition. He noted:<sup>21</sup>

It seems to me therefore that the only assets that should be classified as business assets are ones that are purposely held or used for the production of income or profit. Thus an apartment house would be a business asset, whereas a piece of land held in the hope of gain would be a matrimonial asset. A car used in business would be a business asset and a car used for family purposes would be a matrimonial asset. Money invested in savings certificates, stocks or bonds would be business whereas money resting in current accounts or accounts used for household purposes would be matrimonial. Works of art would be matrimonial whereas an operating farm would be a business asset. It is not enough to say that some gain or benefit may accrue in the future from the asset, but rather it must be said that it is working in a commercial, business or investment way for the production of income or profit.

There are a number of difficulties with this test. For example, it is not clear why land held for resale is not held for profit within the wording of s.2(a). Furthermore the test would seem to classify as business assets even the smallest shareholdings directly bought by a small investor as the only family savings. The broad inclusion of art as a matrimonial asset would mean that if art is purchased as a hedge against inflation and kept in a business office or bank vault it would be a matrimonial asset. The more logical approach would be to classify it as a business asset. Finally, treating a car used for

business purposes automatically as a business asset can, as already noted, create unfairness where the husband has an expensive car he uses for work and the wife an older car which is used for family purposes. The Lawrence approach would allow the husband to keep the full value of his car and claim half the value of his wife's car.

Hart J.A.'s comments in Lawrence on this matter were strictly obiter dicta and therefore are not binding on the lower courts. They are, however, likely to bear much weight in any proceeding involving a distinction between matrimonial assets and business assets. There have been no reported cases since Lawrence in which the views of the Court of Appeal in this area have been further examined. Pending such examination, it may be helpful to note which properties have been classified by the courts as falling within the definition of business assets.

Much of the litigation on the question of business assets has concentrated on whether Registered Retirement Savings Plans (R.R.S.P.s) and other types of pension fall into this category. It is arguable that such assets fall within s.4(1)(e) because they are investments which have not yet been used for family purposes specified in the exception to s.2(a), although there may be some intention so to use them in the future. Initial cases seemed to approve this approach. In Harwood v Thomas<sup>22</sup>, for example, Morrison J. held that the husband's employment pension was a business asset. Hallett J. explained his reasons for reaching a similar conclusion in Ryan v Ryan as follows:<sup>23</sup>

I am of the opinion that a right to a pension arises under a contract of employment and is payable at a future time therefore, although of value and an asset in the popular sense, the right to a pension is not a matrimonial asset within

the meaning of section 4 of the Act because it is merely a contractual right that can be enforced only after the employee has fulfilled his part of the bargain (i.e., working to age sixty five); it is not a right to property that has been acquired before separation, nor does it exist as a property interest at the date of the divorce.

There was some suggestion that the source from which a pension came might have some bearing on its classification. In Covey v Covey<sup>24</sup> Hallett J. found that R.R.S.P. funds purchased out of a common household fund were matrimonial assets as they were purchased from a common pool of money to which both spouses contributed. In Archibald v Archibald, however, he retracted this idea, noting:<sup>25</sup>

In Covey v Covey... I classified as a matrimonial asset a Registered Retirement Savings Plan investment purchased in the name of the husband out of a pool of funds contributed to by both spouses. Registered Retirement Savings Plans are in the nature of an investment. On reflection, it would have been better in that case if I had categorized the investment as a business asset rather than a matrimonial asset. The nature of the asset is the governing consideration; the fact that there was a resulting trust in favour of the wife does not change the nature of the asset.

These cases have now been thrown into doubt by Lawrence v Lawrence<sup>26</sup>, where the Court of Appeal held that a professor whose pension contributions were not transferrable from a Nova Scotia University into the scheme at his new university were matrimonial assets. Hart J.A. declared:<sup>27</sup>

In my opinion entitlements to insurance, pensions and other similar benefits pursuant to contractual arrangements will not fall within the definition of business assets contained in the Act. They are not primarily held for the purpose of producing income or profit. They are in reality schemes for savings which divert present income to future use in times of peril or when the ability to earn income has passed.

Nor would schemes such as registered retirement savings plans be business assets under the Act. Then the primary purpose is to save funds and lessen the income tax which would otherwise be payable on the funds.

Hart J.A. did concede that in certain circumstances an R.R.S.P. or pension might be a business asset, although he did not specify what type of circumstances he had in mind. It has been suggested that a possible example might be where business partners make provision for one another<sup>28</sup>. It is interesting to note that in Bedgood v Bedgood<sup>28a</sup> Rogers J., while following Lawrence in holding that a pension and R.R.S.P. were matrimonial assets, nevertheless felt that they were better left with the husband and considered in an unequal division of the other matrimonial assets. This approach may provide an alternative to courts which were clearly concerned about the difficulty of dividing pensions. The alternative will obviously not work, however, where there are insufficient other assets available for division.

In other instances the courts have had less difficulty in classifying assets as business property. Stocks and bonds are generally held to be business assets as they are usually held for investment purposes. So in McLean v McLean<sup>29</sup> certain stock and Canada Savings Bonds were held to be business assets for this reason. Similarly in Mason v Mason<sup>30</sup> the court held that bonds and securities owned by the husband and totalling \$92,000 in value should have been classified as business assets at trial. In fact the Court of Appeal in Lawrence v Lawrence<sup>31</sup> suggested that stocks and shares would always be business assets. It has already been submitted that this sweeping inclusion of all stocks and shares may be inappropriate in the case of a small investor who purchases shares as the sole family savings. There is no reported instance as yet in which such facts have arisen. It is arguable, however, that in such circumstances the shares are not held for investment purposes but are "schemes for savings which divert present income to

future use in time of peril or when the ability to earn income has passed". They would then, under the Lawrence line of reasoning, qualify as matrimonial assets.

No other types of assets have been discussed in s.4(1)(e) type arguments. It has yet to be seen, accordingly, how the suggested distinction between matrimonial and business assets outlined in Lawrence v Lawrence will be interpreted by the lower courts.

#### Contributions

Even where property has been found to be a business asset, the non-owning spouse may nevertheless be entitled to some interest in it. Section 18 of the Matrimonial Property Act provides as follows:

Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution;

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

Reported cases to date indicate that the courts will require some direct connection between a wife's contribution and the husband's business assets before they will allow her to share in those assets. In this respect the courts have followed the approach of the Ontario cases.

Indeed in Archibald v Archibald<sup>32</sup> Hallett J. relied on two Ontario cases, Bregman v Bregman<sup>33</sup> and Page v Page<sup>34</sup>, to establish the rule that in order for a spouse to claim any interest in business assets under s.18 of the Matrimonial Property Act, the contribution has to be direct and significant. A wife was not entitled to an order simply because she had been a zealous wife and mother, thus freeing her husband to acquire assets; there had to be a significant contribution to the business. This approach was also followed in Baxter v Baxter<sup>35</sup>.

Where there is evidence of a direct contribution the fact that the non-owning spouse was paid a reasonable salary as compensation does not appear to affect a claim under s.18. In Harwood v Thomas<sup>36</sup>, for example, Morrison J. awarded a s.18 interest to the non-owning spouse who had worked for the business as secretary-treasurer and bookkeeper and received an intermittent salary for her efforts. In Mason v Mason<sup>37</sup> the wife had worked as bookkeeper and packer for her husband's business and received regular remuneration for her part. She was nevertheless awarded compensation under s.18.

It has not yet been established how substantial a contribution must be made to a business by the non-owning spouse in order for it to fall within s.18. For example, if a husband establishes a business he will often be required by his borrowing company to provide both prime security and collateral security. The latter often takes the form of a collateral mortgage on the family home. In such an instance would the husband's spouse be regarded as making a s.18 contribution by virtue of signing the mortgage? In the Ontario case of Dziedic v Dziedic<sup>38</sup> it was suggested that in such a case the spouse has, by permitting the



residence to be mortgaged for business purposes, contributing money or money's worth to the company and is thereby entitled to an interest in the company. Since the Nova Scotia courts appear to be following the Ontario approach in this area it is possible that they would follow a similar line.

The Nova Scotia courts have to date been reluctant to award a share in business assets under s.18 even where an appropriate contribution has been proven. The preferred approach in this regard has been to award an unequal division of the matrimonial assets rather than interfere in the business of the owner spouse. The attitude of the courts in this regard can probably be attributed to the feelings expressed by Hallett J. in relation to s.13 distributions of business assets. The issue arose in Ryan v Ryan, where he explained:<sup>39</sup>

Generally in making an award under s.13 (and the same obviously applies to awards made under s.18) the court will divide matrimonial assets unequally rather than divide business assets because of the disruptive effect an enforced transfer of certain business assets would likely have and, secondly, there are likely to be more income tax consequences relating to a transfer of a business asset as opposed to the transfer of a matrimonial asset.

These were the considerations which prompted Morrison J. to order an unequal division of matrimonial assets in Baxter v Baxter<sup>40</sup> rather than grant the wife a share in the husband's farming operation. He noted that to award the wife an interest in the business asset in this instance would only result in the dissolution of the business, that is, the farm, in its entirety.

Section 13 of the Act is also relevant to business assets. It provides, inter alia, that

The court may make a division of property that is not a matrimonial asset where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unreasonable taking into account the following factors:

....

(f) the effect of the assumption by one spouse of any house-keeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, operate or improve a business asset;

(g) the contribution by one spouse to the education or career potential of the other spouse;

(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent.

It is apparent from the case of Ryan v Ryan that, in the words of Hallett J., " a mere disparity in the net worth of the spouses is, in itself, an insufficient reason to make a s.13 award".

Hallett J. also made it clear in Ryan v Ryan that a marginally greater contribution to the marriage by one of the spouses is not sufficient to justify an unequal division of matrimonial assets by way of s.13(i).

The burden of proof in these cases to show unfairness has been held to be on the spouse so alleging<sup>42</sup>. There have been no reported cases to date in which an award of a share in business assets has been made under s.13, presumably for the reasons stated by Hallett J. in Ryan v Ryan, above. The degree of contribution required under s.13, however, seems less than that required under s.18. In Archibald v Archibald<sup>43</sup>, for example, the wife was awarded an extra \$120,000 over and above the equal distribution of the matrimonial assets on the basis of her housekeeping and child care responsibilities, although her claim

under s.18 failed.

Changing character of assets.

It appears from decided cases that assets are classified by the courts at the time of hearing in their existing state, without any tracing of their source<sup>44</sup>. Hallett J. explained in Archibald v

Archibald:<sup>45</sup>

.... In my opinion, the source from which property is acquired is only relevant in classifying property as a matrimonial asset or not if the property is specifically excepted from the definition of matrimonial assets (for example, inheritances, section 4(1)(a)). The fact that business assets (for example, stocks and bonds) may have been acquired by the husband from earnings which would otherwise have been available for family purposes does not make stocks and bonds "matrimonial assets" as stocks and bonds are clearly within the definition of business assets, being primarily held for income producing purposes and thus not properly encompassed within the definition of matrimonial property. Likewise, if property not excluded from the definition of matrimonial assets is acquired from funds realized on the sale of a "business asset", that fact, the source of the funds, does not convert property that otherwise would be caught by the definition of matrimonial assets into a business asset. In my opinion, there is nothing in the definition of a business asset which indicates any intention of the legislature that property, irrespective of its nature (for example, a yacht), purchased from funds realized on the sale of a business asset should therefore be classified as a business asset.

Thus he held in Archibald that a yacht belonging to the husband was a matrimonial asset, rejecting the husband's argument that it should be classified as a business asset. The evidence established that the yacht had at one time been used in connection with the husband's business, "Ocean Yacht". This business had been sold during the course of the marriage and since then the yacht had been used for personal purposes. Accordingly it was, at the time of trial, a matrimonial asset.

It has already been noted<sup>46</sup> that where matrimonial assets are sold after separation and business assets acquired in their stead, the courts will not trace the pre-separation property into the new assets. Such a circumstance could justify the making of a s.13 order. A non-owning spouse in such a case, however, will have no prima facie claim to the post-separation assets.

The Matrimonial Home.

Section 3(1) of the Matrimonial Property Act defines the term "matrimonial home" as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest". A "dwelling" is defined in s.2(a) as including a house, condominium, cottage, mobile home, trailer or boat occupied as a residence. It is possible for spouses to have more than one matrimonial home at one time<sup>47</sup>.

It is not clear why the legislature chose to exclude leasehold interests from the definition. There is obviously a possibility in these circumstances that an opportunity will be taken to evade the Act's provisions. For example, a husband may arrange for his father to keep the freehold of premises and then lease the property. Unfairness may arise even without deliberate attempts of evasion. In such a situation it is difficult to see what options a court would have to redress the imbalance of property ownership. Possibly it could order an unequal distribution of other assets under s.13, though on what grounds is not immediately evident. As noted, Ryan v Ryan<sup>48</sup> has vetoed the idea that a mere disparity in the net worth of the spouses could be grounds for a s.13 award. Possibly a case could be made under s.13(d), based on the length of time the spouses have cohabited during the marriage, or under s.13(e) - the date and manner of the acquisition of the property. Where there is evidence of deliberate evasion, s.13(a) - the unreasonable impoverishment by either spouse of the matrimonial assets - might be

employed. Where there are no assets other than the leasehold matrimonial home, then the courts could exercise their powers under s.13 to make an order regarding property other than a matrimonial asset.

What other "interests" are covered by the definition in s.3(1) is a question yet to be determined by the courts. There have been no reported cases to date in which the section has been discussed. It is interesting to note, however, that in Baxter v Baxter<sup>49</sup> a home in the name of the director of the Veteran's Land Act<sup>50</sup> under a loan agreement with the husband was held to be a matrimonial asset without any discussion as to the constitutional applicability of a provincial statute on federal legislation or the question of whether the husband's "interest" in the home complied with the requirements of s.3(1). Whether this question will be raised in the future remains to be seen.

Footnotes to Chapter 5

1. For example, Re Spears and Levy, (1974), 9 N.S.R.(2d) 340 (C.A.).
2. See Swift v Swift, N.S.T.D. No. 1201-17257, July 24, 1979, Morrison J. (unreported).
3. 1980 (N.S.), c.9.
4. 1980 (N.S.), c.6.
5. The Matrimonial Property Act, S.N. 1979, c.32.
6. (1982), 25 R.F.L.(2d) 130; 47 N.S.R.(2d) 100; 90 A.P.R. 100 (C.A.).
7. (1981), 21 R.F.L.(2d) 353; 44 N.S.R.(2d) 307; 83 A.P.R. 307 (T.D.).
8. Such a use was regarded as "use for a family purpose" in the British Columbia case of Hauptman v Hauptman, (1982), 32 B.C.L.R. 119 (S.C.).
9. (1982), 48 N.S.R.(2d) 361; 92 A.P.R. 361 (S.C.).
10. Supra, n.6.
11. Ibid, pp.142,143.
12. (1981), 45 N.S.R.(2d) 541; 86 A.P.R. 541 (T.D.).
13. (1978), 6 R.F.L.(2d) 235 (Ont. S.C.).
14. The Family Law Reform Act, 1978 (Ont.), c.2; now R.S.O. 1980, c.152.
15. (1981); 23 R.F.L.(2d) 68; 47 N.S.R.(2d) 435; 90 A.P.R. 435 (C.A.).
16. (1980), 11 F.L.D. 35 (B.C.S.C.).
17. Supra, n.9.
18. Ibid, p.373.
19. Supra, n.15.
20. Supra, n.6.
21. Ibid, p.142.
22. (1981), 22 R.F.L.(2d) 1 (N.S.T.D.), affirmed (1981), 45 N.S.R.(2d) 414; 86 A.P.R. 414 (C.A.).
23. (1981), 43 N.S.R.(2d) 423, at p.435; 81 A.P.R. 423. (T.D.).

24. (1980), 20 R.F.L.(2d) 368; 42 N.S.R.(2d) 612; 77 A.P.R. 612 (T.D.).
25. Supra, n.9, at p.375.
26. Supra, n.6.
27. Ibid, pp.142,143.
28. Bissett-Johnson & Holland, Matrimonial Property Law in Canada, p.NS 12.
- 28a. (1982), 26 R.F.L.(2d) 256; 50 N.S.R.(2d) 157; 98 A.P.R. 157 (T.D.).  
This case was appealed to the Nova Scotia Court of Appeal, (1982), 28 R.F.L.(2d) 113, where this part of the judgment was approved in substance, though it was felt that too much emphasis had been placed on the wife's loss of pension rights. The division order of the trial judge was therefore varied.
29. Supra, n.7.
30. Supra, n.15.
31. Supra, n.6.
32. Supra, n.9.
33. (1978), 21 O.R.(2d) 722, affirmed 25 O.R.(2d) 245 (C.A.).
34. (1980), 31 O.R.(2d) 136 (C.A.).
35. (1981), 22 R.F.L.(2d) 225; 46 N.S.R.(2d) 304; 89 A.P.R. 304 (T.D.).
36. Supra, n.22.
37. Supra, n.15.
38. (1978), 6 R.F.L.(2d) 332 (Ont. H.C.).
39. Supra, n.23, at p.431.
40. Supra, n.35.
41. Supra, n.23, at p.431.
42. Covey v Covey, supra, n.24.
43. Supra, n.9.
44. See Mason v Mason, supra, n.15, and Archibald v Archibald, supra, n.9.
45. Supra, n.9, pp.372,373.
46. Infra, p.158.
47. S.3(4).
48. Supra, n.23.



49. Supra, n. 35.

50. R.S.C. 1970, c.V-4.

Chapter 6 - New Brunswick

In 1974, the Law Reform Division of the Department of Justice recommended a general study of matrimonial property law. The purpose of the study was to review the existing law and suggest how it might be updated. A report<sup>a</sup> was produced by the study in 1976 which suggested possible reforms in this area. A discussion paper setting out the tentative proposals of the report was tabled in the Legislature in the Spring of 1978<sup>b</sup>. This discussion was the subject of a number of public hearings throughout the province during the fall of that year.

The discussion paper proposed a concept of equal sharing of property acquired by the spouses during the course of the marriage subject to exemptions for gifts, inheritances and other specified categories. It also proposed a statutory joint tenancy in the matrimonial home and household goods and recommended that the principle of equal sharing apply on divorce, annulment, separation or death of one of the spouses.

Bill 79, the Marital Property Act, was introduced in the New Brunswick Legislature in the spring of 1979. It largely echoed the recommendations of the discussion paper, though some of its provisions differed slightly.

Bill 79 was referred to the Law Amendments Committee of the New Brunswick Legislature for further study and public hearings. In May 1980 a subsequent proposal, Bill 49, the Marital Property Act, was introduced

in the Legislature, its provisions for the most part being the same as those of Bill 79. Bill 49 was enacted in July 1980<sup>1</sup> and came into force on January 1, 1981.

### The Marital Property Act

The philosophy underlying the Marital Property Act is reflected in s.2, which provides:

Child care, household management and financial provision are joint responsibilities of spouses and are recognised to be of equal importance in assessing the contributions of the respective spouses to the acquisition, maintenance, operation or improvement of marital property; and subject to the equitable considerations recognised elsewhere in this Act the contributions of each spouse to the fulfillment of these responsibilities entitles each spouse to an equal share of the marital property and imposes on each spouse, in relation to the other, the burden of an equal share of the marital debts.

The Act gives effect to this philosophy by providing for a regime under which assets which fall into the category of "marital property" are on divorce, annulment, separation or death to be shared equally by the spouses, regardless of their legal ownership<sup>1a</sup>. It establishes special property rights in relation to the marital home and household goods<sup>1b</sup>. Spouses are permitted to prescribe their own property arrangements by contract, but this is subject to regulation under the Act in relation to the formation and application of such contracts<sup>1c</sup>.

The New Brunswick legislation in many respects resembles the matrimonial property legislation of Ontario<sup>2</sup>. Some of the provisions respecting the division of property, the matrimonial home and domestic contracts are identical to or closely resemble the Ontario provisions.

Ontario decisions, accordingly, are likely to be helpful to the New Brunswick courts in applying the Marital Property Act. There are, however, three important differences between the two statutes. First, the New Brunswick legislation extends the concept of equal sharing beyond family assets, to include "marital property", a broader category. Second, the New Brunswick provisions relating to the marital home are more extensive than in Ontario. For example, in New Brunswick there is a right to share in the proceeds of sale of the marital home during marriage. Third, the New Brunswick Act gives more protection in respect of household goods than does the Ontario Act.

There have been very few reported decisions on the New Brunswick legislation in relation to the issue of divisible assets since its enactment in 1980. An examination of its contents, accordingly, of necessity involves much speculation as to how its provisions might be interpreted by the courts.

Assets to which the Act applies.

Upon the happening of one of the events mentioned in ss.3(1) or 4(1) of the Marital Property Act, a spouse is entitled to apply to the court for a division of the "marital property" in equal shares. The term "marital property" is defined in s.1 and includes:

(a) family assets;

(b) property owned by one spouse or by both spouses that is not a family asset and that was acquired while the spouses cohabited, or in contemplation of marriage, except,

(i) a business asset,

(ii) property that was a gift from one spouse to the other, including income from that property,

(iii) property that was a gift, devise or bequest from any

other person to one spouse only, including income from that property,

(iv) property that represents the proceeds of property that was not a family asset and was not acquired while the spouses cohabited or in contemplation of marriage, or that was acquired in exchange for or was purchased with the proceeds of disposition of such property or that represents insurance proceeds with regard to loss or damage to such property; and

(v) property that represents the proceeds of disposition of property referred to in subparagraphs (ii) and (iii) or that was acquired in exchange for or was purchased with the proceeds of disposition of such property or that represents insurance proceeds with respect to loss or damage to such property; and

(c) property that was acquired by one spouse after the cessation of cohabitation and that was acquired through the disposition of property that would have been marital property had the disposition not occurred;

but does not include property that the spouses have agreed by a domestic contract is not to be included in marital property.

The three categories of marital property, accordingly, are

- (a) family assets,
- (b) property other than a family asset, that was acquired while the spouses cohabited, or in contemplation of marriage, and
- (c) property acquired through the disposition of marital property after the cessation of cohabitation.

(a) Family assets.

Family assets are defined in the Act as:<sup>3</sup>

...property, whether acquired before or after marriage, owned by one spouse or both spouses and ordinarily used or enjoyed for shelter or transportation or for household, educational, recreational, social or aesthetic purposes by both spouses or one or more of their children while the spouses are cohabiting, and includes

- (a) a marital home and household goods,

(b) Money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes,  
(c) shares in a corporation or an interest in a partnership or trust owned by a spouse having a market value equal to the value of the benefit the spouse has in respect of property owned by the corporation, partnership or trustee that would, if it were owned by the spouse, be a family asset,  
(d) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and  
(e) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a domestic contract is not to be included in family assets...

As with the Ontario legislation, use for a family purpose is the central concept of this definition. The only reported case to date in which the question of use has arisen for discussion in New Brunswick is that of Mullett v Mullett<sup>3a</sup>. The assets in dispute here concerned a large collection of china collected by the plaintiff wife over a number of years. Jones J. held that since the collection had been displayed in the family home it had been used for a family (aesthetic) purpose, and was therefore a family asset within the meaning of s.1.

There has been no in-depth analysis as yet as to what is incorporated within the term "use". A number of issues in this regard remain to be resolved. It has yet to be determined, for example, what degree of use is required to fulfill the requirement that property be "ordinarily used" for one of the specified family purposes. As the definition of "family assets" resembles so closely that contained in the Ontario legislation, it is likely that Ontario decisions will bear some

weight on this issue. If so, the definition of "ordinary user" suggested by Steinberg J. in Taylor v Taylor<sup>3b</sup> will likely be applied, that is, "ordinary user must mean user in the course of the customary mode of life of the person concerned and should be contrasted with special or occasional or casual user".

Property must be used by both spouses or one or more of their children in order to qualify as a family asset. It seems, however, that a child who uses the property need not necessarily be a child of both spouses. In Olmstead v Olmstead<sup>4</sup> Montgomery J. held that a parcel of land owned by the husband before marriage and used by him and his daughter by a first marriage was a family asset. The evidence showed that the respondent wife and her children did make use of the property on occasion but that their usage was not so frequent or lengthy as to establish a substantial interest in the property. This was regarded by Montgomery J. as one factor bringing the property within s.6 of the Marital Property Act<sup>5</sup> so as to justify the exclusion of the asset from a division. No specific attention was directed to the fact that the child using the property was the offspring of the husband alone. It is therefore open to parties in the future to develop this point. Here, for example, the property was not "used" by both spouses, but by the husband alone. It was not used by one or more of "their" children, as the daughter was not a child of the wife. The husband could thus have argued that the requirements of the definition of family assets had not been satisfied. It is not clear how a court would respond to such an argument. It may be that it would be decided that the term "children" includes a person to whom one of the spouses stands in loco parentis or that it includes a child of either spouse.

The family asset category differs from other categories of "marital property" in that it includes property acquired both before and after marriage. The other categories apply only to property acquired after the spouses were married. As indicated in Olmstead v Olmstead, however, the fact that a family asset was acquired before marriage may bring it within the provisions of s.6 in certain circumstances. Similarly, although "family assets" includes gifts, which are otherwise exempted from "marital property", the fact that an asset was acquired by gift may be pleaded under s.6 so as to exclude them from a division under the Act.

(b) Property other than a family asset.

Property that is not a family asset may nevertheless fall into the category of "marital property" if it was acquired by one or other of the spouses while they cohabited or in contemplation of marriage. A number of assets are specifically excluded from this category, however. They include:

(i) Business assets.

A "business asset" is defined in the Act as "...property owned by one spouse and used primarily in the course of a business carried on by that spouse alone or jointly with others, and includes shares that the spouse owns in a corporation through which he or she carries on a business."<sup>6</sup>

The word "business" is not defined in the Act and may cause



difficulty in future cases. Is the word intended to cover only commercial business or does it have a broader meaning? Would it include a family business, for example, a store in which both husband and wife work? The limits to the term have yet to be defined.

Once it has been established that property has been used in a "business", the next question to be determined is the quality of that user and whether it satisfies the requirements of s.1. The definition of a business asset refers to property used "principally" in the course of a business. Accordingly, where property is used partly for business and partly for other purposes (including family purposes), it will be left to the courts to determine for what principal purpose the property is being used. This may be difficult to determine in some instances. It may also be difficult to distinguish between the test of "ordinary use" required for family assets and the test of "principal use" required for business assets. If it appears that an asset is used equally for family and business purposes, in what category will it fall? The fact that an asset is owned by a corporation or business will not prevent its being classified as a family asset if necessary. The definition of "family assets" emphasises the use to which the property is put, not its ownership.

The Marital Property Act does not contain any equivalent of s.8 of the Ontario legislation or ss.45(3)(e) and s.46(1) of the British Columbia Family Relations Act<sup>7</sup>, which allow for the conversion of a business asset into a family asset by reason of the non-owning spouse's direct or indirect contribution to the business. So in Emery v Emery<sup>8</sup>

the fact that the wife had signed a collateral mortgage over the jointly held home to secure loans for the operation of the husband's company did not make the company a family asset. Montgomery J. found that any benefit that accrued from her actions accrued to the husband alone and had no connection with the family. The fact that the husband had used his income from the company for general family expenses in no way constituted the company a family asset. Business assets are thus emphatically excluded from the category of marital property.

Section 8(b), however, provides that a court may make a division of property that is not marital property where a division of marital property would be unfair having regard to the effect of the assumption by one spouse of the responsibilities set out in s.2 on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not marital property. The responsibilities set out in s.2 include child care and household management. There would appear to have been only one case to date in which a spouse has sought a share in her husband's business assets under this head. In Mazorelle v Mazorelle<sup>8a</sup> the plaintiff wife claimed a share of her husband's camp ground business valued at \$65,000. He had acquired the property and started development of the business before the marriage. The wife was found to have done little or no work to assist in running the camp ground during the summer over the 6½ years of marriage, having devoted her time to being a housewife. In these circumstances it was held that the wife was not entitled to a share of the camp ground property or business. It seems from this case that the courts will require that some extraordinary assumption of s.2 responsibilities be proven to have been made by one spouse before he or she will be regarded as having affected the other's

business ability, and that the assumption of normal child care and household management responsibilities will not be regarded as having automatically freed the other spouse to pursue his or her business interests. The s.8 power is a discretionary one and it is probable that the courts will take a relatively strict line in this regard. If the legislature had intended any other approach, it is submitted it would have made that intention clear, for example, by some provision whereby business assets could be regarded as family assets because of a spouse's contribution.

#### Gifts.

Gifts by one spouse to the other are excluded from the category of "marital property" unless they fall within the definition of family assets. Gifts made by a third party to one spouse only are also excluded unless they comply with the family assets definition. There are no formal requirements laid down in the Act as to how a donor should specify his intention to make a gift to only one of the spouses. In the absence of clear words of intent the court will have to draw inferences from the circumstances surrounding the gift. This is likely to cause some difficulty particularly in the area of parental gifts, where often the intention of the donor will be very obscure. It is interesting to note that a somewhat similar provision is contained in the Saskatchewan Matrimonial Property Act<sup>9</sup>. The Saskatchewan provision, however, refers only to property given as a gift to one spouse before the marriage, and excludes such property "unless it can be shown that the gift was conferred with the intention of benefitting both spouses". Would evidence of such an intention be relevant under the New Brunswick

provision? The answer is unclear. The New Brunswick Act seems to concentrate on the legal intention as opposed to any unspoken intention of the donor. Where a father, for example, legally gives certain property to his son alone, the fact that he may also have intended his son's wife to benefit from the gift may not be enough to satisfy the court that it is a "gift" to both spouses under the Marital Property Act.

(iii) Proceeds of disposition of exempt property.

Where a non-family asset acquired before marriage is disposed of or exchanged by a spouse for other property, the proceeds or exchanged or new property do not become a family asset. Insurance proceeds with respect to loss of such property are excluded from a division of marital property as well. Where the insurance proceeds or new property are used for a family purpose, however, they will obviously fall into the category of family assets and will therefore be distributable.

(c) Property acquired after cessation of cohabitation.

Unlike many other examples of provincial legislation in the matrimonial property arena, the New Brunswick legislation specifically deals with the issue of what happens when property which would have been a family asset is disposed of after separation in return for new property. Paragraph (c) of the definition of marital property provides that the new property be regarded as marital property. Furthermore, where a spouse has deliberately impoverished the marital property by transfer, indebtedness, mismanagement or other means, the court is empowered to

make a division of property that is not marital property.

The Act makes no reference to the status of other property acquired after separation. Presumably such property could not be a family asset on the grounds that it could not be used for a family purpose once the family had separated. The definition of family assets specifically states that the property must have been used in the requisite manner while the spouses are cohabiting. Nor would after-acquired or post-separation property fall within the wider definition of marital property as this definition is confined to assets acquired while the spouses cohabited or in contemplation of marriage.

The concept of equal sharing of the marital property also includes the notion of sharing the family debts, or "marital debts". "Marital debts" are defined in s.1 as:

...the indebtedness of either or both spouses to another person

- (a) for the purpose of facilitating, during cohabitation, the support, education or recreation of the spouses or one or more of their children; or
- (b) in relation to the acquisition, management, maintenance, operation or improvement of marital property.

Under s.9 the court is directed to effect a fair and equitable division of marital debts when making a division of property under ss.3 or 4. Thus, where one spouse at trial is burdened with personal liability for family debts, the court will be required to take that liability into account before dividing the marital property, thereby reducing the share of assets which the other spouse would normally enjoy. Could a spouse argue that a year prior to separation he had disposed of some property that would not have been a family asset or an item of marital property

in order to satisfy marital debts, and that he should now be entitled to receive a greater share of the marital property by virtue of s.9? Presumably he would not succeed under this argument because the debt, once paid, would no longer be a "marital debt" at the time of trial.

This section applies only to "marital debts". Thus personal debts incurred by one spouse would not fall under this head. This was made clear in Emery v Emery<sup>11</sup> where Montgomery J. held that the wife did not have to share any of the burdens of the husband's company where the company was not a family asset.

The Marital Home and Household Goods.

Both the marital home and household goods are treated separately from other marital property in the Marital Property Act. The term "marital home" is defined in s.16 as follows:

Property that is or has been occupied by a person and his or her spouse as their family residence is a marital home, and where property that includes a marital home is used for a purpose in addition to a family residence, the marital home is that portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the family residence.

Section 17(1) further states that s.16 applies notwithstanding that its application results in more than one marital home.

Section 16 does not specify what title a spouse must hold in the property in question. Does it include leasehold interests and equitable interests, for example? The only requirement laid down in s.16 is that it be occupied as the family residence so apparently it would include such interests.

In O'Brien v O'Brien<sup>12</sup> Jones J. dealt with a marital home, title to which was in the name of the director of the Veteran's Land Act<sup>13</sup>. He made no reference to any possible conflict in operation between the Veteran's Land Act and the Marital Property Act. Instead, referring to the Ontario case of Re Whitely<sup>14</sup>, he stated:<sup>15</sup>

At this stage I simply order that the plaintiff is entitled to a declaration the defendant holds his rights to a conveyance from the director of the Veteran's Land Act in trust for the plaintiff as to a one-half interest and that he holds the property, when title is acquired by him, in trust for the plaintiff to the extent of a one-half interest.

The Ontario Court of Appeal in Re Whitley had made an order similar to this where the wife had been found to have an equitable right in the marital home which was also in the name of the director of the Veteran's Land Act. The court was of the view that the vesting of title in the director is more a matter of form and ought not to interfere with the substantive rights of the parties. It seems that the New Brunswick courts are going to follow this reasoning rather than that of the British Columbia Court of Appeal in Harper v Harper<sup>16</sup>, which had held that so long as property remains in the name of the director, the veteran had no interest in the property and s.8 of the Family Relations Act<sup>17</sup> could not apply to the property. So in McClure v McClure<sup>17a</sup> property in the name of the director of the Veteran's Land Act was again dealt with by the New Brunswick under the Marital Property Act, although this time without reference to any possible conflict.

Although the New Brunswick Act does not specify what interest must be held by a spouse in the marital home, some interest must obviously be held, otherwise there would be nothing to share. It is not clear what the situation would be where a spouse only acquired an "interest" in the property after the parties had separated, though the home itself had been used as the family residence prior to separation. For example, if the parties had been living in premises owned by the wife's parents and after separation the house was gifted to the wife alone, would the husband be entitled to seek a share in it? The exemption of gifts from the definition of marital property does not apply with respect to the marital home, which is dealt with under a different part of the Act<sup>18</sup> and which, in any event, is expressly included under the definition of family assets. Logically, therefore, the husband



would be entitled to his share. If this is so, at what point, if ever, does the husband's interest cease, or will he always be entitled to claim a share in the house, despite the number of years of separation, once the wife acquires title to it? The Act gives no indication that a marital home, so found, can ever lose this status. Once a home has been occupied as a family residence it acquires the status of a marital home and seems to remain so forever. This would indicate that the husband's right here is indefinite, subject to the proviso that if a distribution is made under the Act and the wife then acquires title to the "marital home", the husband might have difficulty in implementing this right. Even in these circumstances, however, there appears to be nothing in the Act that would render the house a marital home no longer.

Section 16 gives no indication, either, of what degree of "residence" is required to bring a house within its terms. It refers to a house that "is or has been occupied (by the spouses) as their family residence". There is no requirement that they ordinarily reside in the property. It seems, therefore, that even a short stay in a house as a family unit would render that property a family home. Something more than mere occupation would probably be required, however. In this respect the New Brunswick courts are likely to follow the Ontario decision of Taylor v Taylor<sup>19</sup>, where it was held that a family residence ought to be a place around which a couple's normal life revolves.

An interesting innovation in the New Brunswick legislation is that it gives spouses extensive rights over the marital home while the marriage still subsists. Section 20 gives a non-owning spouse a right

to one-half of the net proceeds realized from the disposition of the marital home. If the house is sold during the course of the marriage, s.21(3) provides that any proceeds received are held in trust, to be shared by the spouses. The right does not survive if the marriage ends through divorce or the death of one of the spouses<sup>20</sup>. In these circumstances, however, the non-owning spouse would be protected by the right to share equally in the marital property.

Household goods are defined in s.1 as "furniture, equipment, appliances and effects owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children within or about the marital home while the spouses are or were cohabiting". There have been no reported cases as yet in which the definition has come up for discussion. In most, if not all, cases, it will probably be apparent whether assets do constitute household goods. As they form a sub-category of family assets, it is irrelevant whether household goods were acquired before or after marriage.

One of the most important rights given to a non-owning spouse in relation to household goods is contained in s.27. This gives a non-owning spouse a right to apply to the court to prevent the disposition of any interest in specified household goods without joint consent. Once an application is made and a summons and supporting affidavit are served on the other spouse, that spouse is prevented from disposing of household goods. Furthermore, if household goods have been disposed of within three months prior to the date of the application or before or after the summons was served, the court may order the defendant spouse to pay compensation to the applicant spouse in respect of the loss of

use and enjoyment of the household goods, in an amount the court considers fair and reasonable<sup>22</sup>. The court does not have authority to set aside a disposition made in contravention of the Act or a court order. Under s.30(1), however, it may require any person who acquires the goods under such a disposition and who had notice that the goods were being disposed of in contravention of the Act or a court order to compensate the non-owning spouse.

As with the marital home, these rights apply during the course of the marriage. They thus interfere with the normal procedure in a separate property regime which permits an owner spouse to dispose of his or her property during the course of the marriage as and when he or she pleases.

Footnotes to Chapter 6

- a. Report on Matrimonial Property Law (1974).
- b. Matrimonial Property Reform for New Brunswick: Discussion Paper W.P. 1978.
- 1. As c.M-1.1 of 1980 (N.B.).
- 1a. S.3.
- 1b. Part II, ss.16-32.
- 1c. Part III, ss.31-41.
- 2. The Family Law Reform Act, 1978, R.S.O. (Ont.), c.152.
- 3. S.1.
- 3a. (1982), 28 R.F.L.(2d) 272 (N.B.Q.B.).
- 3b. (1978), 6 R.F.L.(2d) 341, at p.353 (Ont. U.F.C.).
- 4. (1982), 25 R.F.L.(2d) 74; 25 N.B.R.(2d) 626; 97 A.P.R. 626 (Q.B.).
- 5. Section 6 provides:

Where marital property to be divided under s.3 or 4 includes a family asset that was acquired

- (a) before the spouses married, or
- (b) by one spouse as a gift from the other spouse or as a gift, devise or bequest from any other person,

the court may exclude that family asset from the division of marital property if, in the discretion of the court, it would be unfair and unreasonable to the owner to include the family assets in the division of marital property taking into account the circumstances of the case as well as one or more of the following considerations, namely, that.

- (c) there was no substantial contribution by the non-owning spouse to the acquisition, management, maintenance, operation or improvement of the family asset;
- (d) the cohabitation of the spouses was of short duration;
- (e) the spouses had an agreement, arrangement or understanding that the use of the family asset by the non-owning spouse or any of their children would not prejudice any rights of the owning spouse to the family asset, notwithstanding that this was not expressed in a domestic contract.

- 6. S.1.

7. R.S.B.C. 1979, c.121.
8. (1982), 26 R.F.L.(2d) 331 (N.B.Q.B.).
- 8a. (1982), 36 N.B.R.(2d) 706; 94 A.P.R. 706 (Q.B.).
9. The Matrimonial Property Act, 1979, (Sask), c.7-6.1, s.23(1).
10. S.8.
11. Supra, n.8.
12. (1982), 25 R.F.L.(2d) 372 (N.B.Q.B.).
13. R.S.C. 1970, c.V-4.
14. (1974), 4 O.R. 393; 48 D.L.R.(3d) 161 (C.A.).
15. Supra, n.12, at p.376.
16. B.C.C.A., November 15, 1977 (unreported).
17. S.B.C. 1972, c.20, now repealed and replaced by the Family Relations Act, 1978 (See n.7 above).
- 17a. N.B.Q.B. (Fam. Div.), August 25, 1982, Montgomery J. (unreported).
18. Part II.
19. Supra, n.3a.
20. S.20(4).
21. S.27(2).
22. S.29.

Chapter 7 - Ontario

The Family Law Reform Act<sup>1</sup> of Ontario was enacted in 1978 after a long process towards reform. This process began in 1965 when the Ontario Law Reform Commission initiated its Research Project on Family Law. The result of their initiative was the publication of a six part report<sup>2</sup>, part 4 of which dealt with matrimonial property. The report proposed a scheme of deferred sharing of assets. Essentially, the scheme would have involved the retention of separate property during the marriage and the division of the profits of the marriage on breakdown. Certain items of property were to be exempt - gifts, property acquired by inheritance and ante-nuptial property. Automatic co-ownership of the matrimonial home was also recommended. The proposals were criticized, however, because of their excessive technicality and rigidity and were not implemented.

Certain limited reforms were accomplished with the enactment of the Family Law Reform Act of 1975<sup>3</sup>. This statute abolished the vestiges of unity of personality<sup>4</sup>, and also abolished the presumption of advancement<sup>5</sup>. In addition the Act sought to remedy the problem which had arisen in Murdoch v Murdoch<sup>6</sup>.

The 1975 statute was clearly intended only as an interim measure and other, more fundamental, reforms were proposed. The first attempts at further reforms were abortive<sup>7</sup>. Finally, however, the present Family Law Reform Act became law, coming into force on March 31, 1978.

The Family Law Reform Act, 1978

Under the Family Law Reform Act the system of separate property continues during marriage. In the event of marriage breakdown, however, the Act provides that each spouse has a right to share in any property which is a family asset, regardless of which spouse owns it. Although there is a presumption of equal sharing<sup>8</sup>, the Act allows a judge to depart from this rule if, after consideration of the legislative guidelines, it appears just to do so<sup>9</sup>. The court also has a discretion to order sharing of non-family assets where family assets have been unreasonably impoverished<sup>10</sup>. Business property and other non-family assets not subject to automatic sharing may be divided where the court finds that, having regard to the assumption of responsibility by a spouse as a homemaker and in caring for the children, it would be inequitable to share only family assets<sup>11</sup>. Further, where a spouse or a former spouse has made a direct contribution in work or money to property which is not a family asset, there is a right to claim proportionate compensation or an interest in the property<sup>12</sup>.

Generally only those assets which constitute "family assets" under the Act's provisions will be divided on marriage breakdown. As Gravely U.F.C.J. explained in Kastrau v Kastrau<sup>13</sup>:

Although the Family Law Reform Act ... makes clear in both its preamble and in s.4(5) that marriage is to be treated as a form of partnership, it restricts in the normal case the result of the winding up of the partnership to divisions of family assets only.... It is only when unfairness would be the result of such a division that the court has any right to entertain division of non-family assets under s.4(6).

Given this basis, the characterization of assets is obviously a

vital element in any case brought under the Act.

Family Assets.

"Family assets" are defined for the purpose of the Family Law Reform Act by s.3(b):

.....

(b) "Family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used and enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or household, educational, recreational, social or aesthetic purposes, and includes,

(i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes,

(ii) where property owned by a corporation or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect to the property,

(iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and

(iv) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets;

(c) "property" means real or personal property or any interest therein.

Specifically included within the term "family assets" is the "matrimonial home", defined in Part III as follows:<sup>14</sup>



Property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their matrimonial home.

The matrimonial home will be discussed later in this section. For the moment the emphasis will be on what other property is encompassed within the term "family assets".

From the outset the courts made it clear that not all property owned by the spouses would be considered a family asset. In Meszaros v Meszaros<sup>15</sup> counsel for the wife urged that all property owned by either husband or wife constitutes "family assets" and should be divided equally under s.4 of the Family Law Reform Act. The court pointed out that this approach is precluded by the fact that the Act has expressly defined "family assets" in s.3(b) and in s.4(6) set out the circumstances in which the court is to make a division of other property. In order to qualify as a "family asset", therefore, an asset had to constitute "property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes".

Under s.3(1), property is so defined that it includes real or personal property or any interest therein. Section 3(b) requires ownership by one spouse or both spouses. Accordingly it was held in Sobot v Sobot<sup>16</sup> that an organ which had been purchased for the use of one of the children and was a gift to him would not be included in a division of property as it was not a family asset. For the same reason it was held in McIntyre v McIntyre<sup>17</sup> that property lots held in the name

of the husband and wife alternatively as trustee for their children are not beneficially "owned" by a spouse and therefore are not family assets. The extended definition of family assets, however, makes it clear that assets owned by a corporation, where one of the spouses owns shares in that corporation, will be covered.

Ordinarily used and enjoyed.

In dealing with the concept of family assets, one of the contentious areas is whether a particular asset was sufficiently used by both spouses or by their children to bring it within the scope of ordinary usage and enjoyment. This question has been considered in many cases. In Bregman v Bregman<sup>18</sup> the husband had an Oriental rug collection, some of which were kept on display in the family residence and some of which were stored in a special boxed collection and not generally used or displayed in the family home. It was held by the court that the boxed collection was a private collection, segregated and retained as such by the husband, and was not ordinarily used or enjoyed by both spouses or any of their children during cohabitation. This part of the collection was not a family asset. Those rugs on display in the house, on the other hand, were held to be family assets as the requisite usage of same had been established.

In Silverstein v Silverstein<sup>19</sup> a summer cottage building lot was held not to be a family asset. Although the lot had been owned by the husband for a long time it was found that it had never been ordinarily used or enjoyed by the spouses or their children. In fact it was never used for any purpose whatsoever.

In McIntyre v McIntyre<sup>20</sup> a fifty acre parcel of land used for growing vegetables and feeding horses was found to be a family asset because that usage amounted to usage in the ordinary or customary mode of life of the family.

In Boydell v Boydell<sup>21</sup>, a doll collection worth between \$10,000 and \$25,000 assembled by the wife as her hobby was held not to be a family asset even though the husband assisted the wife by driving her on buying and selling trips, making storage and duplex cabinets, and lending her money for purchases. The collection was owned by the wife and was not used or enjoyed by the husband for any of the purposes set out in s.3(b).

It would seem clear that mere intention to use property in the required manner would not be sufficient to bring the property within the definition of a family asset. Actual usage appears to be what is envisaged by the Act. This is certainly the approach which was initially taken by the courts. Thus in Taylor v Taylor<sup>22</sup> the husband had bought a condominium in Florida which he and his wife had planned to use for recreational purposes. The court found that neither the spouses nor their children had ordinarily used the condominium for this purpose, although the intention to do so was there, were the family to remain intact. Steinberg U.F.C.J. accordingly held that "the mere intention to ordinarily use the property for recreational purposes is insufficient to convert it to a family asset without actual ordinary use"<sup>23</sup>.

In Toth v Toth<sup>24</sup>, however, the court held that tools which had been purchased for use in a hobby enjoyed by both spouses but which had

never actually been so used constituted family assets. In dealing with the issue of proof of user, Clements C.C.J. stated:<sup>25</sup>

An argument may be made that the Act expresses itself in the words "ordinarily used or enjoyed" and thus not only should there be a user test due to the disjunction "or" but also an enjoyment test. No doubt the plaintiff and the defendant enjoyed expanding their collection of tools and equipment and treated same as part of their hobby and as an enhancement to their pleasure from it.

Although this argument may be appealing, it is submitted that His Lordship gave too liberal an interpretation to the word "enjoyed". The word "enjoyed" must be interpreted within the context of the relevant sections. Sections 3(b) and 4(1) attempt to provide for the sharing of assets, not by reference to particular types of assets, for example, cars and houses, but by reference to the manner in which any particular type of asset is utilized. This is certainly the sense in which the word "enjoyed" was interpreted in Taylor (supra).

Further support for this interpretation is contained in the cases dealing with pension benefits. The courts have consistently held that registered retirement savings plans, registered home ownership plans and the like do not fall within the definition of family assets. In St. Germain v St. Germain<sup>26</sup> Arnup J.A. explained that although a spouse would enjoy the security of knowing that such a pension was there:<sup>27</sup>

Since payments under the plan had not begun and were many years away, it could not be said that the interest in the plan was property "owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses..." while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes".

In reaching this conclusion the court stopped, in large part, any possibility of adapting the innovative language of McDermid C.C.J.

in Irwin v Irwin<sup>28</sup> to pension funds. The latter case dealt with the issue of whether the proceeds from a fire insurance policy on the contents of the matrimonial home could be properly considered to be a family asset, such proceeds having been paid as a result of a fire which occurred after the separation of the parties. To do so it had to fall within the terms of s.3(b) of the definition. At first sight it would appear that the insurance proceeds could not fall within this section. Since the money due under the policy was only realized after separation, the funds themselves could not be used in a fashion that would satisfy the definition of s.3(b). McDermid C.C.J. nevertheless held that the proceeds did constitute a family asset. He justified his conclusion on the ground that "both of the parties would have "the use and benefit of" the insurance policy insofar as it related to household purposes, while they were living together. Surely a household purpose would be fulfilled by the provisions of an insurance policy to provide for replacing household contents which might be lost as a result of a fire". His conclusion, however, is subject to argument. Until such time as fire ensues and the proceeds are paid over, it is difficult to see what "use" or "benefit" the parties here would have with respect to such policy. At best they would have the satisfaction of knowing that if the contents burned they would be compensated. Although the conclusion reached by McDermid C.C.J. was both a reasonable and desirable one, it is not as evident technically as it is emotionally. Any "use" the policy has seems to be a metaphysical one. It was mainly this consideration which led the court in the St.Germain case to regard the pension plan as a non-family asset. In fact, there is no substantial difference between a registered retirement savings plan and the fire insurance policy in Irwin. In each case, an "insurance policy" has been created

which seeks to provide future security. In Irwin if the contents of the house were destroyed, they would be replaced by the fire insurance policy. In the case of registered retirement savings plans, when the wage-earner's income producing days have ceased, the policy will provide the necessary funds to take the place of the salary.

St.Germain v St.Germain did not specifically over-rule the Irwin decision and it was not clear for some time whether the former case was intended to apply to pension plans in general or to the particular type of pension involved in the case itself. The uncertainty was compounded by the paucity of evidence as to the relative and respective rights of the spouses in the pension fund. This uncertainty was resolved in Re Leatherdale and Leatherdale<sup>30</sup>. In this case the Court of Appeal affirmatively stated that a registered retirement savings plan was not a family asset as defined in s.3 because it was not ordinarily used or enjoyed by the spouses within the meaning of s.3(b).

This same line of reasoning has been applied by the courts when dealing with employee savings and profit sharing plans. In Corrin v Corrin<sup>31</sup> the court had to characterize a Dofasco employees Savings and Profit Sharing Fund. In holding that the fund was not a family asset, Steinberg U.F.C.J. noted:

...firstly, that the applicant does not have a present right to use the money, as it is vested in a trustee; secondly, that the applicant has never withdrawn any moneys from the fund; and thirdly, that the fund has never been ordinarily used or enjoyed by either of the spouses for shelter, transportation or household, educational, recreational, social or aesthetic purposes.

This particular fund came up before the courts so often that

Steinberg U.F.C.J. noted in Moore v Moore<sup>32</sup> that the court was familiar with it almost to the point of being able to take judicial notice of its constitution. In cases coming before the Unified Family Court dealing with the fund the consistent approach has been to deny that it can be treated as a family asset. Their approach was affirmed by the Court of Appeal in the Leatherdale case, supra, which held that employee shares owned by the respondent husband in Bell Canada were not family assets.

There appears to be only one reported case on employee savings funds which conflicts with this general trend. Couzens v Couzens<sup>33</sup> involved, inter alia, a share purchase arrangement made available to the husband by his employer. In awarding the wife a share in the plan Stotin D.C.J. noted:<sup>34</sup>

In the case at bar I find that the share purchase made available to the husband by his employer was not a pension plan fund in its ordinary and usual meaning. While the share purchase plan was obviously designed to provide a sort of "nest egg" for retiring employees, there were immediate and distinguishing benefits. There were annual dividends in the nature of profit sharing. The plan was not compulsory and sales, while restricted, were not prohibited...

In the result he held that the acquisition of the fund was by the joint efforts of both husband and wife, since the husband's ability to acquire the shares was assisted by his wife's efforts inside and outside the home. If they were not family assets under s.4, he concluded, they were covered by s.8 and it was fair and equitable that the wife be given a one-half interest in the shareholdings.

Although the plan in Couzens differed slightly in operation from the Dofasco plan, in both cases the right to participate in the plan arose

solely by virtue of the husband's employment.- a fact outside the control of the wife. In fact, in the Couzens case not all employees, but rather only selected employees, were given the right to acquire shares based, presumably, on their work record and history. The decision therefore appears to be at odds with Corrin and it is submitted that it was wrongly decided, at least insofar as it sought to establish that the fund may have been a family asset<sup>34a</sup>.

It is clear from the foregoing that mere intention to use property in a particular way is insufficient to satisfy the requirements of ordinary use and enjoyment. Intention is not irrelevant, however. Where goods are used only occasionally for a family purpose it seems they may yet be characterized as family assets if the intention of the parties is that the property can, where required in the ordinary course of the family's life, be used for family purposes. So in Coburn v Coburn<sup>35</sup> a car owned by the husband and ordinarily used by him, but used occasionally by the wife and children, was held to be a family asset because both spouses realized and intended that it would be available for use by the family when required. In Grimes v Grimes<sup>36</sup> a bank account in the husband's name which was used occasionally for family purposes was held to be a family asset, notwithstanding that it had been resorted to sporadically for other purposes. Similarly in El-Soheny v El-Soheny<sup>37</sup> a house which had been occupied by the spouses and their children for only two weeks before they moved to Egypt and was never lived in by the family again was regarded as a family asset. It is difficult at first to reconcile these cases with the precise wording of s.3. The reasoning seems to be that if no "user" is shown, the asset cannot be a family asset. If some user is present, however, intention may be relevant to



colour the user in construing "ordinarily used and enjoyed".

In general the courts will require more frequent usage than that indicated in the foregoing cases. Normally in order to qualify as ordinary use for a family purpose, the predominant usage of the property must, in the ordinary course of usage, be a family user. Such usage involves more a qualitative analysis than a quantitative one. So in Brewer v Brewer<sup>38</sup> a boat which had been built by the husband was held not to be a family asset. There was evidence that the wife had done some work on it and had gone out in the boat about four times, once with her daughter. Gravely U.F.C.J. concluded that something more than this casual or occasional user was required to constitute a family asset. A return to this qualitative and quantitative test may be seen in the recent case of Mes v Mes<sup>39</sup>. The property in dispute here was a vacant lot which had been acquired for a family purpose, was used occasionally for family purposes and was available to the family whenever required. Nevertheless Kreever J. refused to characterize it as a family asset. He explained:<sup>40</sup>

My interpretation of the adverb "ordinarily" excludes the use or enjoyment I have described with respect to the Alta Vista property (some visits by the wife and children and less than six family picnics). I conclude that this property was not a family asset.

The decided cases on this issue are not entirely consistent. Each case seems to turn on its own particular facts and it would be difficult to predict in advance how a court would be likely to classify occasional usage of an asset where it is accompanied by intention that the asset be available to the family. This uncertainty is to be regretted in a statute which seeks to avoid litigation by clearly setting out in

advance those items of property in which a spouse has a prima facie right to share on marital breakdown.

"By both spouses or one or more of their children" .

The Act imposes a user test by both spouses or one or more of their children<sup>41</sup>. Property used by only one spouse will not be a family asset. Thus in Bregman v Bregman<sup>42</sup> it was held that a sailboat used exclusively by the husband for sailing and entertaining was not a family asset, notwithstanding that its predecessor had been used by the husband and one of the children and therefore would have been a family asset. While use by one spouse alone will not suffice to make a property a family asset, use by one child alone is sufficient for this purpose. Thus if in the Bregman case the boat had been used exclusively by one of the children it would have fallen within the family assets category. The distinction can have bizarre results. Thus if a husband has a set of fishing rods and is the only member of his family to use them, the rods would not be a family asset. If, however, the husband's rods were used by one of the children then they would fall within this class. The logic behind the distinction seems to be that some person other than the spouse who owns the asset in question must have the use of that asset before it can be regarded as family property. Yet if that is the case then surely if in the example above the wife was the only member of the family to use the fishing rods, that should be sufficient to satisfy this requirement. According to the definition, however, that use, being use by only one of the spouses, would not be sufficient.

"While the spouses are residing together".

It seems implicit in the words used in s.3(b) that assets, to be family assets, must have been acquired while the spouses were residing together in a conjugal relationship. Accordingly property acquired after separation is excluded from the operation of the Act. No cases have yet been reported in which the phrase "residing together" has been interpreted. The phrase is not free from ambiguity. Thus under s.4 of the Divorce Act<sup>43</sup> it has been held in several cases that the spouses were not residing together but were living separate and apart while living under the same roof, in view of the spouses' intention to treat the relationship as being at an end. Factors which have been considered relevant have included cessation of sexual relations, the degree of contact and whether one spouse performs services for the other<sup>44</sup>. Whether the Ontario courts will follow this approach has yet to be seen. The question could be important where a spouse alleges that property acquired by him while the spouses were living under the same roof and which was used by his children should nevertheless not be regarded as a family asset by reason of the fact that the spouses had not been living in a conjugal relationship. In order to determine the character of such an asset, the court will first have to decide what type of marital relationship is envisaged by the Act in the words "residing together".

"For shelter or transportation, etc.".

In order to qualify as a family asset an item of property must be used for any one of the listed "family purposes"<sup>45</sup>. For this reason

items purchased for investment purposes only are excluded. Thus in Boydell v Boydell<sup>46</sup> the wife's doll collection was held not to be a family asset because it was a purely financial venture, in addition to its not being "used" by the husband. Similarly in Irrsack v Irrsack<sup>47</sup> it was held that a personal chequing account, a savings account and a term account belonging to the husband were not family assets. There was no evidence that they had ever been used for a family purpose and the court felt that they were probably used by the husband as repositories for excess cash accumulated out of his bakery business.

Where assets are used for only one purpose and would generally be used only in such a manner, the question of whether or not property is a family asset will depend on whether or not the user falls within s.3(b). Difficulties may arise, however, where property is used for a number of purposes, only one of which is a family purpose. An example might be where a painting was acquired partly for aesthetic purposes and partly as an investment. In such a case the question of whether the painting is a family asset will depend on whether the court uses a test of predominant purpose or one based on the fact that since the asset has been acquired partly for one of the purposes specified, it should be classified as a family asset. The courts have used both approaches in practice. In Dittmer v Dittmer<sup>48</sup> the wife kept money she had inherited from her father's estate in a separate bank account but used part of the money to purchase household furniture. Although the account had been used partly for family purposes the court held that its primary nature was a private one and accordingly held that the account was not a family asset. This case may be contrasted with Coburn v Coburn<sup>49</sup>. As already noted, the court here held that although

the husband's car was rarely used for family purposes it was nevertheless a family asset because both spouses realized and intended that the car would be available when required. The cases may, perhaps, be resolved on the basis that the wife had free access to the car in Coburn whereas in Dittmer only the wife would have had direct access to the bank account. This explanation is unsatisfactory, however, as it still fails to explain how often an asset must be used in order to qualify as a family asset rather than a business asset where it has more than one use. Since s.3 requires that assets should be "ordinarily used and enjoyed" for a family purpose, it is submitted that the asset should be predominantly used for such a purpose in order to qualify as a family asset.

#### Business assets.

Business assets are not generally subject to division under the Family Law Reform Act since they do not constitute family assets. In certain circumstances, however, a spouse may apply for a share of non-family assets under either s.4(6) or s.8 or a combination of the two. The effect of these sections is to convert property into "family assets" of a kind, even though such property is not defined in the Act as a family asset.

Section 4(6) of the Act provides as follows:

4(6) The court shall make a division of any property that is not a family asset where,

....

- (b) the result of a division of the family assets would be inequitable in all the circumstances, having regard to,
  - (i) the considerations set out in clauses (a) to (f) of

subsection (4) and,

(ii) the effect of the assumption by one spouse of any of the responsibilities set out in subsection (5) on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset.

Sections 4(4) and 4(5) read respectively;

4(4) The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to,

(a) any agreement other than a domestic contract;

(b) the duration of the period of cohabitation under the marriage;

(c) the duration of the period during which the spouses have lived separate and apart;

(d) the date when the property was acquired;

(e) the extent to which property was acquired by one spouse by inheritance or by gift; or

(f) any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

4(5) The purpose of this section is to recognise that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in subsections (4) and (6).

Section 8 is also concerned with providing for a distribution of business assets and states:

8. Where one spouse or former spouse has contributed work, money or money's worth in respect of the acquisition, management, operation or improvement of property other than family assets, in which the other spouse has or had an interest, upon application, the court may by order

(a) direct the payment of an amount in compensation therefor; or

(b) award a share of the interest of the other spouse or former spouse in the property appropriate to the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

The basis for awarding a share under s.4(6) or s.8 in non-family assets is different. Section 4(6) is designed to deal with the assumption by one spouse of the role of homemaker, thereby freeing the other spouse to build up non-family assets, whereas s.8 is designed to cover more direct contributions through financial contribution or labour, which relate directly to the building up of the non-family asset.

The Family Law Reform Act has not been interpreted in the same manner in this regard as has the comparative British Columbia legislation<sup>49a</sup>, nor has it caused the same difficulties for the courts. The courts in British Columbia, for example, have disagreed widely as to whether a direct contribution to business property is necessary to bring that property within a distribution or whether, by establishing that she has been a good wife and mother, a petitioner thereby makes out a prima facie case as to her entitlement to share in her husband's business assets<sup>49b</sup>. From the beginning, the courts in Ontario insisted that in order to satisfy s.8, a contribution must be of a direct nature. In other words, there must be a direct correlation between the contribution made and the ability of the husband to acquire business assets. So in Bregman v Bregman<sup>49c</sup> the fact that the wife had worked to put her husband through university did not operate so as to bring that contribution under s.8. A number of lower court decisions followed this line<sup>49d</sup>, and the approach was affirmed by the Court of Appeal in Leatherdale v Leatherdale<sup>49e</sup> and Young v Young<sup>49f</sup>.

Leatherdale and Young also discussed the question of what is required to establish a claim under s.4(6). They made it clear that the simple performance of household duties will not provide a basis for a claim to share in business assets under this section. What is required is a causal connection between the s.4(5) contribution and the particular asset claimed against. The reward for performance of household duties, it was said, was as a general rule via a division of family assets and not a division of non-family assets.

Two things appear to cast this analysis into doubt. First, the "root" Court of Appeal decision - Leatherdale v Leatherdale - is before the Supreme Court of Canada; second, a decision of the Court of Appeal itself in Colville-Reeves v Colville-Reeves<sup>49g</sup>. At trial in this case it was found that the wife was not entitled to a division of non-family assets by reason of the assumption of the responsibilities set out in s.4(5) of the Act. The wife, however, was awarded an interest on the basis that, in the circumstances, a division of non-family assets was required to redress inequity. The husband appealed and alleged that the trial judge had erred in failing to read the two subparagraphs of s.4(6)(b) conjunctively. Cacourciere J.A. agreed that the trial court was incorrect in viewing the prerequisites under s.4(6)(b) as disjunctive. He continued; however:<sup>49h</sup>

While we agree that both paragraphs must be read conjunctively it does not follow that the award of a share of non-family assets must fail. The statute only requires that the court have regard to the effect of the assumption by one spouse of any of the responsibilities set out in subs.(5) in deciding whether the division of the family assets would be inequitable in all the circumstances. The learned trial judge did exactly this. In our respectful view, he applied all the statutory criteria before he decided that, in the circumstances, a division of non-family assets was required to redress inequality.

Having regard to the remedial quality of the family law reform



legislation and to the context of the entire Act, its preamble and particularly s.4, we are of the view that a court is not required to impose the stringent limitations argued for in making a division of non-family assets. While the learned trial judge was wrong in reading s.4(6)(b) disjunctively, he did, in our view, consider the effect of the assumption by the respondent of the responsibilities set out in subs.(5) and that is all that he was required to do by s.4(6)(b).

The appeal, accordingly, was dismissed.

What the Court of Appeal held here is that it is not necessary to prove an inequity pursuant to s.4(4) and then to prove some, albeit indirect, contribution between the s.4(5) contribution and the non-family assets. It is sufficient if an inequity exists in some "overall" sense. In effect, a trial judge is given an absolute discretion: if he turns his attention to s.4(4) and (5) he is entitled to do equity. The difficulty with this conclusion is that it appears to fly in the face of the decision of Wilson J.A. in Young v Young, which required a connection between s.4(5) and the assets. If the decision in Young was to be overruled, it is most surprising that no mention was made of the case. Indeed, when a decision appears to run contrary to the general trend, in law, it is surprising that there is no analysis of the relevant authorities. It is not clear where the Colville-Reeves case fits into the analytical scheme outlined above. As the situation now stands, there would appear to be two conflicting Court of Appeal decisions as to how to approach a claim under s.4(6).

An issue which has not yet been definitively answered in any reported decision concerns the nature of the contribution required under s.8 and (possibly) s.4(6). Direct contributions are usually relatively easy to establish. So in Boydell v Boydell<sup>49j</sup> the fact that the husband

had built cabinets for his wife's doll collection and had driven her around in connection with it was held to be a contribution under s.8. A number of less tangible contributions were referred to in Diamond v Sugar<sup>49k</sup>. The wife here had signed as guarantor on certain loans, allowed a mortgage on the jointly held matrimonial home and posted certain securities. The court held that in each of these circumstances contribution was made out within the meaning of s.8. No doubt there will be cases in the future where the contribution alleged is not one that obviously falls within s.8 or s.4(6). It has yet to be decided, for example, whether post-separation contributions would fall under this head. So would a wife who began working for her husband's company after the separation of the spouses be entitled to claim a share in the company's assets under s.8? These and similar questions remain to be resolved.

Another question which remains outstanding is how a court is to assess a contribution once it has been established. Sections 8 and 4(6) provide no guidance as to the assessment of the value of a contribution. This is a matter which the courts have had to determine on the basis of the facts of individual cases. The inexact manner in which the courts assess the value of contributions has been noted in a number of cases<sup>49m</sup>. Given the wording of the sections, however, there seems no way this question can be decided other than on a purely ad hoc basis.

#### Onus of proof

In Bregman v Bregman<sup>50</sup> it was held that in identifying which assets are family assets the onus is on the person claiming a division of them. He or she, accordingly, must prove that the assets were used for a family

purpose.

It is not clear how great an onus lies on a spouse in this regard. It appears, however, that in the absence of direct evidence as to usage, the court will assume usage from the lifestyle of the family. Thus in Meszaros v Meszaros<sup>51</sup> there was a paucity of evidence as to the use of a boat, trailer and skidoo but, owing to the fact that the family went camping and the nature of the goods, it was held that more probably than not these goods were all used and enjoyed by the family and were family assets. Where, however, the asset in question was a bank account, which would normally be regarded as an investment, direct evidence as to its use for a family purpose would probably be required.

#### Changing character of an asset.

A number of questions may arise under this category.

- (A) When a family asset is sold, do the proceeds of sale qualify as a family asset?
- (B) If a family asset is sold and the proceeds are used to purchase a non-family asset, do any rights in regard to the original family asset survive?
- (C) May the character of an asset change with a change in user?

#### (A) Proceeds of sale

As already explained, the Family Law Reform Act still retains the concept of separate property while the spouses are living together. It is only upon marriage breakdown that a spouse becomes entitled to share

in family assets, irrespective of legal ownership. The doctrine of separate property means that each spouse is free to dispose of his or her assets. In order to determine when this right ceases it is necessary to establish at what stage entitlement to a share in the family assets crystallizes, in other words, what is the relevant cut-off date. There are a number of possibilities: (a) before separation; (b) at the time of separation; or (c) at the date of the application for division.

Date (a) is clearly inconsistent with the notion of separate property and must be rejected. As between dates (b) and (c), date (c) would at first appear to be the most logical. The spouses may, after all, have been separated for many years without having had any intention of divorcing or dividing the property. In such an instance it would be unfair if one spouse could then seek to share in assets which had been disposed of while he or she was no longer a real part of the family. It would also be unfair to the owner spouse in such circumstances to inhibit his or her rights to deal with his or her property, especially since it will not always be clear whether the property being dealt with would be regarded by the court as a family asset. On the other hand, it may be argued that if a legal claim to property existed at any time before the property was disposed of, then the proceeds ought fairly to be distributed between the spouses.

The practice of the courts with regard to the proceeds of sale has been to choose the date of separation as the cut-off date. Thus in Woodbyrne v Woodbyrne<sup>52</sup> the husband had sold the matrimonial home (which was in his sole name), to a bona fide purchaser after he had separated from his spouse but before she had made an application to the court for

a division of property. It was held that the proceeds of sale were a family asset. In Prytula v Prytula<sup>53</sup> the wife had sold the matrimonial home (again in her sole name) to her father, being under the mistaken belief that she was entitled to do so notwithstanding the Family Law Refrom Act. When the husband then brought an application for division of assets, the court held that the proceeds stood in the place of the matrimonial home and should be divided. A similar conclusion was reached in Doroshenko v Doroshenko<sup>54</sup>, a case which was also concerned with the sale of a matrimonial home. The principle has also been extended beyond the sale of matrimonial homes. So in De Ross v De Ross<sup>55</sup> the husband had spent \$22,981.72 from a joint bank account after separation but before an application by the wife for a division of assets in order to purchase investment properties. In awarding the wife an equal share in that sum, Misner L.J.S.C. explained:<sup>56</sup>

Obviously, as of the date of the breakdown of the marriage the joint bank account was a family asset, and the question arises as to whether or not Mrs. De Ross is entitled to claim a division of the down payment at this stage. In my view she is so entitled. The legal ownership of existing property (save only for the matrimonial home) is not affected by the Family Law Reform Act until the conditions precedent to the operation of s.4 are met. Essentially that means that the provisions of the Act insofar as they affect beneficial entitlements to property come into play once there is no reasonable prospect of the resumption of cohabitation, and the class of family assets is to be determined as of that date.

This approach was recently adopted in Samson v Samson<sup>57</sup>. In this case a husband had disposed of his car before trial. At trial it was found that the car would have been a family asset. Accordingly the proceeds of sale were regarded as family assets in its stead, and a division of the proceeds was ordered.

In only one reported instance has this approach been departed

from. Mes v Mes<sup>58</sup> concerned an instance where a wife, while in interim exclusive possession of the matrimonial home and contents pursuant to a Provincial court order, sold the bulk of the contents to used furniture dealers and left the province. The husband subsequently repurchased the same furniture. On existing authority, the wife should have been bound to account to the husband for half the proceeds of sale. Not only did the court fail to order such an accounting, it ordered that the repurchased furniture be divided equally between the spouses on the basis that they were family assets. No reason was given for not dividing the proceeds of sale. Kreever J. simply refused to give credit for the money. He then somewhat inconsistently held that when the husband repurchased the furniture, it retained its character as a family asset, and allowed the wife to share. If the husband had replaced the furniture with new furniture, the new furniture could not, on any logical basis, be regarded as family assets; it clearly was not used so as to fall within s.3(b). No furniture acquired after separation can qualify as a family asset. When the furniture was sold it then ceased to belong to the spouses, title instead lying in the furniture dealers. On repurchase by the husband the furniture should have been regarded as new property. Given the absence of logical reasoning in the judgment it is submitted that Mes v Mes should not be regarded as having changed the law on the matter of family assets sold after separation.

Further support for the former approach in this regard is echoed in the courts' approach to insurance proceeds as family assets. Thus in Irwin v Irwin<sup>59</sup> the court found that where family assets had been destroyed in a fire, the proceeds from a fire insurance policy stood in their stead and the wife was entitled to a share in them. Although Irwin

may be criticized for its reasoning in this regard<sup>60</sup>, the principle that an insurance policy can stand in the place of a family asset has been followed in subsequent cases. Thus in Toth v Toth<sup>61</sup>, where a van was purchased by the husband after separation, using the proceeds of an insurance policy on a previous van which had been used for family purposes, Clemens C.C.J. held that the money received as a result of the insurance proceeds was available for consideration in a division.

Employing the date of separation as the cut-off date does have the advantage of protecting family assets. Employing the date of application as the operative date could result in one spouse disposing of assets within his control after separation, to the detriment of the non-possessory or non-titled spouse. Some protection could be achieved through a restraining order under s.9, a division of non-family assets under s.4(4)(a) or an unequal division of family assets under s.4(4)(f). It seems that preservation orders may be obtained relatively easily, at any rate insofar as family assets are concerned. In Mageau v Mageau<sup>62</sup> it was held that interim preservation orders may be made as a matter of course in the case of family assets. In the case of non-family assets, on the other hand, it was said that there would be a heavy onus on the applicant. Since it may be difficult before trial to determine which items of property constitute family assets, s.9 may prove difficult to implement in some cases. It is also probably unfair to oblige one spouse to resort to added litigation in order to protect his or her rights to marital property. The use of the date of separation as the cut-off date, on the other hand, would deter dispositions without the need for extra court action since the value of the disposed property would be included in a division.

(B) Family assets sold and a non-family asset acquired with proceeds.

Again there is a question here as to the relevant cut-off date. If before separation an asset is acquired out of funds which come from the sale of a family asset, that asset does not become a family asset unless the new asset is used as required by s.3(b). Thus in Bregman v Bregman<sup>63</sup> a sailboat which Mr. Bregman used for entertaining and which one of the children also used, was sold, and a second sailboat purchased from the proceeds. This second boat was used almost exclusively by Mr. Bregman for sailing and entertaining business clients. It was held that as this boat had not been ordinarily used or enjoyed by both spouses or one or more of their children it was not a family asset. The fact that the first boat was a family asset did not mean that the replacement automatically became a family asset.

Where a family asset is sold after separation and the proceeds used to purchase a non-family asset, the courts do recognise that some rights remain in respect of the original property. They have generally been reluctant to allow any tracing into the new property. The new property does not become a family asset. Instead the courts will demand that the vendor spouse account for half the proceeds of sale of the original property, despite the fact that these proceeds have since been converted into new property. Thus in De Ross v De Ross<sup>64</sup> although the wife was not allowed to share in the investment property which her husband had purchased with the proceeds of a family asset, she was held entitled to an equal share in the proceeds themselves. Similarly in Toth v Toth<sup>65</sup> the wife was held entitled to share in the insurance proceeds of the original property and not to the van which those proceeds had been



used to purchase.

(C) Change in user of property.

The issue of the relevant cut-off date is also important to this issue. As far as the matrimonial home is concerned, it seems clear that the mere fact that there has been a change in user will not take the property outside the definition, since in defining "matrimonial home" the Act states "is or has been occupied"<sup>66</sup>. Consequently if a house were once used as a matrimonial home but is now, for example, used for rental purposes, it remains a matrimonial home.

As regards other assets, it is evident that non-family assets can be converted into family assets by a change in user. No asset becomes a family asset until it is used in the requisite manner. Thus in Bregman v Bregman<sup>67</sup> it was held that a Picasso painting purchased by the husband's company (in which the husband was the sole shareholder), for use in his office, became a family asset when transferred subsequently to the family home.

The question of whether a family asset may be converted into a non-family asset by a change in user is more complicated. To date no court has dealt with the issue in any analytical fashion. In Bregman v Bregman the husband had attempted to change the status of the painting once more by removing it from the house on the eve of separation and returning it to his office. Henry J. held that the status of the painting could not be changed so easily and determined that the painting was still a family asset. He explained that "with the marriage breakdown

imminent, he (the husband) was not entitled to remove it"<sup>68</sup>. There seems to be no reason why in other circumstances a family asset may not change its status to that of a non-family asset. Thus if in Bregman the painting had originally been purchased to hang in the matrimonial home but on being found unsuitable had been removed to the husband's office, it seems that the painting would then have become a non-family asset. Clearly what is important is the intention behind the purported change in user.

Date of valuation.

In several cases an issue has arisen as to the date at which an asset ought to be valued for the purpose of s.4. In Boydell v Boydell<sup>69</sup> Gravelly U.F.C.J. noted that s.4 of the Family Law Reform Act does not specifically require that an accounting be made at the date of separation. Where an asset is a depleting one it may be that the court will try to preserve the value as of the date of separation, subject to the equities of the situation. An increase in the value of a family asset subsequent to separation will be taken into account, as will improvements which enhance the value of the family asset. In Saint-Louis v Saint-Louis<sup>70</sup> the court rejected the argument that the date of valuation of the matrimonial home for the purposes of division should be the date of separation and not the date of partition and sale. To accept such an argument would give the spouse in whose name title stood an inherent advantage which was contrary to the philosophy of the Family Law Reform Act that it mattered not in whose name title stood. So long as it was a family asset it was subject to 50-50 division, subject to other considerations in s.4(4) of the Act. However, the value of improvements made after the date of separation were taken into account.

A later case on the issue of improvements is Brock v Brendon<sup>71</sup>. The view was expressed here that it should not be entirely open to the party who retains possession of the matrimonial home after separation to spend whatever he or she wants with respect to improvements and be able to charge that amount to the other party without limit. Accordingly the court limited reimbursement for improvement.

In Grimes v Grimes<sup>72</sup> the date of application as opposed to the date of separation was chosen as the relevant date of valuation on the grounds that it would be fairer to the wife in the circumstances. The implication was that each case must turn on its own facts. On this reasoning, where property has increased in value since separation mainly because of inflation, the court will be prepared to value the property as of the date of application or the date of trial. Where the increase in value is solely due to the efforts of the owner spouse, then the date of separation would be the more appropriate date.

The most recent reported case on this issue is Re Young and Young<sup>73</sup>. The Court of Appeal here held that the date of trial is the appropriate date of valuation of real property where division is made in a matrimonial proceeding. The court also said that where an appeal was taken from a trial judge's decision and allowed, the dollar value of the parties' interest as determined on the appeal should not be fixed as of the date of trial. The appellant in such a case would assume the risk of a fluctuating real estate market. No mention was made as to what the result would be where the increase in value was due in part to the efforts of the owner spouse. One assumes, however, that the owner spouse would normally be compensated for improvements made or effort expended in

maintaining the property.

As this is the most recent, and indeed the only, pronouncement of the Court of Appeal to date on the issue of the appropriate date for valuation, it seems that normally the date of valuation will be the date of trial.

The Matrimonial Home

The most significant asset owned by most families is the matrimonial home. As already noted, the matrimonial home is specifically included in the definition of family assets under s.3(b). The term "matrimonial home" is further defined in s.39 as follows:

Property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their family residence is their matrimonial home.

The definition is further extended by s.38 and s.39(2). Section 38 provides the term "property" includes both real and personal property. Thus in Caldwell v Caldwell<sup>74</sup> it was held that a trailer and motor home were encompassed within the definition of "matrimonial home", having been occupied as a family residence. Section 39(2) makes clear that spouses may own more than one matrimonial home.

Probably one of the most difficult aspects of the definition lies in deciphering what the term "interest" means. The word "interest" is not defined in the Act. The customary meaning of the word would include a fee simple, life estate, leasehold and indeed any estate or interest recorded in law or equity. In practice the courts have found that a narrower definition may be required for the purposes of matrimonial property.

The first area of difficulty concerns whether the Act may apply to property which is in some way under federal control. In Sandy v Sandy<sup>75</sup> Grange J. for the High Court was of opinion that the provisions

of the Family Law Reform Act were ultra vires insofar as it was sought to deal with land covered by the Indian Act<sup>76</sup>. He pointed out that the Indian Act restricted rights with respect to occupation, transfer and encumbering of such lands and felt that all these restrictions and provisions militated against any provincial legislative control over lands reserved for Indians. The rigours of this decision were softened somewhat on appeal to the Court of Appeal<sup>77</sup>. Jessup J.A. noted:<sup>78</sup>

In our opinion the Family Law Reform Act 1978...is within the constitutional competence of the Province but is inoperative to the extent only that it affects lands occupied on a reserve by an Indian with the approval of the band and the approval of the Department of Indian Affairs. In our view the provisions of the Family Law Reform Act 1978 relating to personal property are not in conflict with the Indian Act...Further, we are of the view that an Indian such as the respondent husband in this case has an "interest" in real property within the meaning of s.8 of the Family Law Reform Act, 1978, and that his spouse is therefore entitled to a payment in compensation for the matters referred to in s.8, although she is not entitled to an award of a share of an interest of her husband in the real property. We do not purport to enumerate all of the sections of the Family Law Reform Act...which in our opinion are not in conflict with the Indian Act and are, therefore, of application to Indians.

The decision of the Court of Appeal is somewhat vague. What Jessup J.A. seems to be saying is that the Family Law Reform Act cannot order a sale of property which is subject to the Indian Act, although it can order monetary compensation for a spouse's efforts in the marriage. To this extent it seems that the Family Law Reform Act applies to Indians except to the extent that there is an operational incompatibility between the two Acts. This is certainly the interpretation that was chosen by the court in Hopkins v Hopkins<sup>79</sup>, where it was held that there was no inconsistency between the Indian Act and the Family Law Reform Act so as to interfere with its jurisdiction to grant an order for exclusive possession to another Indian. It was recognised by the court that such an order is limited by the Indian Act, to be made only

in favour of an Indian spouse, and its execution is subject to the approval of the Minister of Indian Affairs and Northern Development.

A similar approach has been used when dealing with land subject to the Veteran's Land Act<sup>80</sup>. Thus in Re Brown and Brown<sup>81</sup>, on the question of whether the husband had an "interest" in the home to satisfy the requirement of s.39(1), Meehan C.C.J. noted:<sup>82</sup>

Here it is not a question of the transferability of the veteran's interest, but merely the existence of some interest as a threshold test for the application of Parts I and III of the Family Law Reform Act...It is submitted that the test is satisfied.

The Court of Appeal in Re Whitely<sup>81a</sup> went further than this, however. The court clearly felt that the fact that title chances to be in the name of the director of the Veteran's Land Act by virtue of a mortgage arrangement with the equitable owner, should not operate so as to deprive the non-owner spouse of her rights. It expressed the view that the vesting of title in the director is more a matter of form and ought not to interfere with the substantive rights of the parties. Accordingly, having found that the wife had an equitable right in the marital home, an order was made that the defendant husband held his rights to a conveyance from the director (when the loan for the home had been repaid), in trust for the plaintiff as to a one-half interest and that he held the property, when title was acquired by him, in trust for the plaintiff to the extent of a one-half interest.

Another question which arises from the term "interest" concerns whether possessory rights and other personal interests are encompassed within its meaning. Thus, for example, if a husband and wife occupied

a house owned by the husband's parents, would the husband be regarded as having any "interest" in the house if there was a vague promise on the part of his parents that the house would one day go to him? It is submitted that such an interest would be regarded as too insubstantial to constitute a marital asset, for how could any value be placed on such an asset? Such a case has yet to come before the Ontario courts, however, and it may be that a broader view would be taken.

A peculiarity of the definition of matrimonial home is that it includes property "that is or has been occupied" by the spouses. Thus if a property has been used at any time as the family residence it will always retain its status as the matrimonial home even if at the time of separation it is no longer used for that purpose. So in Meszaros v Meszaros<sup>83</sup> the court found that there were two matrimonial homes among the family assets, despite the fact that one of the houses had not been used as a family residence in many years. Thus, unlike other family assets, a matrimonial home cannot change its character.

In order to come within the definition of a matrimonial home, a house must be occupied as the "family residence". A number of cases have dealt with the quality of "residence" which is required in this regard. The first reported case to touch upon this issue was Taylor v Taylor<sup>84</sup>. According to this case, more than simple occupation is required and a house must be the place around which the family's normal life revolves in order to constitute a matrimonial home. Accordingly a condominium in Florida was held not to be a matrimonial home where it had been used by the spouses on only a very infrequent basis. It seems that the length of residence will not be a conclusive factor, however.



So in El Soheny v El Soheny<sup>85</sup> a condominium had been occupied by the parties and their children for only two weeks. The parties had then gone to Egypt and separated shortly thereafter, so the condominium was never used by the entire family again. In holding that the condominium was a matrimonial home, the court noted that the parties had moved their furniture into the condominium during their stay and there was evidence that the husband had purchased the property specifically for use as a matrimonial home. By contrast, in Victoria Grey Trust v Stewart<sup>86</sup> a one week to ten day residence by the wife and children with the husband in a house, which residence was for the purpose of reconciliation, was held to be insufficient to convert the house into a matrimonial home. Carter C.C.J. noted that the wife had not brought any furniture with her but that she and the children had moved in simply with their clothes. He concluded that there were insufficient facts to justify a finding that the property was a matrimonial home. It seems that the important factor in this case was the character of user and the intention behind the user. It would appear that where the family is still a functioning unit and the intention is to actually occupy property as a family residence, that should be sufficient to bring a house within the definition of a matrimonial home irrespective of the length of residence. Where the intention to reside in the house as a family is missing, then the definition will not be satisfied. This reasoning would explain the case of Elliot v Elliot<sup>87</sup>, where Currelly L.J.S.C. found that a two week occupancy of a property by a husband and wife pending a return to their customary matrimonial home was not sufficient to convert the second property into a "matrimonial home".

Section 39(4) has the effect of limiting the extent of a

matrimonial home. This section provides:

(4) Where property that includes a matrimonial home is normally used for a purpose other than residential only, the matrimonial home is only such portion of the property as may reasonably be regarded as necessary to the use and enjoyment of the residence.

One of the first cases to deal with this section was Youngblut v Youngblut<sup>88</sup>. The court held in this case that only the family residence and a small area of surrounding land qualified as the matrimonial home and that the remainder of the farm could not reasonably be regarded as being an intrinsic part of the family residence. So also in Ling v Ling<sup>89</sup> the court pointed out that in the absence of evidence one cannot reasonably regard a 97 acre farm as being necessary to the use and enjoyment of the matrimonial home. Accordingly only the surrounding acreage was held to be a part of the matrimonial home. The size of the property alone is not the crucial factor in these cases. More important is the nature of the use. In Dowding v Dowding<sup>90</sup>, therefore, the 38 acres of land surrounding the matrimonial home were held to be part of it since they were used for recreational purposes and formed an integral part of it.

Part III of the Act which deals with matrimonial homes only applies to property situate in Ontario<sup>91</sup>. This accords with the well accepted principle of Conflict of Laws that a court should not deal with property which is situate outwith its jurisdiction. Section 13(2), however, provides that if the matrimonial home is located outside Ontario, the value of the property will be taken into account under s.4, at least to the extent that there are other or sufficient assets within the province.

Footnotes to Chapter 7

1. 1978 (Ont.), c.2, now R.S.O. 1980, c.152.
2. Report on Family Law: Part I, Torts (1969); Part II, Marriage (1970); Part III, Children (1973); Part IV, Family Property Law (1974); Part V, Family Courts (1974); Part VI, Support Obligations (1975).
3. S.O. 1975, c.41.
4. Ibid, subsection 1(1).
5. Ibid, subsection 1(3)(a).
6. [1975] 1 S.C.R. 423. Section 1(3)(c) of the Act provides as follows:  
"...except as agreed between them, where a husband or wife contributes work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a property in which the other has or had an interest, the husband and wife shall not be disentitled to any right or compensation or other interest flowing from such a contribution by reason only of the relationship of husband and wife or that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances."
7. Bill 140, 1976 (3rd Sess.) (Ont.) was given first reading on October 26, 1976, but died on the order paper at Christmas recess. Its successor, Bill 6, 1977 (4th Sess.) (Ont.) was given first reading on March 31, 1977, but it also died on the order paper when the Ontario government called a Spring election.
8. S.4(1).
9. S.4(4).
10. S.4(6)(a).
11. S.4(6)(c).
12. S.8.
13. (1979), 7 R.F.L.(2d) 318, at p.323 (Ont. H.C.).
14. S.39(1).
15. (1978), 22 O.R.(2d) 695 (Ont. H.C.).
16. (1980), 15 R.F.L.(2d) 225 (Ont. U.F.C.).
17. (1979), 9 R.F.L.(2d) 332 (Ont. H.C.).
18. (1979), 21 O.R.(2d) 722; 7 R.F.L.(2d) 201; 91 D.L.R.(3d) 470 (H.C.).

19. (1978), 20 O.R.(2d) 185; 1 R.F.L.(2d) 339 (Fam. Law Div.).
20. Supra, n.17.
21. (1978), 2 R.F.L.(2d) 121 (Ont. U.F.C.).
22. (1978), 6 R.F.L.(2d) 341 (Ont. U.F.C.).
23. Ibid, p.354.
24. (1981), 21 R.F.L.(2d) 74 (Ont. Co. Ct.).
25. Ibid, p.81.
26. (1980), 14 R.F.L.(2d) 186 (Ont. C.A.).
27. Ibid, p.192.
28. (1980), 25 O.R.(2d) 251; 12 R.F.L.(2d) 5 (Co. Ct.).
29. Ibid, pp.252,253.
30. (1981), 31 O.R.(2d) 141; 19 R.F.L.(2d) 148; 118 D.L.R.(3d) 72 (C.A.).
31. Ont. U.F.C., February 22, 1979 (unreported).
32. (1980), 14 R.F.L.(2d) 63 (Ont. U.F.C.).
33. (1981), 18 R.F.L.(2d) 333 (Ont. D.C.).
34. Ibid, p.343.
- 34a. Note, an appeal from this decision to the Ontario Court of Appeal has now been reported at (1982), 34 O.R.(2d) 87; 24 R.F.L.(2d) 243. Lacourciere J.A. for the court seems to have assumed that the fund in question was a family asset. He found that s.8 did not apply to the non-family assets, as there was no evidence that the wife made a direct contribution to the acquisition of the shares as opposed to an indirect contribution by the major assumption of the joint responsibilities of child care and household management. Section 4 was, therefore, the appropriate section to be applied. He felt that the considerations which prompted the trial judge to give the wife a share of the non-family assets made an equal distribution of the main family assets inequitable and held that the entire net proceeds from the sale of the matrimonial home should be paid to the wife. Once this was done, he pointed out, the division of family assets was no longer inequitable and a division of non-family assets pursuant to s.4(6) was no longer necessary (See infra, pp. 209-214).
35. (1978), 6 R.F.L.(2d) 235 (Ont. U.F.C.).
36. (1980), 16 R.F.L.(2d) 365 (Ont. H.C.).
37. (1981), 17 R.F.L.(2d) 1 (Ont. H.C.).

38. (1980), 17 R.F.L.(2d) 215 (Ont. U.F.C.).
39. (1982), 24 R.F.L.(2d) 257 (Ont. H.C.).
40. Ibid, p.273.
41. "Child" is defined in s.1(a) and includes those who formerly would have been illegitimate children and children in relation to whom a person has demonstrated a settled intention to treat as a child of the family.
42. Supra, n.18.
43. R.S.C. 1970, c.M-5.
44. For example, see Rushton v Rushton, (1968), 1 R.F.L. 215 (B.C.S.C.).
45. S. 3(b).
46. Supra, n.21.
47. (1979), 22 O.R.(2d) 245; 93 D.L.R.(3d) 139 (H.C.).
48. (1978), 1 F.L.R.A.C. 252 (Ont. Co. Ct.).
49. Supra, n.35.
- 49a. The Family Relations Act, R.S.B.C. 1979, c.121, ss. 45(3)(e) and 46.
- 49b. For example, contrast the decision in Simpkins v Simpkins, (1981), 29 B.C.L.R. 339 (S.C.), with Johnson v Johnson, (1982), 24 R.F.L.(2d) 70 (B.C.S.C.).
- 49c. Supra, n.18.
- 49d. For example, Silverstein v Silverstein, supra, n.19, Meszaros v Meszaros, supra, n.15.
- 49e. Supra, n.30.
- 49f. (1981), 21 R.F.L.(2d) 388; 32 O.R.(2d) 19; 120 D.L.R.(3d) 662 (C.A.).
- 49g. (1982), 27 R.F.L.(2d) 337 (Ont. C.A.).
- 49h. Ibid, pp.340,341.
- 49j. Supra, n.21.
- 49k. (1980), 19 R.F.L.(2d) 1 (Ont. H.C.).
- 49m. Boydell v Boydell, supra, n.21; McIntyre v McIntyre, (1979), 9 R.F.L.(2d) 332 (Ont. H.C.); Stere v Stere, (1980), 15 R.F.L.(2d) 357 (Ont. H.C.); and Fletcher v Fletcher, (1980), 17 R.F.L.(2d) 325 (Ont. U.F.C.).
50. Supra, n.18.

51. *Supra*, n.15.
52. (1980), 16 R.F.L.(2d) 180 (Ont. U.F.C.).
53. (1981), 30 O.R.(2d) 325; 19 R.F.L.(2d) 440 (H.C.).
54. (1977), 9 R.F.L.(2d) 61 (Ont. Co. Ct.).
55. (1981), 19 R.F.L.(2d) 358 (Ont. H.C.).
56. *Ibid*, p.372.
57. (1982), 24 R.F.L.(2d) 433 (Ont. Co. Ct.).
58. *Supra*, n.39.
59. *Supra*, n.28.
60. See *infra*, at pp.200-202.
61. *Supra*, n.24.
62. (1979), 8 R.F.L.(2d) 282 (Ont. Prov. Ct.).
63. *Supra*, n.18.
64. *Supra*, n.55.
65. *Supra*, n.24.
66. S.39(1).
67. *Supra*, n.18.
68. *Ibid*, p.212.
69. *Supra*, n.21.
70. (1978), 1 F.L.R.A.C. 117 (Ont. Co. Ct.).
71. (1979), 1 F.L.R.A.C. 290 (Ont. H.C.).
72. *Supra*, n.36.
73. *Supra*, n.49f.
74. (1978), 1 F.L.R.A.C. 42 (Ont. D.C.).
75. (1980), 25 O.R.(2d) 192; 9 R.F.L.(2d) 310 (H.C.).
76. R.S.C. 1970, c.1-6.
77. (1980), 27 O.R.(2d) 248; 13 R.F.L.(2d) 81 (Co. Ct.).
78. *Ibid*, p.249.

79. (1981), 29 O.R.(2d) 24; 18 R.F.L.(2d) 264 (Co. Ct.).
80. R.S.C. 1970, c.V-4.
81. (1980), 20 O.R.(2d) 252 (Ont. Co. Ct.).
82. Ibid, p.265.
- 82a. (1974), 4 O.R.(2d) 393; 48 D.L.R.(3d) 161 (C.A.).
83. Supra, n.15.
84. Supra, n.22.
85. Supra, n.37.
86. (1981), 22 R.F.L.(2d) 283 (Ont. Co. Ct.).
87. [1979] 3 A.C.W.S. 392 (Ont. H.C.).
88. (1980), 11 R.F.L.(2d) 249 (Ont. H.C.).
89. (1981), 29 O.R.(2d) 717; 17 R.F.L.(2d) 62; 114 D.L.R.(3d) 261 (C.A.).
90. [1978] 2 A.C.W.S. 379 (Ont. H.C.).
91. S.49(7).

Chapter 8 - Prince Edward Island.

Modern matrimonial property law in Prince Edward Island is for the most part to be found in the Family Law Reform Act, 1978<sup>1</sup>. This Act was enacted by the Prince Edward Island Legislature in August 1978 and was proclaimed on December 31, 1978. From the outset the Prince Edward Island statute was based on the Ontario legislation of the same name<sup>2</sup>. In many instances its provisions represent a verbatim reproduction of the Ontario Act. It does, however, contain some major differences. One of these concerns the "family farm". The legislators were careful to provide for the preservation of family farms which would, in many instances, have been in one family for generations. Special provisions were contained in the Act to cover such situations. Another difference, and one that has caused a major divergence in interpretation between the two provinces, is that of the onus of proof. For the most part, however, Ontario decisions are regarded as very persuasive authorities in the interpretation of the Prince Edward Island statute where they bear on similar provisions of their own Act.

The Family Law Reform Act

As with comparable legislation in its sister provinces of Ontario<sup>3</sup> and British Columbia<sup>4</sup>, the Family Law Reform Act seeks to bring an end to the separate property regime where "family assets" of separated spouses are concerned. It provides that all such "family assets"<sup>5</sup> are to be divided equally between the spouses should separation occur, except where such division would be inequitable<sup>6</sup>. Married persons



who are not separated, or former spouses who have already received a divorce by decree absolute, must apply under s.8 (determination by the Family Court of ownership of family assets), or s.9 (determination by the Family Court of ownership of any other property). In these instances, the laws of separate property are still relevant.

Family assets.

"Family assets" are defined in s.4(a) of the Family Law Reform Act, which provides as follows:

4. In this Part

(a) "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes

(i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes,

(ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,

(iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and

(iv) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed

by a domestic contract is not to be included in the family assets.

This definition is identical to the definition of family assets contained in the Ontario Act. The fundamental tests for a family asset are that it be owned by one or both of the spouses and be ordinarily used or enjoyed by both spouses (or their children) during cohabitation, for general domestic or recreational purposes. It is not suprising, therefore, that to a large extent the Prince Edward Island courts have interpreted the definition in the same manner as their Ontario counterparts. In Dover v Dover<sup>7</sup>, for example, it was held that a bank account held in trust for a child of the marriage, which existed before marriage and had been used by the wife for a family purpose, was not a family asset, emphasising that property must be owned by one or both spouses in order to constitute a family asset<sup>7a</sup>. This echoes the Ontario decision in Sobot v Sobot<sup>8</sup>, where it was held that an organ which had been purchased for the use of the son and was a gift to him, would not be included in a division of property. It was not owned by the spouses and could thus not be a family asset.

One major provision in the Prince Edward Island legislation, which does not appear in the Ontario statute and which has a bearing on the definition of family assets, is contained in s.5(4) of the Act. This section provides that:

5(4) For the purpose of determining the value of any property which

(a) is a family asset; and

(b) was acquired by either spouse prior to the date of the marriage,

the court shall deduct from the net value of that property

at the date of the hearing such sum as the court determines to be the value, at the date of the marriage, of the equity owned by that spouse.

In effect the section operates to exclude from a division of family assets, property that was acquired before the marriage, but includes any appreciation in value of such property that occurs during the marriage. Thus a farm worth \$50,000 at the time of marriage could be worth \$80,000 at the time of separation, but if the farm was owned by the husband prior to marriage the wife would, on separation, only be entitled to claim one half of the increase in value of the property, that is, one half of \$30,000. It is not clear what the situation would be under s.5(4) where property had decreased in value since the marriage, or at least where there had been no increase in value. To again take the example of the farm, the wife could have worked very hard over many years towards its upkeep but the farm may have failed to increase in value through no fault of hers. In such a case it seems unfair that she would not have a claim to any portion of the property. Where a decrease in value had been due to the action of the husband, s.5(6) may, perhaps, be invoked to provide for a division of property that is not a family asset in order to compensate the wife. If there has been no culpable act on the part of the husband, or if there are no other assets to be shared, then the court will face a dilemma. Section 5(4) seems to be framed in mandatory terms ("the court shall deduct from the net value of that property ...such sum as the court determines to be the value, at the date of the marriage, of the equity in that property owned by that spouse"), so it does not appear that a court could order a share in the pre-marital value of the property.

"Ordinarily used or enjoyed"

An aspect of the definition of family assets that has been differently interpreted by the Prince Edward Island courts has been the question of what constitutes ordinary use and enjoyment of property. In Ontario it has been held consistently that in order to qualify as a family asset, property must have been actually used. Mere intention to use property in the required manner is not regarded as being sufficient to bring the property within the definition. The most patent example of this reasoning is to be seen in Taylor v Taylor<sup>9</sup>. In this instance the husband had bought a condominium in Florida which he and his wife had planned to use for recreational purposes. The court found that neither the spouses nor their children had ordinarily used the condominium for this purpose, although the intention to do so in the future was present, should the family remain intact. Steinberg U.F.C.J. accordingly held that "the mere intention to ordinarily use the property for recreational purposes was insufficient to convert it to a family asset without actual ordinary use"<sup>10</sup>.

Other Ontario cases holding that there must be actual user of a family asset include Bregman v Bregman<sup>11</sup>, McIntyre v McIntyre<sup>12</sup> and Fisher v Fisher<sup>13</sup>.

A radically different approach to this was taken by MacDonald J. in Gillis v Gillis<sup>14</sup>. In discussing the status of a bank account owned by the husband, he stated:<sup>15</sup>

Furthermore, in reference to s.4(a), the words "ordinarily used", in my opinion, do not mean that there must be an "actual" use of the account. The section does not state that there must be an "actual" use and the legislature could very

easily have stipulated such a use. In reaching the conclusion that there does not have to be an "actual" use of an asset I realize that I may not be in accordance with the decision in Bregman v Bregman...; McIntyre v McIntyre...; Taylor v Taylor...; and Fisher v Fisher..., which appear to indicate that there must be actual use.

To further justify his position, he referred to s.6(2) of the Family Law Reform Act which states that "the onus shall lie on the party claiming that any particular item of property is not a family asset to adduce evidence to that effect". In Bregman v Bregman, supra, the Ontario High Court had held that the onus of proof lay on the party claiming a division to establish what property is a family asset. MacDonald J. reasoned that the Prince Edward Island provision made property prima facie a family asset. It was up to the defendant to rebut this presumption.

In Ferguson v Ferguson<sup>16</sup>, MacDonald J. followed his earlier approach in Gillis. He noted:<sup>17</sup>

In the Gillis case I placed a wider interpretation on s.4(a) of the Family Law Reform Act, than appears to have been done under a similar section of the Ontario legislation. It is my opinion that when a court is determining what a family asset is, it must consider the intention of the spouses toward the assets and whether or not it could reasonably be used for any one of the purposes set out in s.4(a)...

The advantage of following this approach is that, by not using the "actual use" test, the question of how much "actual use" is necessary before the asset becomes a family asset is not in issue. If a particular asset was intended by the parties to the marriage, during the course of the marriage, to be a family asset, and could be so used at some time during the course of the marriage so as to comply with one of the purposes set out in s.4, there would be no reason why after separation, on a division

of assets, it should be necessary to discover who used the asset or how much it was used during the marriage. The clear intent of the parties should suffice to establish whether an asset should be characterized as a family asset. Whether this reasoning is justified on the face of the statute is another question. If MacDonald J. is correct in his interpretation, then it is difficult to see what function the words "property...ordinarily used or enjoyed (for a family purpose)" serve in the definition. Also, while the effect of s.6(2) does seem to make property prima facie a family asset, it is not clear why, if one spouse can prove that property was not "ordinarily used or enjoyed" for the requisite purpose, this prima facie presumption could not be rebutted even if an intention to use the property as a family asset was present. It is possible, accordingly, that an appellate court might choose to follow the Ontario approach in this matter, rather than that suggested by MacDonald J. No appellate court cases have been reported on this area to date, however, and for the moment the Gillis and Ferguson decisions represent the law in this regard.

One result of MacDonald J.'s interpretation of "ordinarily used or enjoyed" has been the inclusion as family assets in Prince Edward Island cases of property which in Ontario has been excluded from this definition. A case in point is that of the pension. In St. Germain v St. Germain<sup>18</sup> Arnup J.A. held that a pension did not qualify as a family asset. "Since payments under the plan had not begun and were many years away, it could not be said that the interest in the plan was property "owned by one spouse or both spouses and ordinarily used and enjoyed by both spouses ...while the spouses are residing together for shelter or transportation or for household, educational, recreational, social

or aesthetic purposes"<sup>19</sup>.

As proof of actual use does not seem to be required in Prince Edward Island, MacDonald J. had no hesitation in Gillis v Gillis in holding a pension to be a family asset. Pensions were also held to be family assets in Ramsay v Ramsay<sup>20</sup>; McCabe v McCabe<sup>21</sup>; and Ferguson v Ferguson<sup>22</sup>. Some confusion has now arisen in this area by virtue of the decision in Andrews v Andrews<sup>23</sup>. One of the assets in dispute in this case was the husband's interest in a provincial government pension scheme. Having pointed out that the Family Law Reform Act does not mention pension plans specifically whereas the British Columbia statute is particular about including them<sup>24</sup>, McQuaid J. continued:<sup>25</sup>

I have arrived at the conclusion that, in the circumstances which here exist, the defendant's pension benefits do not constitute family assets. The pension does not bear the characteristics provided for in s.4 of the Family Law Reform Act. This conclusion is fortified by a reading of s.19(5)(a):

19(5) In determining the amount, if any, of the support in relation to need, the court shall consider all the circumstances of the parties, including

(a) the assets and means of the defendant and of the respondent and any benefits or loss of benefits under a pension plan or annuity (emphasis added by court).

Clearly it was the intention of the legislature that one of the effects of separation and consequent division of assets would be that the defendant spouse would take no benefit under a pension plan, but that this result would be a factor which the court might consider, collaterally, in assessing support payments, see St.Germain v St.Germain.

McQuaid J. here has inherently accepted the interpretation of the Ontario courts with regard to the question of ordinary use and enjoyment. He did not, however, refer to MacDonald J.'s decisions in Gillis and Ferguson, which are in direct conflict with his conclusion. Resolution of this conflict must await a decision of the appellate court.

Another asset which has caused some confusion in this regard is the life insurance policy. In McCabe v McCabe<sup>26</sup> McQuaid J. held that a life insurance policy without cash surrender value is not a family asset. He did admit, however, that life insurance, depending on the nature of the policy, might in some cases be considered a family asset. In Gillis v Gillis<sup>27</sup> MacDonald J. found that a life insurance policy that had a cash surrender value was a family asset. Once again he rejected the contention that such a policy must be proven to have been used for a family purpose in order to qualify under the definition, noting that the "cash surrender value, or the proceeds of sale upon death, might at any time be used for any one of the purposes set out in s.4(a)"<sup>28</sup>. He did suggest, however, that one instance where a life insurance policy would not be classified as a family asset would be if it were maintained for the purpose of paying off a particular debt not connected with the family. In Andrews v Andrews<sup>29</sup> McQuaid J. introduced an interesting innovation with regard to policies which he did not consider to be family assets. Again he had to classify two life insurance policies which he assumed were term policies, with no cash surrender value. These, he admitted, would not be family assets, properly speaking. He continued, however:<sup>30</sup>

(The policies) were, no doubt, taken out in happier days, no doubt, after mutual discussion, and intended for the protection and security of the plaintiff in the event of the untimely demise of the defendant. Premiums would have been paid out of income which might otherwise have been used for the common use and enjoyment of the spouses. It would appear to me that there was thus constituted a contractual arrangement between the defendant and the plaintiff of a continuing nature whereby, for the consideration of their (then) mutual love and affection, and in consideration also of the normal domestic services being and anticipated to be provided by the plaintiff to the defendant, the defendant undertook to provide for the future security of the plaintiff. This is a matrimonial benefit of which I think the plaintiff should not be arbitrarily and unilaterally deprived. As the named beneficiary, the plaintiff has a continuing interest in the maintenance of these indemnity



contracts. If the defendant is unwilling to maintain premium payments, for the ultimate benefit of the plaintiff, then he should notify the plaintiff accordingly, and provide her with the opportunity, if she so elects, to pay the premium herself, and thus, at her own expense, provide that ultimate security and benefit, whether for herself or for the children of the marriage, which had originally been mutually agreed between the parties, and it will be so ordered.

This decision is open to question on a number of points. It is difficult to see how the "contract" envisaged by McQuaid J. could possibly be regarded as an enforceable agreement, particularly in view of the common law position with regard to contracts made between married persons<sup>31</sup>. In any event, he does not carry through his argument of a contract to its logical conclusion. If there were an enforceable contract here, then surely the husband would be obliged to continue paying the premiums himself. It is arguable that the wife could have claimed some interest in the policy under the constructive trust doctrine. Even in this regard, it is extremely unlikely that she would succeed<sup>32</sup>. McQuaid J., however, at no stage bases his argument on a trust concept. The major difficulty with the decision is that it does not define how far the "interest" of the wife in the policy could extend. Would the court, for example, have prohibited the husband from assigning the beneficial interest in the policy to a new wife? If so, on what basis? The status of a term life insurance policy with no cash surrender value, it is submitted, is not clarified by this decision.

Another aspect of the definition of family assets affiliated to the question of use is the issue of the status of an asset that has been used for both family and non-family purposes. The initial impulse of the courts seems to have been to treat such property automatically as family assets without examining the frequency with which the asset was used for

one purpose or the other. The reason for this approach can probably be found in the provisions of s.6(2). In Dover v Dover<sup>33</sup>, for example, a truck used by the husband for business purposes was also used on occasion for family purposes and was held by the court to be a family asset. The court did not indicate for which purpose the truck had been most often used, MacDonald J. noting simply that the husband had not discharged the onus of proving that the truck was not used for a family purpose. The case was thus based on s.6(2), which places the onus on the party claiming that any particular item of property is not a family asset to produce evidence to that effect.

In McCabe v McCabe<sup>34</sup>, there was sufficient evidence to show that an asset had been used for a dual purpose. The asset in question, a van, was owned by the husband's business and had been used for both business and family purposes. In discussing the correct approach to a division of the van, McQuaid J. noted:<sup>35</sup>

The van, although technically owned by the petitioner's business, is, in my opinion, nonetheless a family asset, with an indicated value of \$6,000. I would reduce this value, for distribution purposes, to \$4,000 since it is used in part by the petitioner for business purposes. The respondent's share of the asset is then \$2,000.

There do not appear to be any provisions in the Act allowing for this type of apportionment in the case of assets used for more than one purpose. Nevertheless McQuaid J.'s solution makes good sense. Where an asset is used for both business and family purposes, it seems unfair to exclude it totally from one category or the other on this account alone. Whether this solution will be applied in future cases remains to be seen.

Child care and household management.

Section 5(7) of the Family Law Reform Act provides as follows:

5(7) The purpose of this section is to recognise that inherent in the marital relationship there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets upon termination of the marriage, subject to the equitable considerations set out in subsections (5) and (6).

What is meant by "contribution to the family welfare" is unclear. In Gillis v Gillis<sup>36</sup>, however, MacDonald J. suggested that child care and household management, among other things, should be taken into consideration as a contribution to the family welfare.

Contributions to the family welfare under s.5(7) only entitles a spouse to an equal division of the family assets. To claim a share in the other spouse's business assets, it is necessary to proceed under s.9, which states:

9(1) Where one spouse or former spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property other than family assets, in which the other has or had an interest, upon application, the court may by order

(a) direct the payment of an amount in compensation therefor; or

(b) award a share of the interest of the other spouse or former spouse in the property appropriate to the contribution.

In Ferguson v Ferguson<sup>37</sup> a wife attempted to claim compensation under s.9, arguing that she had contributed to her husband's share interest in a company which was not a family asset, by assuming the major responsibilities for child care and household management. In rejecting her claim, MacDonald stated:<sup>38</sup>

Clearly that section has no application to the petitioner's contribution to child rearing and household management although it may have permitted the respondent to devote more time to the acquisition of non-family assets. Her contribution to the family welfare must be considered under the provisions of s.5(7) of the Act.

Presumably the courts will require a direct contribution to be made to a non-family asset before they will award an interest in that asset under s.9. In Ferguson, for example, the wife was awarded compensation for the value of accounting work she had contributed to the company, in proportion to her husband's interest therein. There have been no reported cases on s.9 since Ferguson, however, so it is not yet evident how this area will develop. Bearing in mind the similarity between s.9 and the equivalent provision of the Ontario legislation<sup>39</sup>, it is likely that the Ontario decisions in this area will bear some weight on the matter.

#### Changing character of assets.

Once an asset has been used for a particular purpose, which would establish that property as either a family or non-family asset, may it ever change its status? Further, if a family asset is sold and a non-family asset bought in its stead, do any rights in respect of the original property survive? In Ramsay v Ramsay<sup>40</sup>, McQuaid J. had this to say on the matter:<sup>41</sup>

There may well be a gray area as between what is and what is not a family asset. In such a case, one must revert to s.4, which specifies the fundamental tests for a family asset, which are ...that it be owned by one or other of the spouses and be ordinarily used or enjoyed by both spouses (or their children), during cohabitation, for general domestic or recreational purposes. If it does not meet these criteria, then it is not a family asset, and the source of the funds, even though those funds be themselves family assets, is immaterial. The fact that

those funds may have been family assets will not, for that reason alone, impress upon acquisitions secured therefrom the character of a family asset. (Having referred to certain Ontario cases, he continued:) These cases are, I think, illustrative of the following principles: (a) Savings acquired by one or other of the spouses are not necessarily family assets unless they meet the conditions stipulated in s.4; (b) An asset acquired out of funds which are themselves family assets does not itself become a family asset unless it meets these same conditions; (c) An asset which is itself a family asset may change its character and become a non-family asset if the evidence establishes that at some point it has ceased to meet those conditions; (d) Conversely, an asset which was not a family asset may change its character and become a family asset if the evidence establishes that at some point it has come to meet those conditions.

It seems, accordingly, that in Prince Edward Island, as in Ontario, the present use (at separation) and not the mode of acquisition will be the important element in assessing the character of an asset.

What of property the use of which changes after separation when it is sold and new property acquired from the proceeds of sale? Cotton v Cotton<sup>42</sup> seems to be the only reported case to date which touches on this aspect. The husband here had sold a cottage after separation, which cottage had been used as a family asset before separation. MacDonald J. held that the wife was entitled to one half the proceeds of the sale of the cottage, though he did not discuss the issue in any detail. His decision seems to confirm the developing trend that the family assets are determined upon separation and the rights of the parties become, in essence, property entitlements to one half (subject to the provisions for an unequal division)<sup>43</sup>.

It is not clear what the position would have been here if the proceeds of the cottage had been used by the husband to purchase an item of business property. Would the court, for example, have been

prepared to trace the proceeds into the new property? In Ontario the practice has been to award a spouse a half interest in the proceeds even where new property has been acquired, but no interest in the new property itself<sup>44</sup>. It is probable that the Prince Edward Island courts will follow this approach.

The Matrimonial Home

The matrimonial home is dealt with specifically in ss.38 to 49 of the Family Law Reform Act. The definition of matrimonial home is contained in s.39, which provides:

- 39(1) Property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their family residence is their matrimonial home.
- (2) Subsection (1) applies notwithstanding that its application results in more than one matrimonial home.
- (3) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to the occupation of a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purpose of subsection (1).
- (4) Where property that includes a matrimonial home is normally used for a purpose other than residential only, the matrimonial home is only such portion of the property as may reasonably be regarded as necessary to the use and enjoyment of the residence.

The Act does not specify what "interest" a spouse must have in property in order for that property to qualify as a matrimonial home. As the first part of the definition is identical to that contained in s.39 of the Ontario legislation, it is possible that the Ontario cases on this issue will be followed by the Prince Edward Island courts.

The other elements of the definition appear relatively straightforward. It is specifically provided that a couple may have more than one matrimonial home. Sections 39(3) and (4) further refine the definition. Section 39(4) assists to effect the intent that the family farm be preserved. Thus, where a family home is located on farmland, the

dwelling house and as much of the land as was used for residential purposes would qualify as a matrimonial home. The majority of the farm land would in general not be included.

No cases have yet been reported in which the definition of the matrimonial home has been discussed. It is unlikely that a court would have much difficulty in this regard, however. More probably, the court will take it as given that a certain property was used as the family residence and will proceed directly to the question of its division.



Footnotes to Chapter 8

1. S.P.E.I. 1978, c.6.
2. The Family Law Reform Act, 1978 (Ont.), c.2; now R.S.O. 1980, c.152.
3. Ibid.
4. The Family Relations Act, R.S.B.C. 1979, c.121.
5. "Family assets" are defined in s.4 of the Act in terms identical to those used in the Ontario statute.
6. S.5(1).
7. (1979), 10 R.F.L.(2d) 50 (P.E.I.S.C.).
- 7a. The issue of the nature of this "trust" was not explained by MacDonald J. It seems unlikely that this was a legal trust, since otherwise the wife would have been in breach of it by spending some money from the account for a family purpose. One assumes that there must have been some informal agreement between the spouses that the money in the account would be held for the benefit of the child, although this is not clear from the case itself.
8. (1980), 15 R.F.L.(2d) 225 (Ont. U.F.C.).
9. (1978), 6 R.F.L.(2d) 341 (Ont. U.F.C.).
10. ibid, at p.354.
11. (1978), 21 O.R.(2d) 722 (H.C.).
12. (1979), 9 R.F.L.(2d) 322 (Ont. H.C.).
13. (1978), 21 O.R.(2d) 105 (H.C.).
14. (1980), 14 R.F.L.(2d) 137 (P.E.I.S.C.).
15. Ibid, pp.155,156.
16. (1980), 16 R.F.L.(2d) 207 (P.E.I.S.C.).
17. Ibid, p.221.
18. (1980), 14 R.F.L.(2d) 186 (Ont. C.A.).
19. Ibid, p.192.
20. (1979), 1 F.L.R.A.C. 333 (P.E.I.S.C.).
21. (1979), 11 R.F.L.(2d) 260 (P.E.I.S.C.).

22. Supra, n.16.
23. (1982), 26 R.F.L.(2d) 181 (P.E.I.S.C.).
24. Supra, n.4, s.45(1)(d).
25. Supra, n.23, at p.185.
26. Supra, n.21.
27. Supra, n.14.
28. Ibid, p.160.
29. Supra, n.23.
30. Ibid, p.184.
31. For example, as expressed in Balfour v Balfour, [1919] 2 K.B. 571 (C.A.). There would surely be no intention to create legal relations in this instance. Further, as the alleged "contract" was not in writing it would not fall to be considered as a marriage agreement under the Act.
32. For a more detailed examination of the possibility of finding a constructive trust in these circumstances, see the controversial decision in Simmons v Simmons, (1978), 45 N.Y.(2d) 233, where the court found a constructive trust in a life insurance policy where a husband had agreed in a separation agreement to maintain certain policies which named his wife as beneficiary.
33. Supra, n.7.
34. Supra, n.21.
35. Ibid, p.269.
36. Supra, n.14.
37. Supra, n.16.
38. Ibid, p.227.
39. Supra, nn.2, s.8.
40. Supra, n.20.
41. Ibid, p.339.
42. (1981), 23 R.F.L.(2d) 78; 32 Nfld. & P.E.I.R. 30; 91 A.P.R. 30 (S.C.).
43. See Irwin v Irwin, (1979), 12 R.F.L.(2d) 5 (Ont. Co. Ct.).
44. For example, Woodbyrne v Woodbyrne, (1980), 16 R.F.L.(2d) 180 (Ont. U.F.C.); and De Ross v De Ross, (1981), 19 R.F.L.(2d) 359 (Ont. H.C.).

Chapter 9 - Saskatchewan

The Saskatchewan Legislature was quick to implement remedial legislation following upon the outcry which sprang up in the wake of Murdoch v Murdoch<sup>1</sup> and Rathwell v Rathwell<sup>2</sup>. The government's first move was to introduce an interim measure to deal with the situation, by repealing and replacing s.22 of the Married Women's Property Act<sup>3</sup>, effective as of May 11, 1975. This legislation remained virtually unchanged until 1980<sup>4</sup>. In 1978, subsection (1) of s.22 was amended to allow applications to the District Court<sup>5</sup> and the title was amended to refer to "married persons"<sup>6</sup>, to reflect the applicability of the section to both husband and wife.

Under s.22, the Saskatchewan courts were given wide discretion to make such orders regarding the property in dispute as they saw fit. The legislation contained few restraints on the exercise of this discretion. In essence, s.22 required that a judge, without legislative stipulation as to the type of property under consideration, consider the respective contributions of the spouses, whether in the form of money, services, prudent management, caring for the home and family or any other form whatsoever<sup>7</sup>. The legislation contained no presumption of equality or, indeed, of any entitlement at all. No mention was made of misconduct, either marital or economic. Finally, the exercise of this broad discretion was subject only to any written agreement between the spouses to the contrary<sup>8</sup>. Section 22, therefore, constituted "pure" judicial discretion, without any policy guidelines as to what property was or was not shareable.

The Matrimonial Property Act, awaited since s.22 of the Married Persons' Property Act was introduced as an interim measure in 1974, was introduced during the spring session of 1979, and came into force on January 15, 1980. It is probably fair to say that the Act resembles most closely the reform legislation of Alberta<sup>9</sup>, in that it appears to establish a presumption of equal ownership of much of a couple's matrimonial property. In doing so, it incorporates or codifies many of the principles which emerged in the 4½ years during which the judicial discretion scheme pursuant to s.22 of the Married Persons' Property Act had been in operation.

#### The Matrimonial Property Act

The Matrimonial Property Act provides for the distribution of the "matrimonial property" of spouses, or its value, upon the application of either spouse<sup>10</sup>. The stated purpose of the Act, as enunciated in s.20, is to recognise:

...that child care, household management and financial provision are the joint and mutual responsibilities of spouses and that inherent in the matrimonial relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the matrimonial property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.

The words "subject to any exceptions, exemptions or equitable considerations mentioned in this Act" have the effect of transferring what at first sight appears to be a fixed 50/50 regime into distribution according to judicial discretion. Section 21(2) empowers the court, where it is satisfied that it would be unfair and inequitable to make an equal distribution, to refuse to order any distribution, vest all

property in one spouse, or make any other order that it considers fair and equitable. This marks a significant change from the provisions of s.22 of the Married Persons' Property Act. Whereas under that Act the onus lay on the applicant to establish to the satisfaction of the court a right to some share in property held by the other spouse by virtue of demonstrable contribution<sup>11</sup>, the court is now directed to begin from the premise that he or she has an inherent right to one half of the shareable matrimonial property. The new Act has thus established a presumption that the spouses are entitled to an equal division of any matrimonial property which is not exempt under the Act. It is, however, open to either spouse to attempt to convince the court that an equal share would be unfair and inequitable.

#### Assets to which the Act applies

The court is, under s.21(1), empowered to make an order to distribute "matrimonial property". That term is defined in s.2(h) in sweeping terms as property owned or in which an interest is held by one or both spouses at the time the application is made or at the time of the adjudication, whichever the court thinks fit. The legislation does not espouse the concept of distinguishing between "family assets" and property that is not a family asset, for example, "business assets" or "commercial assets"<sup>12</sup>. On the other hand, the Act does make a distinction between the matrimonial home and other matrimonial property. Distribution of the matrimonial home is governed by s.22 while all other assets are distributable under s.21. Household goods, while covered by s.21, are treated like the matrimonial home in the sense that they are never exempt from distribution<sup>13</sup>. There are also special provisions found in

Part I of the Act concerning possession of the matrimonial home or household goods. The matrimonial home will be discussed later.

Cases have made clear that it is the matrimonial property which exists as at the date of the application which is distributable. In Rathie v Rathie<sup>14</sup> Carter L.J.Q.B. noted that s.2(h) defines "matrimonial property" as property that "at the time an application is made" under the Act, is owned by a spouse. He determined that:<sup>15</sup>

...the court need not concern itself with property that no longer exists unless it is property disposed of within two years before the application is made to someone other than a bona fide purchaser, or property dissipated by one spouse or given to a third person without the consent of the other spouse<sup>16</sup>.

The result here was that although the wife had lost some matrimonial property after separation in unsuccessful business ventures, the husband was not to be compensated for the loss. He was entitled only to a share in the property remaining at the date of the application, and not in the property as it existed at separation.

This approach has been adopted in several cases since. So in Zabreski v Zabreski<sup>17</sup>, Dickson U.F.C.J. refused to include in the list of matrimonial property available for distribution the value of certain chattels sold by the husband since separation, including a cash fund of \$25,000 which the husband had converted into an equity in a house in Victoria, B.C., and a \$10,000 term certificate. As the matrimonial funds no longer existed at the time of application, the wife had no right to a share in them. Similarly in Phillips v Phillips<sup>18</sup> the husband had allegedly "run off" with \$44,000 in cash when the parties separated and the wife claimed an equal share of that money rather than a share of what was left.

Dickson J. held that as the \$44,000 cash fund no longer existed, it was not matrimonial property within the statutory definition.

The reasoning behind these cases is that since the separate property regime continues to operate until an application for distribution is made under the Act, an owner spouse should be entitled to deal with his or her property as that spouse chooses until the application is made. It is only at the time the application is made that the owner spouse is put on notice that the separate property regime is being replaced by the legislative scheme. Obviously this reasoning may have harsh results in some instances, for a spouse may find that the matrimonial property has been considerably depleted through the behaviour of the other spouse after separation. In such an instance the first spouse is denied any use of the spent assets and appears to be denied any compensation in respect thereof. There may be a solution which could be used to alleviate such hardship in some cases. Such a solution was suggested in Morrell v Morrell<sup>19</sup>. The property in dispute here concerned Canada Savings Bonds and cash which had been in the possession of the husband when he left the matrimonial home on separation. By the time the application for distribution was made to the court by the wife, the bonds had been liquidated and the cash spent. Although Dickson J. noted that the original property could not be distributed as it no longer fell within the definition of matrimonial property, he did indicate that "the fact that matrimonial property has been disposed of by one spouse for his or her exclusive benefit is a factor that may lead the court to conclude that equal distribution of existing property is unfair. An off-setting adjustment may then be made"<sup>20</sup>. He did not see fit to order an unequal distribution in this instance, probably because

there was no indication that the husband had spent the money other than honestly. In fact it is probable that the courts would not resort to making an unequal distribution in such cases unless there were some dishonest intent apparent in the conduct of the disposing spouse. Such an approach would be in keeping with the fact that a spouse is entitled to dispose of his property during the subsistence of the separate property regime. Some support for this proposition may be seen from the fact that it has been only in cases of actual dissipation of property that a court has attempted to include the value of property that no longer belongs to a spouse in making an order under the Act. In fact, acts of dissipation are expressly dealt with in the Act under s.28(1)(a)(ii). Where an act of dissipation has been actually pinpointed by the court it always appears to have been of a blatant nature. So in Lee v Lee<sup>21</sup> a husband had divested himself of one third of his shares in a company after separation so that his wife could not claim them. The court had no difficulty in finding that the transfer flew in the face of s.28(1)(a)(ii) and therefore included the value of the shares in a list of the husband's assets. Similarly in Brahmbhatt v Brahmbhatt<sup>22</sup> the court held that a husband's act in signing over a house, not their matrimonial home, to his father's estate for no consideration amounted to dissipation of matrimonial property and declared that the value of the house was subject to distribution. In other instances the court has appeared loath to find that there has been an act of dissipation. So in Phillips v Phillips<sup>23</sup>, even though the court found that the husband's conduct in spending \$40,000 amounted to callous and selfish behaviour, it was held that the conduct did not amount to dissipation of assets. The \$40,000 was regarded as lost and the remaining property (the matrimonial home) was divided equally between the spouses. Wait v Wait<sup>24</sup>



has indicated that the onus lies on a spouse alleging the other spouse has dissipated property. What is required, according to this decision, is proof that a spouse squandered the property and thereby jeopardized the financial security of the household. The cases would seem to indicate that a high standard of proof is required in this regard.

Another solution may lie in the fact that property acquired after separation by one spouse may be distributed under the Act. There is no requirement in the Act that in order to qualify as "matrimonial property", property must have been used by both spouses and/or their children. Accordingly assets acquired by one spouse after separation but before an application is made to the court under the Matrimonial Property Act constitutes matrimonial property. It is unusual for a court to order an equal distribution of such property, however. Section 21(2) prescribes a list of equitable considerations which justify an unequal distribution of matrimonial property, including the duration of the separation<sup>25</sup>. Thus in Baudry v Baudry<sup>26</sup>, where the spouses had been separated for 14 years, the court held that the \$50,000 accumulated by the husband since separation should be vested in him solely. In Guran v Guran<sup>27</sup> the spouses had been separated seven years, during which time the husband bought and sold property and loaned and invested money. The court held that, having regard to the period during which the spouses lived separate and apart, it was unfair and inequitable to make an equal division of all the property owned by the parties as of the date of judgment. Accordingly, an unequal division was ordered. In Brahmbhatt v Brahmbhatt<sup>28</sup> Gagne J., at least by implication, accepted the principle that in general post-separation property should be non-divisible, so long as it has been acquired or maintained solely by one spouse. The

parties here had lived together only eight months and had been separated some time before an application for distribution was made to the court. Gagne J. noted:<sup>29</sup>

Since the date of separation, the applicant wife has been working as a waitress and chambermaid and for a period of time held two jobs of this kind. From her employment and industry and frugal living, she has managed to save up approximately \$14,000. In my opinion, it would be grossly unfair for her to have to share this with her husband. The cash savings of the wife before trial will be exempt.

Where one spouse has increased his assets after separation as a result of inflation or other factors outside his control, however, it seems that such property will be distributed by the courts. So in Tokaruk v Tokaruk<sup>30</sup> the court ordered an equal distribution of farmland property, including post-separation property, where the parties had been separated for twenty years. Walker J. explained:<sup>31</sup>

The long separation is not at the heart of the application because here both husband and wife left the farmland and went to work and reside elsewhere....This was not a case of the husband continuing to reside on and work the matrimonial asset increasing and improving it. Neither worked the farm or on it after 1965. The farmland has increased in value while neither husband nor wife had that much to do with it. This limits the significance of the twenty year separation. There is no evidence before me that the husband has improved the farmland since the separation, but it would appear that the value appreciation is due to inflation and market conditions. Equitable considerations 21(2)(b), (c) and (d) have, therefore, no great significance although they may have in other situations of protracted separation.

In the light of this reasoning it will clearly be in the interests of the owner spouse to have an application brought under the Act as soon as possible after separation. The fact that post-separation property is available for distribution in some measure balances out the fact that property disposed of after separation but before trial is not included in a distribution. It would seem also that where matrimonial property

is disposed of after separation and other property obtained in its place, the latter property should be included in the distribution of assets. The property will not have been obtained solely as a result of one spouse's efforts and there seems no reason why it should be excluded. True, the court failed to make such a connection in Zabreski v Zabreski<sup>32</sup>, where the husband had converted matrimonial funds into an equity in a home in Victoria and a \$10,000 term certificate. The court here, however, did not expressly direct itself to the fact that post-separation property may be distributed between the spouses. It is possible, also, that there might have been some difficulty in implementing an order for distribution in this case, as the husband was living outside the jurisdiction of the Saskatchewan courts at the time of trial. There seems no logical bar to using such a "tracing" process should a case with more favourable facts present itself.

Section 2(h) defines matrimonial property as being "property owned or in which an interest is held by one or both spouses..." In s.2(h)(i), such property is said to include a "security, share or other interest in a corporation or an interest in a trust, partnership, association, organisation, society or other joint venture".

Clearly corporate assets or their value are included in the definition of matrimonial assets. Section 26, which sets out the powers of a court to effect a distribution, appears to offer an effective approach to making orders concerning such assets. Subsection (3) of s.26 provides that where a spouse has an interest in a corporation and where it would not be reasonable to give the other spouse shares in the corporation, the court may order the spouse who has an interest in

the corporation to pay the other a sum of money no larger than the benefit the spouse has in respect of the assets of the corporation. The section thereby contemplates a transfer of shares as the normal course to follow in these cases. Yet where a transfer of shares is not possible (for example, it may be prohibited by the articles of the corporation in question), a spouse may be unable to raise sufficient funds to comply with the alternative offered in s.23(3) because of a lack of liquidity in his assets. Where such a stalemate position is reached, the court may resort to s.26(1), whereby it is given power to "make any order that it considers fit in the circumstances whether or not it affects title to matrimonial property"<sup>33</sup> and it may "order a spouse to give security, upon any terms or conditions that the court thinks fit, for the performance of any obligation imposed by an order under this section, including a charge on property, and provide for the enforcement of that charge by sale or otherwise as necessary"<sup>34</sup>. It will be apparent that the powers inherent in this section are not limited to matrimonial property, thus suggesting that a court may, for example, deal directly with the assets of a company. This, in fact, is what was done in Gawletz v Gawletz<sup>35</sup>. The spouses here had separated in 1977 after 35 years of marriage and the wife applied for a division of property. In the course of his short reasons for judgment, Halvorson J. stated:

Some of the property of the respondent is held through his company, but I will ignore the corporate structure for the purpose of this judgment. Indeed, I could not do otherwise considering the manner in which the evidence was tendered. I understand that both counsel are in agreement with this approach.

Practicably, given the general use of equalization payments, there may be no difference between treating the shares of a company

as shareable assets and going directly to the assets themselves. Theoretically, however, the approach adopted in Gawletz ignores the rule of separation of personality which is fundamental to company law. It is suggested that if the legislature had intended to allow such a radical departure from established legal norms, it should have made that intention clearly and in unequivocal terms.

As in other provincial matrimonial regimes, the question of pensions as matrimonial assets has given the Saskatchewan courts some difficulty. The courts' initial reaction was to treat pensions as obviously falling within the definition of matrimonial assets. Dickson U.F.C.J. explained in Zabreski v Zabreski<sup>36</sup>:

I am satisfied that a pension fund falls within the statutory definition of matrimonial property. The benefits represent remuneration from employment which would otherwise have been shared through division of other assets or during the course of the marriage.

The difficulty which presented itself in the early cases was how a pension should be divided, especially if the pension in question was not yet payable at the time of trial. For example, further to his comments above, Dickson U.F.C.J. continued:

...a pension fund under which payments are not yet payable can fairly be regarded, not as a property asset, but instead a source of income from which maintenance obligations can be paid when employment ceases. For several reasons, I intend to regard the husband's pension as a maintenance asset rather than a divisible property asset. Firstly, there is no evidence before me of actual value of the fund upon which an order for division could be based.

Secondly, there is a problem of jurisdiction in relation to the pension fund. The Saskatchewan Court of Appeal in Middleton v Middleton, (1980), 15 R.F.L.(2d) 251...ruled that the situs of a pension is the jurisdiction where it is properly payable or recoverable, i.e., the residence of the pensioner. Only the courts of that jurisdiction may deal directly with the pension. (The husband here was residing in British Columbia at the time

of trial).

....

Thirdly, unlike other matrimonial assets, a pension fund cannot be sold or transferred to effect equal distribution of matrimonial property.

When not faced with the complexities of jurisdiction, the courts were prepared to treat as yet unpaid pensions as property assets. In Greenwood v Greenwood<sup>37</sup> Carter U.F.C.J. distributed such a pension by making an order under s.26(1)(b)(viii) of the Matrimonial Property Act, vesting in the wife a 47% interest as tenant in common in the respondent's pension benefits, whenever they should be received. In Morrell v Morrell<sup>38</sup> Dickson U.F.C.J., confirming his earlier conclusion in Zabreski that a pension fund was a shareable asset, concluded:<sup>39</sup>

In my opinion, the proper approach is to regard the husband's pension as a shareable asset of undetermined value that will produce future benefits that are also undetermined, perhaps not capable of determination at the time. Vesting in the wife now a share of the future benefits, whatever they prove to be, appears to be the most logical approach.

These cases have now been thrown into doubt by a number of recent decisions. In Ronning v Ronning<sup>40</sup>, the court held that a pension which the respondent would have become eligible to receive in the future was not matrimonial property within the definition of the Act. Malone J. admitted that if the respondent had been in receipt of the pension at the time of the application, he would have had no difficulty in holding it to be matrimonial property. As the respondent was not at this time to receive the pension, Malone J. held that his interest was at best an expectant right. This right was contingent on the happening of a number of events, not the least of which was that he live long enough to become eligible to obtain the anticipated benefits. Such a right, he

felt, could not qualify as real or personal property which is owned by the respondent or in which he has an interest at the time of the application.

This decision is open to some criticism and Malone J. appears to have confused the issues. He concentrated on the fact of the ~~fact~~ contributions which the respondent had already made to the pension during the marriage. The total amount of such contributions was \$7,5000. Malone J. stated that these contributions were matrimonial assets, thus ignoring the earlier case law which indicated that where a matrimonial asset such as cash has been spent, it no longer forms part of the matrimonial property. Continuing on this line, Malone J. pointed out that if the respondent were now to be required to pay half of this \$7,500 he could do so only by terminating his employment or by realizing the amount from present assets in the hope that he would recover it when and if he became eligible to receive his pension. He felt it would be unfair and inequitable to order the respondent to pay from present assets the sum of \$3,750 to the applicant when there was such an element of uncertainty that he would ever be in a position to recover this amount. This reasoning misses the point that it is the pension itself and not the moneys invested in it through contributions in which the applicant was seeking a share. Malone J. failed to consider any of the alternative sharing devices that had been suggested in earlier cases, seemingly blinded by the fact that the respondent proposed working another ten years before retiring and that he had no sufficient funds to make an immediate settlement on his wife. There seems no logical reason why the wife should not have been awarded a share in the future benefits in this pension, if and when it should

happen to become payable, thus circumventing Malone J.'s concerns regarding uncertainty of the interest. In the result, the wife, after some thirty years of marriage, was denied a share in an asset to which the husband had been contributing with matrimonial funds throughout their married lives.

It was these considerations which influenced Walker J. in Tataryn v Tataryn<sup>40a</sup> to follow the British Columbia decision of Rutherford v Rutherford<sup>40b</sup> and hold that a pension should be classified as matrimonial property. He emphasized that difficulty in valuing a pension should not stand in the way of its classification as a matrimonial asset. No reference was made in his decision to the Ronning case, however.

Ronning v Ronning was specifically mentioned and approved in Frolick v Frolick<sup>40c</sup>, where the pendulum once more swung against pensions being categorized as matrimonial property. Forbes J. here also referred to a decision of the Saskatchewan Court of Appeal, Harriman v Harriman<sup>40d</sup> in support of this finding, quoting the text of that judgment as follows:<sup>40e</sup>

In testing the husband's assets, the learned trial judge included the husband's post office pension at a capitalized value of \$14,000. The evidence is not clear as to the exact terms of the post office pension. This court, with my brother Boyda, dubitante, is not prepared to capitalize it and give it the value and status of an asset for division as part of the property here. This is not necessarily to say that pensions or annuities can never be considered in the division of property. Under the circumstances of this case, we are not satisfied that the capitalized value of the pension should be used as a basis for division. Therefore, the award to the wife should be reduced by \$5,000 to \$15,000.

Forbes J. interpreted this reasoning as follows:<sup>40f</sup>



The judgment inferred that pensions might "be considered in the division of property" but I do not take that to mean pensions are ever to be included and listed as matrimonial property unless perhaps where the pension has already been reduced to a liquid asset which is available on demand, such as in the case of where an employee has terminated his employment and, as a result, was entitled to his own contributions plus interest on demand and had left those funds on deposit with his former employer.

It is submitted that this interpretation is too narrow. The Court of Appeal in Harriman was careful to restrict its comments to the case at hand, thus leaving it open for a contrary view to be taken in subsequent cases.

There are now a number of Saskatchewan decisions of the Court of Queens Bench which have taken conflicting approaches in regard to pensions<sup>40g</sup>. Substantial uncertainty and judicial disagreement in this area only serve to further inconvenience potential litigants. In Tataryn v Tataryn, Walker J. commented:<sup>40h</sup>

The time cannot be far off when principles will begin to emerge from the authorities dealing with pension plans in the context of the Matrimonial Property Act which will help guide prospective litigants striving for agreement on property division. Present authorities reflect, in the main, the variety in pension plans, the particular state of evidence on the "pension" before the court, and the practical and mechanical difficulties which have beset judges in giving effect to the principles set forth in s.20 of the Act to the extent fairness and equity allow. The problem becomes more urgent with the frequency of applications for division of matrimonial property and the variety of annuities, private sector pensions and government superannuation benefits which are in existence.

It remains to be seen whether resolution of the apparent confusion surrounding the pension benefit will soon be realized.

Exempt property.

All matrimonial property is presumed shareable unless it is established that it is property within a list of exemptions set out in s.23 of the Matrimonial Property Act<sup>41</sup>. Section 23 reads:

23(1) Where matrimonial property other than a matrimonial home or household goods, is

(a) property acquired before the marriage by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefitting both spouses;

(b) property acquired before the marriage by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefitting both spouses;

(c) property owned by a spouse before the marriage;

the fair market value of that property at the time of the marriage is, subject to subs. (4), exempt from distribution under this Part.

(2) Property acquired as a result of an exchange of property mentioned in subs. (1) is, subject to subs. (4), exempt from distribution under this Part to the extent of the fair market value of the original property mentioned in subs. (1) at the time of the marriage.

(3) Where matrimonial property, other than a matrimonial home or household goods, is:

(a) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses;

(b) money paid or payable under an insurance policy that is not paid or payable in respect of property, unless the proceeds are compensation for a loss to both spouses;

(c) property acquired after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation made in respect of the spouses;

(d) property acquired as a result of an exchange of property mentioned in this subsection.

(e) appreciation on or income received from and property acquired by a spouse with the appreciation on or income received from property mentioned in this subsection.

it is, subject to subs.(4), exempt from distribution under this Part.

(4) Where the court is satisfied that it would be unfair and inequitable to exempt property from distribution, the court may make any order that it considers fair and equitable with respect to the matrimonial property mentioned in this section.

As can be seen, exempt property falls under two heads. Property which falls under s.23(1) and (2) is only partially exempt, the fair market value of such property at the time of marriage being exempt from distribution unless the court is satisfied that it would be unfair and inequitable to exempt it. Property which falls under subs.(3) of s.23, on the other hand, is exempt in specie.

As regards partially exempt property, some confusion seems to have arisen in decided cases as to what effect inflation has on exempt property. Although the Matrimonial Property Act envisages the exemption of the fair market value of the property at the time of the marriage and not the property in specie, the courts have in some instances been reluctant to find that a spouse is entitled to a half interest in the inflationary increase of property if he or she is not entitled to a half interest in the basic property itself. So in Bains v Bains<sup>42</sup>, farmland had been acquired by the husband prior to marriage at less than market value. At the time of the marriage the property was worth \$12,000. By the time of trial it had increased in value to \$100,000. In considering what distribution ought to be made, Halvorson J. noted:

\$12,000 worth of land was sold to the husband by his father for \$9,000. In effect, the husband received a gift of a significant portion of the value of the land. The land is now worth \$100,000. I am satisfied that it would be unfair not to recognise this benefit given him by his parent. As I

see it, it would be likewise inequitable to consider the husband's added contribution in this respect to be merely \$3,000 (\$12,000 minus \$9,000). It is more reasonable and just in assessing the husband's extra credit in this regard to give consideration to the present day value of the gifted portion. This approach also more adequately recognises that in most similar situations the reduced price for farmland is in the nature of an advance on inheritance made by a parent to his child.

It is submitted that this is precisely why property brought to a marriage is partially exempted from distribution by the Act. Once the exemption required by the Act is made, it should not be open to the court to make, in effect, a larger exemption than the Act contemplates by weighting the distribution in favour of the party who brought the property into the marriage. The exemption under the Act itself weights the distribution in favour of that person. Only where the court is satisfied that such weighting would be unfair because of the unusual circumstances of the case may it exercise its discretion in regard to such property by disallowing or increasing an exemption. There seem to have been no unusual circumstances in the Bains case. Indeed the court found that in the day-to-day operation of the farm the husband and wife had contributed to a relatively equal degree.

Support for the proposition that an inflationary increase in exempt property should be equally divided was expressed by Hughes J. in Thatcher v Thatcher<sup>44</sup>. In discussing this question he noted:<sup>45</sup>

Unless considered by the court to be unfair and inequitable, property in the stated three categories is exempt from distribution to the extent of its fair market value at the time of marriage. Thus, appreciation on property exempt under s.23 is property subject to distribution under s.21...

A return to the Bains approach seems apparent, however, in the

recent decision of Fornwald v Fornwald<sup>46</sup>. In considering the effect of inflation on exempt property, Rutherford J. noted:

There seems to be case law on both sides. To evaluate whether the sharing should move from equality, the provisions of s.21(2) must be examined. Subsection (e) has been held to justify unequal distribution respecting gifts during the marriage. Fairness would indicate that it should be even more applicable when it is an inflationary result flowing directly from gifts prior to marriage. Also because these assets formed the base from which all else grew, fairness indicates there should be unequal sharing. The degree of inequality must be determined by a consideration of all the facts of a given case.

Thatcher v Thatcher is presently under appeal. It is to be hoped that the Court of Appeal will resolve some of the difficulties which have arisen in this regard.

Section 23(1) states, in paragraphs (a) and (b) respectively, that the fair market value at the time of the marriage of property acquired prior to the marriage by a spouse by gift from a third party (or by inheritance) is exempt from distribution unless it can be shown that it was conferred with the intention of benefitting both spouses, unless it would be unfair and inequitable to exempt. It is difficult to see why the legislation refers to these two types of property specifically since, presumably, either a gift or an inheritance acquired before the marriage would be "property owned by a spouse before marriage". The distinction seems to lie in the phrase "unless it can be shown that the gift (or inheritance) was conferred with the intention of benefitting both spouses". Presumably what is envisaged by the legislation in this case was a gift to a man or woman with the intention of benefitting his or her future wife or husband since at the time there would be no "spouse". Logically it would seem that if it can be shown that a gift or inheritance was conferred with the intention of

benefitting two ascertained persons, then it should qualify as property beneficially owned by each of them before the marriage and should be exempt as such. The legislation provides, however, that in that case the property would be subject to distribution, since it exempts only a gift to one spouse. This creates the anomalous situation that a gift to only one of the spouses before marriage will be exempt from distribution but a gift, for example, a piece of farmland, benefitting both of the spouses will normally be subject to equal division regardless of their respective interests as received from the benefactor. There seems little justification for exempting a gift to one party and not exempting a gift to both. No cases have yet been heard on this precise point. It is possible that a court would view the fact that a gift to both was originally given in unequal shares as a circumstance justifying unequal distribution on separation. Any other conclusion would seem to be a mockery of the testator's or donor's intention.

Another question which arises from s.23(1)(a) and (b) is how "ascertained" the future spouse must be before the court will hold that the gift or inheritance was intended to benefit him or her. Would it be enough that a father left his farm to his unmarried son, knowing that someday, if the son marries, the property will benefit his wife, or must the future wife be ascertained and contemplated as such by the father and/or the son when the gift or inheritance is conferred? Again, no reported cases have yet been decided on this issue. Most probably, however, the courts will hold that the future spouse must have been in specific contemplation before he or she will be said to have been intended to benefit under a gift or inheritance.

Section 23(3), which deals with fully exempt property, appears to have raised few difficulties for the courts. A note of reservation must be entered about the decision in Guran v Guran<sup>47</sup>, however. Soon after separation, which occurred seven years prior to the property application here, the wife had suffered serious injury as a result of an auto accident. She had received \$10,000 for her injuries, a weekly payment and \$8,000 for the loss of her car. The court held that these sums fell under s.23(3)(b), (d) and (e) and were therefore exempt from distribution. Section 23(3)(b) does not exempt money paid under an insurance policy in respect of property. One would have thought, therefore, that the \$8,000 paid in respect of the loss of the car would not have been exempt, since this sum was paid in respect of property.

Distributions under the Act.<sup>47a</sup>

Section 21 of the Matrimonial Property Act directs that the court shall distribute the matrimonial property equally between the spouses, subject to equitable considerations. Section 21(2) prescribes sixteen specific factors which the court may take into account in this regard and the court may also consider "any other relevant factor or circumstance"<sup>48</sup>. Probably one of the most frequently urged grounds for unequal distribution of Saskatchewan farm assets is contained in s.21(2)(e), which lists:

(e) the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the matrimonial property...

In many instances a spouse has sought to assert that property which he or she received personally as a gift or through the assistance

of a parent during the marriage should be vested in him or her as sole owner. Such an assertion was made in Thatcher v Thatcher<sup>49</sup>, where the husband alleged that he ought to be allowed retain the matrimonial property received by him largely as a result of his father's assistance.

Hughes J. stated:<sup>50</sup>

Counsel...placed great stress on the fact, as he saw it, that what the couple have today as matrimonial property is largely due to the successful base built in life by the respondent's father and his generosity in passing it on to the next generation. Any relevance that that argument must have is confined to consideration under s.21(1)(c) - one of the previously undecided 17 situations bearing on the question of whether it would be unfair or inequitable to make an equal distribution. I say that because, as I read the statute, gifts and inheritances acquired after marriage are to be deemed to be shareable.

No real guidelines have been developed as to how to determine whether such property should be excluded from a distribution. One factor to which the court has looked is the intention of the donor. So in Olah v Olah<sup>51</sup> Halvorson J. found that the contributions of the father were intended to benefit the son alone and not the applicant wife. After crediting the husband under s.21(2)(e) with his father's contribution and under s.21(2)(q) with the fact that the husband brought assets into the marriage while his wife did not, the court was satisfied that it would be unfair to make an equal distribution. The wife was therefore awarded a 35% share in the farm assets in addition to her share in the matrimonial home. In Peters v Peters<sup>52</sup> Carter J. looked not only to the intention of the donor in the case of a transfer from a third party but also directed his attention to past contributions of both spouses to the property. With regard to the latter point, he addressed the issue of the extent to which the family unit had had an impact on the acquisition and maintenance of the property. Such a consideration seems a sound



one. Whenever property has been brought into the family pool, used and operated by the family, it ought fairly to be shared unless a strong case can be made out that the parties understood that it was "exempt" in whole or in part. In Peters v Peters<sup>52</sup> the husband had inherited land from his mother during the course of the marriage. There was no specific evidence as to the mother's intention with respect to the gift. Carter J. noted, however:<sup>53</sup>

Considering that the wife lived and worked on that land, or on the farm of which it forms a part, and that she was close to her mother-in-law, I am not prepared to exclude it from distribution.

He accordingly ordered that the matrimonial property be divided equally.

The issue of the intention of the donor was raised again in Mytko v Mytko<sup>54</sup> in somewhat emphatic terms. The court held that before s.21(2)(e) could be applicable, there had to be evidence that the contribution was made by the third party for the benefit of only one of the parties to the marriage. This clearly places the onus on the party alleging that there should be unequal distribution to prove that the gift was intended for him or her alone.

A return to the wider principles enunciated in Peters v Peters is evident in Pepper v Pepper<sup>55</sup>. Maher J. here commented:

Considering the general view that requires an equal distribution of matrimonial property, it is not sufficient for the spouse contending that the court should rule otherwise to simply establish that there has been a contribution by a third party. There must be established to the satisfaction of the court on an overall view of the evidence that a contribution to a spouse during the course of the marriage would make it unfair and inequitable to direct an equal division of the matrimonial property.

It is not clear how a court would decide a case where, for example, a gift of land was made with the intention of benefitting both spouses but the wife refused to work on it. Would the wife's non-contribution be of any relevance? Olah v Olah<sup>56</sup> suggests that it would. Here, however, the court was satisfied that the donor (the husband's father) had not intended to benefit the wife and her non-contribution was regarded as merely a compounding of that view. If there is doubt as to the intention of the donor, then the wife's failure to operate or maintain the asset in some necessary way may be regarded by the court as evidence as to the donor's probable intention. If there is no doubt as to intention, radical non-contribution on the part of the wife could in any event be brought under s.21(2)(q) ("any other relevant fact or circumstance") to justify an unequal distribution.

It is not clear whether the courts would in any circumstances be prepared to order an unequal distribution or deferred sharing in order to protect an existing business or property from being disrupted. Initial cases under the Act seemed to reject any such possibility. In Patron v Patron<sup>57</sup> McLeod J. rejected the request of the husband for an order providing for deferred payment of the wife's share of the property without interest. He noted with regard to the distribution order he had made:<sup>58</sup>

The husband will undoubtedly have to sell his farm unless someone comes to his aid. A distribution under the Act may put a farmer or other proprietor out of business, but the Act does not permit the courts to apply any notions of social policy or public interest as to the preservation of farms or any other business.

A similar approach was taken by Dixon J. in St. John v St. John<sup>59</sup>. Again the court ordered an equal division of matrimonial property.

notwithstanding that the husband was dependent upon the farming business. With regard to this point, Dixon J. remarked:<sup>60</sup>

Because of the husband's illness and advancing age, his counsel contends that he is dependent on the farmland for his livelihood. Such a circumstance, he argues, is one contemplated by subs.(q) and justified not only unequal distribution but no distribution at all. The attending result of accepting counsel's contention would be the husband retaining ownership and use of all the farm assets. When applied to the wording of the subsection, the logic of counsel's argument escapes me. Have the husband's means and earning capacity been affected by the circumstances of the marriage? Has the taking up of his marital responsibilities reduced or sacrificed his ability to earn an income? I think not. More likely, marriage has increased his earning capacity. His wife helped him build a prosperous farming business. He now leases the land to his son for a share of the crop. The fact that the husband is dependent upon the farming business is not a circumstance that satisfies me that equal distribution would be unfair to him.

A somewhat more lenient approach was taken in the case of Schaufert v Schaufert<sup>61</sup>. In this instance the court was concerned with farmland which had been bequethed to the husband in his step-mother's will. The husband had been very close to his step-mother and she had specifically requested that the land be kept in the name of "Schaufert". Cameron J. found that the farmland qualified as matrimonial property. He concluded, however:<sup>62</sup>

Having regard to the contribution of the step-parents to the respondent in the acquisition of the land and the circumstances surrounding its gift, together with the other circumstances I have mentioned (sale of the property would have triggered capital gains tax and would have deprived the husband of the opportunity to continue farming and of keeping the farm in the family name), I have come to the conclusion that it would be unfair and inequitable to order an equal distribution of the land or its value.

He accordingly awarded the wife 25% of the land and directed that the husband might satisfy the sum by paying it off in four yearly instalments, with no interest.

There seems little to separate the facts in Schaufert from the facts in Patron v Patron. The decision in Schaufert is obviously more humane. One might also question McLeod J.'s opinion that the Matrimonial Property Act does not permit the court to "apply any notions of social policy or public interest" as to the preservation of farms or other businesses where the Act itself is a policy document. Another solution in these cases would be to adjust an award of maintenance. The difficulties with maintenance and its role in the matrimonial property regime lie outside the scope of this thesis. It is, however, an alternative which might have been used in Patron v Patron as an interim measure to allow the husband sufficient time to arrange financing.

#### Date of valuation

Under s.21 of the Matrimonial Property Act the court is given a discretion to elect a fair market value of matrimonial property either at the time of the application or the adjudication. The valuation date is probably of most importance in the case of land. Land, being a limited commodity, has traditionally inflated so that the initial capital asset is worth many times its value at the time of separation than at the time of purchase and, indeed, may be worth substantially more at the time of the proceedings than at the time of separation. The appropriate date of valuation therefore becomes of crucial importance.

The most popular date of valuation chosen by the courts is the date of trial. This was the date chosen in Bains v Bains<sup>63</sup>, Evenson v Evenson<sup>64</sup>, and Fisher v Fisher<sup>65</sup>. The attitude of the courts in this regard was probably voiced in Kemf v Kemf<sup>66</sup> where it was stated:

It would be fair and equitable for the wife to share in the fortuitous effects of inflation.

In Thatcher v Thatcher<sup>67</sup> the date of adjudication was also chosen as the date of valuation. Hughes J. noted, however, that " if a fair market value cannot be determined, the court may fix such value as it considers reasonable"<sup>68</sup>.

It is probable that the date of adjudication will be used as the date of valuation in most cases. In Day v Day<sup>69</sup>, Rutherford J. commented as regards the relevant date for valuation:

In the absence of reasons for not doing so and in the interests of consistency I shall effect the valuation of assets as nearly as possible to the date of application (emphasis added).

Choosing the date of adjudication as the relevant date for valuation would also appear to be consistent with the intention of the Act. As already noted, the assets available for distribution are those in existence at the time of the adjudication. It therefore appears reasonable that they be valued as of that date. Furthermore, choice of the date of adjudication for this purpose provides that any decrease or increase in value since the separation will, prima facie, be shared pari passu. It would not seem unreasonable to depart from this basic proposition where the increase or decrease was due solely to the conduct or efforts of one spouse.

The Matrimonial Home

A matrimonial home is defined in s.2(g) as property owned or leased by one or both spouses or in which one or both has or have an interest. The definition extends to property owned by a corporation in which one or both spouses has or have an interest and by virtue of which he or she is entitled to occupy the property as a family home<sup>70</sup>. The property must have been occupied as the family home by one or both spouses or must be intended by both spouses to be so occupied<sup>71</sup>. The matrimonial home may be a house, part of a house or business premises, a trailer or mobile home, a unit in a condominium or a suite<sup>72</sup>.

An interesting aspect of the definition is that it does not require that the house should be occupied by both spouses as the family home. Thus it appears that property occupied by only one spouse and children of the marriage could fall within the s.2(g) definition, even where the new house had been acquired after the separation of the spouses. This was the interpretation applied by Forbes J. in Eberele v Eberele<sup>72a</sup>. After the parties to this case had separated, a farm house in which the spouses had lived was abandoned and the husband went to live with the children in another residence. In an application for division of property, Forbes J. noted that the farm house had been abandoned and was of no value. In these circumstances he held that the home acquired by the husband after separation should be designated as the matrimonial home under s.22(2)<sup>72b</sup>. He concluded, however, that it would be unfair and inequitable to the husband, who had custody of the five children, to make a distribution of the family home and ordered that all matrimonial

property be vested in the husband.

It is not every "interest" of a spouse which will bring a property within the definition of "matrimonial home". In McGuckin v McGuckin<sup>73</sup> the court held that the home lived in by the spouses was not a matrimonial home where title to the house was in the name of the husband's parents and the house was occupied by the spouses under a rental arrangement. The wife had alleged that the house was occupied by her and her husband under an agreement for sale. There was no written agreement but she sought to prove acts of part-performance by introducing evidence as to how her father had installed plumbing in the house and also evidence of rent paid. There was evidence too that the husband had signed a "notice of change of ownership" instructing the Secretary of the Rural Municipality of Montrose, who administered the district in which the house was located, to assess the house to Ian McGuckin (the husband) as "title holder". At trial the husband gave evidence that he had lied when he had signed the "notice of change of ownership" for tax purposes. His father gave evidence that the agreement with Ian and his wife was a lease. He intended, he said, that the young couple would live in the house and, eventually, the house would be turned over to them if things worked out. Having discussed this evidence, Carter J. continued:<sup>74</sup>

Upon consideration of the whole of the evidence I am unable to say that the arrangement between the registered owner and the parties to this action was an agreement for sale. Was there any interest to be charged? There is no evidence. For how long were the payments to be made? The evidence is two years by some witnesses, three by others. It is true that a prudent rentor would be unlikely to put plumbing into a house which was only leased. But here, in fact, it was the father who did it, and parents are not always prudent or businesslike in their efforts to help their children. I find that the arrangement was on a balance of probabilities a rental arrangement with a promise to consider giving the house to the young couple in the future.

What precise degree of "interest" must be owned in the property is unclear. That it need not amount to full legal ownership is suggested by the case of Bateman v Bateman<sup>75</sup>. The matrimonial home here was registered in the name of the director of the Veteran's Land Act<sup>76</sup>. Halvorson J. recognised that in these circumstances he could not order that the property be vested in the applicant wife and, indeed, suggested that a strong constitutional argument could be raised as to whether the proprietary rights of a wife granted under the Matrimonial Property Act are abrogated by the provisions of the Veteran's Land Act. As the director was not a party to this action, however, he did not embark further on this issue. He went on to say:<sup>77</sup>

In my view, I am not estopped from ordering that the respondent's interest in the matrimonial home, whatever that interest may be, shall be vested in the applicant.

The interest Mr. Bateman had in this instance, he decided, was a right to have the matrimonial home transferred into his name once the money he had borrowed under the Veteran's Land Act had been repaid. It was a substantially greater interest than the rental arrangement found in McGuckin v McGuckin. More important than the latter case in defining the limits of the "interest" which must be held in the matrimonial home, perhaps, is the decision of Wildman v Wildman<sup>78</sup>. The spouses here lived in a matrimonial home which was on land owned by the husband's parents. The parties both assisted the husband's parents in the operation of their farm as well as attending to their own property. The court held that the matrimonial home amounted to no more than a lease at sufferance and, as such, could not be considered property available for distribution. It is not clear from the reported decision whether the spouses occupied this property on an understanding that it would one day be theirs by



inheritance or even whether that fact would have made any difference to the ultimate decision of the court. It appears to be a custom in Saskatchewan for spouses to occupy premises belonging to the parents of one of the spouses on such an understanding, the spouses working the family farm in the belief that it will one day go to them. In these circumstances it would be unfortunate if all the work and effort of one of the spouses were to go to naught in the event that the parties separate before the property has been legally given over to them.

A suprising decision in Koznuk v Koznuk<sup>79</sup> held that a "matrimonial home" as defined in the Matrimonial Property Act was not merely a house or part of a house in the general sense but had a meaning more akin to "living quarters" or "dwelling". Accordingly it was held that a property which had hitherto been occupied as the matrimonial home but which, after nine years separation, was now uninhabitable, no longer qualified as a "house" within the matrimonial home definition. It was felt that a place that was not inhabitable did not fit well within the spirit of the Act. The house had, in fact, been vacant for eight years. The parties, however, had resided there for the duration of their twenty year marriage. It is submitted that the question of a property's condition ought to be confined in these cases to one of valuation and not to the question of whether or not a derelict house ought to be regarded as a matrimonial home. As it was, the property was distributed under the general provisions of the Matrimonial Property Act rather than under the special provisions of s.22.

The provisions of s.22 can probably best be explained in the words of McLeod J. in Dolff v Dolff<sup>80</sup>, where he accepted the proposition

that "all property is to be divided equally except for the matrimonial home, which is to be divided even more equally". The legislature in s.22 created a wholly artificial device for the equal distribution of property to which the considerations of s.21(2) do not apply. Further, s.23(1) provides that a matrimonial home is never exempt from a distribution. Thus even if the matrimonial home was owned by a spouse prior to marriage, it will not be exempt from distribution. It is very unusual for a matrimonial home under the Saskatchewan Act to be distributed other than equally. Where there is more than one matrimonial home, however, s.22(2) comes into play. This provides as follows:

(2) Where there is more than one matrimonial home, the court may designate to which matrimonial home subs.(1) applies and any remaining matrimonial home shall be distributed in accordance with s.21.

This section was invoked by both parties in Kerr v Kerr<sup>81</sup>. The parties here owned both a town house and a farmhouse. Halvorson J. explained:<sup>82</sup>

For the applicant, it is contended that the farmhouse should be designated by me under s.22(2) of the Act as the matrimonial home. The respondent would prefer that the town house of the spouses be so designated. The issue is important because s.22(1) directs that the value of the matrimonial home be distributed equally and the home quarter section is worth \$127,000, whereas the house in town is valuated at approximately \$60,000.

In the event he found that the farmhouse was the matrimonial home and held that the wife was entitled to one half its value.

#### Household Goods.

Household goods are defined in s.2(e) as:

(e)...personal property that is ordinarily used, acquired or

enjoyed by one or both spouses for transportation, household, educational, recreational, social or aesthetic purposes but does not include heirlooms, antiques, works of art, clothing, jewellery or other articles of personal use, necessity or ornament or any personal property acquired or used in connection with a trade, business, calling or profession, occupation, hobby or investment.

Household goods are distributable under s.21. They are treated like the matrimonial home in the sense that they are never exempt from distribution.

Broadly speaking, household goods would seem to mean those contents of the average home and garage which are generally considered necessary for modern life. Perhaps suprisingly, no cases appear to have been reported in which the definition has come under scrutiny. One concludes, therefore, that the definition has been found to be workable.

Footnotes to Chapter 9

1. [1975] 1 S.C.R. 423. (S.C.C.).
2. [1978] 2 S.C.R. 436 (S.C.C.).
3. 1974-75 (Sask.), c.29, s.1.
4. Section 22 was repealed by the Matrimonial Property Act, 1979 (Sask.), c.7-6, s.60(1), effective January 1, 1980.
5. 1978 (Sask.), c.35, s.1.
6. 1978 (Sask.), c.36, ss.2,3.
7. Married Persons' Property Act of Saskatchewan, s.22(4).
8. S.22(2).
9. The Matrimonial Property Act, 1978 (Alta.), c.22.
10. S.21(1).
11. Under s.22(4).
12. Cf. The Family Relations Act, R.S.B.C. 1979, c.121, ss.43,45,46; the Family Law Reform Act, R.S.O. 1980, c.152, ss.3(b), 4; the Marital Property Act, 1978 (Man.), c.24, ss.1(b), (d), 13(1), (2).
13. S.23(1).
14. (1981), 17 R.F.L.(2d) 265; 2 Sask. R. 361 (Q.B.).
15. Ibid, p.267.
16. The exceptions mentioned by Carter C.J.Q.B. are specifically mentioned in s.28 of the Act.
17. (1981), 21 R.F.L.(2d) 153; 3 W.W.R. 33 (Sask. U.F.C.).
18. Unified Family Court, April 26, 1982, Dixon J. (unreported).
19. (1982), 24 R.F.L.(2d) 454 (Sask. Q.B.).
20. Ibid, p.458.
21. (1981), 19 R.F.L.(2d) 280 (Sask. Q.B.).
22. (1981), 11 Sask. R. 398 (Sask. Q.B.).
23. Supra, n.18.

24. Sask. Q.B., July 14, 1981, Malone J. (unreported).
25. S.21(2)(c).
26. (1981), 18 R.F.L.(2d) 384 (Sask. Q.B.).
27. (1982), 24 R.F.L.(2d) 119; 10 Sask. R. 12 (U.F.C.).
28. Supra, n.22.
29. Ibid, p.405.
30. (1982), 14 Sask. R. 394 (D.C.).
31. Ibid, at p. 401.
32. Supra, n.17.
33. S.26(1)(b).
34. S.26(1)(b)(xiv).
35. Sask. Q.B., May 19, 1981, Halvorson J. (unreported).
36. Supra, n17, at p. 162.
37. (1981), 22 R.F.L.(2d) 125 (Sask. U.F.C.).
38. Supra, n.19.
39. Ibid, p.461.
40. (1982), 27 R.F.L.(2d) 1; 2 W.W.R. 72(Sask. Q.B.).
- 40a. (1982), 27 R.F.L.(2d) 283 (Sask. Q.B.).
- 40b. (1980), 14 R.F.L.(2d) 41; 2 W.W.R. 330; 120 D.L.R.(2d) 143, affirmed in part 23 R.F.L.(2d) 337; [1981] 6 W.W.R. 485; 30 B.C.L.R. 145 (C.A.).
- 40c. (1982), 27 R.F.L.(2d) 383 (Sask. Q.B.).
- 40d. Sask. C.A., February 27, 1979 (unreported).
- 40e. Supra, n.40c, at p.386.
- 40f. Ibid, pp.386,387.
- 40g. In addition to those mentioned, for example, see Bray v Bray, Sask. Q.B., February 11, 1982 (unreported) and Engel v Engel, Sask. Q.B., March 8, 1982 (unreported).
- 40h. Supra, n.40a, at p.281.
41. S.23(6).

42. (1981), 17 R.F.L.(2d) 193; 1980 5 W.W.R. 7; 2 Sask. R. 384 (Q.B.).
43. Ibid, p.199.
44. (1981), 20 R.F.L.(2d) 257 (Sask. Q.B.) (under appeal).
45. Ibid, p.59.
46. Sask. Q.B., February 18, 1982, Rutherford J. (unreported).
47. Supra, n.27.
- 47a. Note - The following discussion is not intended to be an exhaustive analysis of the manner in which the Saskatchewan courts exercise their discretion in matrimonial property cases. It merely seeks to pinpoint those assets which, while literally falling within the statutory definition of the Matrimonial Property Act, are commonly excluded from division or are the subject of an unequal division because it appears to the court that they ought not fairly to be said to belong to both spouses.
48. S.21(2)(a).
49. Supra, n.44.
50. Ibid, p.57.
51. (1981), 20 R.F.L.(2d) 238; 8 Sask. R. 446 (Q.B.).
52. (1981), 23 R.F.L.(2d) 316 (Sask. U.F.C.).
53. Ibid, p.321.
54. (1982), 25 R.F.L.(2d) 213 (Sask. Q.B.).
55. Sask. Q.B., March 22, 1982, Maher J. (unreported).
56. Supra, n.51.
57. (1981), 7 Sask. R. 366 (Q.B.).
58. Ibid, p.373.
59. (1981), 9 Sask. R. 121 (Q.B.).
60. Ibid, pp.125,126.
61. (1982), 14 Sask. R. 310 (Q.B.).
62. Ibid, p.316.
63. Supra, n.42.
64. (1980), 6 Sask. R. 47; 17 R.F.L.(2d) 389 (Q.B.).
65. (1979), 4 Sask. R. 186 (Q.B.).

66. Sask. Q.B., November 19, 1979 (unreported).
67. Supra, n.44.
68. Ibid, p.61.
69. Sask. Q.B., November 6, 1981, Rutherford J. (unreported).
70. S.2(g)(i)(b).
71. S.2(g)(ii).
72. S.2(g)(iii), (v), (vi), (vii).
- 72a. Sask. Q.B., December 14, 1981, Forbes J. (unreported).
- 72b. See infra, p.286.
73. (1981), 10 Sask. R. 110 (Q.B.).
74. ibid, pp. 114, 115.
75. (1981), 22 R.F.L.(2d) 384 (Q.B.).
76. 1942-43 (Can.), c.33.
77. Supra, n.75, at p.387.
78. (1981), 20 R.F.L.(2d) 225 (Sask. Q.B.).
79. Sask. Q.B., March 22, 1982, Halvorson J. (unreported).
80. Sask. Q.B., December 18, 1980, McLeod J. (unreported).
81. (1981), 6 Sask. R. 188 (Q.B.).
82. Ibid, p.190.

### Conclusion

One of the purposes of new legislation, it is submitted, is to clarify the law so as to promote out-of-court settlement of disputes and reduce litigation. In the area of matrimonial law discussed in this thesis, the primary purpose of the new legislation should have been to allow estranged spouses to determine which items of property would fall into the category of divisible assets in advance of litigation. This study will have indicated that in many instances the contrary has proven the case. Confusion as to the meaning of the definition of divisible assets has promoted, rather than reduced, litigation. The definitions employed in the matrimonial legislation of the common law provinces have either failed to make clear what property is encompassed in their provisions or else have been interpreted by the courts so as to exclude property which it might otherwise be thought ought fairly to be included. Because of the intricacy of the language used in the definitions, courts of equal standing have reached different conclusions when interpreting the same sections. Counsel use elaborate arguments in order to persuade a court to follow one approach or the other where both approaches are equally open under the relevant legislation. Of the issues which have given rise to confusion in this regard, the following have been amongst the most prevalent.

#### The concept of ordinary use for a family purpose

British Columbia<sup>1</sup>, Ontario<sup>2</sup> and Prince Edward Island<sup>3</sup> all define as property which is prima facie shareable ("family assets"), assets



which are "ordinarily used and enjoyed" by the spouses and their children for a specified family purpose. This phrase has given rise to numerous difficulties. Questions have arisen as to whether "use" means "actual use in the past" or whether intended future use is included within its meaning. In some instances courts have held that items such as life insurance policies and pensions do not constitute "family assets" as they have not been "used" for a family purpose<sup>4</sup>. Rather, they were said to have been intended to provide future security for the family. In other instances a contrary view has been taken<sup>5</sup>. An allied question concerns what amount of "use" constitutes "ordinary use" within the meaning of the definition. Thus would use by the family once or twice a year be sufficient to bring an asset within the "family asset" category or is something more required? Other difficulties have revolved around the phrase "family purpose". In British Columbia, unlike Ontario and Prince Edward Island, this term is not defined in the statute. The British Columbia courts have thus had to decide whether items such as expensive jewellery and furs fall within this subsection and have employed different reasoning in reaching opposite conclusions in this regard<sup>6</sup>. Cases under the Ontario statute, which defines family purpose as use "for shelter or transportation or for household, educational, recreational, social or aesthetic purposes"<sup>7</sup>, have not been free of complexity. So in Boydell v Boydell<sup>8</sup> the wife's doll collection was held not to be a family asset because it was a financial venture of the wife's and had not been "used" by the husband.

Despite the multitude of litigation which this phrase has spawned, the courts have come no closer to evolving any certain formula with regard to its interpretation and have been forced to treat each new set

of facts on an ad hoc basis.

#### Business assets - contribution

As noted, the British Columbia and Ontario legislation defines certain property as "divisible" or "family" assets by virtue of use. Other assets, generally business assets, qualify as divisible only when a "direct or indirect contribution" has been made to them. Business assets or "ventures" are variously defined in the statutes and difficulties have been experienced in their interpretation. One issue which has caused some concern is whether a distinction should be made between different sorts of professional practices. Another issue which has caused particular confusion in this regard is the question of what amounts to an "indirect contribution" to a business asset. In British Columbia there have been cases which suggest that adequate fulfillment of one's role as a housewife and mother automatically establishes a prima facie case to a right in the owner spouse's business assets<sup>9</sup>. In other instances, the British Columbia courts have followed the Ontario approach that a wife must prove that by her assumption of more than her fair share of household responsibilities she enabled her husband to acquire or operate his business acquisitions<sup>10</sup>. The confusion evident in British Columbia decisions in this respect stems in large part from the wording of the relevant sections<sup>11</sup>, which support either interpretation.

#### Pre-acquired assets

In both the Saskatchewan<sup>12</sup> and Alberta<sup>13</sup> statutes, the market value at the time of marriage of property acquired before marriage is

specifically excluded from the definition of divisible assets. One of the difficulties which has arisen with respect to this exclusion is that it appears to exempt pre-marital property from distribution irrespective of how it was acquired. So in Komarniski v Komarniski<sup>14</sup> it was held that the matrimonial home was excluded from the divisible asset category where it had been given to the wife by her husband during a period of cohabitation prior to marriage. Any equitable rights which a non-owning spouse might have acquired in pre-marital property is thus ignored by the statutes.

Another question which has vexed the courts in these provinces is whether an inflationary increase in such property is to be included among the divisible assets. Both the Saskatchewan and Alberta courts have been reluctant to include such property automatically in a distribution<sup>15</sup>, though some courts are more flexible than others in this regard. In Saskatchewan in particular there has been judicial disagreement on this question<sup>16</sup>. Ultimately cases have been decided on an individual basis according to the policy of the particular court deciding the issue. The definitions in the respective statutes, unfortunately, are so framed as to support either stance.

#### Post-separation assets

The question of whether property acquired in substitution for divisible assets after the separation of the spouses should be included in a division of assets is a question that has concerned the courts of virtually all the provinces. In all but three provincial statutes<sup>17</sup>, post-separation property is specifically excluded from the definition of

divisible assets. As the statutes retain the concept of separate property during the subsistence of a marriage, creating a right to share in divisible assets only upon marriage breakdown, it has sometimes been held that where property which would have been a divisible asset at separation is converted into new property after separation but prior to trial, that property does not fall within the assets available for distribution<sup>18</sup>. This approach can be supported on the basis that it would be unfair in the event of a long separation to restrict the rights of an owner spouse as to how he should deal with his property. This would be especially true where it was not immediately apparent that the property of which he had disposed was covered by the definition of divisible assets. Other courts have taken a contrary view on the basis that it would be hard for the non-owning spouse if the owner spouse were to be permitted to dispose of property that is prima facie divisible after separation and not be called upon to account for such property. In these cases, the approach of the courts has been to use extra-statutory remedies such as tracing in order to bring new property purchased with the proceeds of divisible assets into a distribution<sup>19</sup>. Of the provinces which exclude post-separation property from distribution, New Brunswick has the only statute which specifically deals with the issue of what is to happen when property which would have been a divisible asset is converted into new property after separation<sup>20</sup>. In other provinces the courts have had to resolve this issue themselves.

#### Date of valuation

The date at which assets are valued is of great importance in a matrimonial distribution. The division of assets turns on the valuation

date since in most instances property will either have increased or decreased in value between the date of separation and the date of trial. Given the importance of this date it is perhaps suprising that only the legislation of Saskatchewan attempts to give the courts some guidance in this regard<sup>21</sup>. Under s.21 of that statute, the court is given a discretion to elect a fair market value of property either at the time of the application or the adjudication. In practice the Saskatchewan courts have usually chosen the date of trial as the time at which property ought to be valued.

In provinces where there are no legislative guidelines in this area, the practice of the courts has varied. In British Columbia, for example, the approach has been to choose a date when the principles of equality of interest may be maintained, in other words, the date which is most appropriate in the interests of equity<sup>22</sup>. In Ontario and Alberta, on the other hand, the courts have usually chosen the date of trial as the specific date for valuation<sup>23</sup>.

Choosing a specific date of valuation has the advantage of certainty. To cast the matter as one of discretion may discourage parties from dividing assets since the division will depend on the valuation of the divisible assets. Bearing this in mind it is submitted that the better approach is to adopt as a general rule the principle that in the absence of extraordinary factors, the valuation date is the division date (sale or date of trial). Where a post-separation increase or decrease is attributable to one spouse alone, compensation could be awarded in the form of an unequal division of all divisible assets<sup>24</sup>.

### Onus of proof

The question of which spouse bears the onus of proving what property is divisible is relevant to decisions as to how and in what proportions property should be distributed. As with the issue of the valuation date, very few provincial statutes give judicial guidance on this matter. In Prince Edward Island the Family Law Refrom Act specifically states that the onus lies "on the party claiming that any particular item is not a family (divisible) asset to adduce evidence to that effect"<sup>25</sup>. In other provinces the courts have had to decide this point from the manner in which a particular definition is framed. Different decisions have been reached. In Ontario, for example, it has been held that the onus of proof lies on the person claiming a division to establish what property is a divisible asset<sup>26</sup>. In Alberta the onus of proof appears to shift depending on what category of property is in dispute<sup>27</sup>. In British Columbia also there appears to be a difference in who bears the burden of proof depending on whether the property in dispute is a "family asset" or "business asset". The precise position, however, is rather confused<sup>28</sup>. As there are many instances where it is difficult to classify property as belonging to a divisible or exempt class, the question of on whom lies the burden of proof may often be crucial to a decision.

### The matrimonial home

The statutory definition of what constitutes the matrimonial home has caused difficulty in all the provinces. Generally defined as property in which one spouse has an interest and that is or has been occupied by

by the spouses as their family residence, questions have arisen as to what length and what type occupation is required in order to constitute "residence" within the meaning of the Act. Another frequent source of dispute is whether, once the requisite residence has been found ever to have occurred, a house can ever lose the quality of being a matrimonial home. Other issues have concerned what type of "interest" a spouse must own in the property in question. The definition of what constitutes an "interest" has raised numerous difficulties. One of those frequently discussed is whether land in the name of the director of the Veteran's Land Act<sup>29</sup> under a mortgage agreement with the factual owner can be said to be "owned" by a spouse. In Ontario, New Brunswick and Nova Scotia the courts have not hesitated to apply the terms of their matrimonial legislation to land held in the name of the director. In Re Whitely<sup>30</sup> the Ontario Court of Appeal stated that the vesting of title in the director was more a matter of form and ought not to interfere with the substantive rights of the parties. In contrast, the courts of Saskatchewan, Manitoba and British Columbia have held that the provincial matrimonial legislation could not apply to such property, as it was already subject to federal legislation<sup>31</sup>. The Supreme Court of Canada declined to rule on this issue in Harper v Harper<sup>32</sup>, an appeal from a British Columbia Court of Appeal decision on the matter, as the home in question had been transferred to the husband prior to the appeal. Their failure to give a decision on this aspect is to be regretted bearing in mind the conflict between the provinces on this question. The issue has been differently decided depending on the court which chances to hear the application. This fact is particularly evident in British Columbia, where many lower court decisions have failed to follow a Court of Appeal pronouncement on the matter<sup>33</sup>.

The factors mentioned above are just a portion of those which have caused difficulty for the courts. In the case of divisible assets classified according to usage, questions have arisen as to whether a change in user can result in a change in characterization<sup>34</sup>. Where divisible assets are defined through a process of elimination of "exempt property", there have been disputes as to whether an asset fulfills the necessary conditions in order to be considered exempt<sup>35</sup>. Whether or not marital debts should be distributed is another question which has provided cause for dispute. In Manitoba the Marital Property Act makes some provision for the sharing of the debts and liabilities of a spouse<sup>36</sup>. In provinces where no special provision is made in this regard, the courts have treated the matter on an individual basis. A major source of confusion has proven to be the fact that provinces have failed to bring some aspects of the law regarding insurance and pensions into line with the system of deferred sharing introduced by the new legislation. In some instances this has resulted in courts excluding such items from the definition of divisible assets even though they patently constitute marital property of some description.

It is ironic that, although the parties to every case must go through the exhausting and confusing process of identifying and classifying particular items of property, each provincial statute gives its courts powers to include in a distribution property that is not prima facie shareable, or to order an unequal share of assets in circumstances where it would be just and equitable. Some courts seem to ignore all legislative definitions and classifications and simply order such distribution of the total assets of the spouses as appears to them to be fair in all the circumstances. In Hull v Hull<sup>37</sup>, for example, the Manitoba court made



absolutely no attempt to categorize a long list of assets which ought clearly to have been classified as either "commercial assets" or "family assets" under the relevant legislation. In other provinces the courts go through the whole process of categorization only to decide that an equal division of the distributable assets alone would not be just and other non-divisible assets ought to be included in a distribution. In the light of this situation it may be questioned what value, if any, the sections dealing elaborately with various classifications have. It is submitted, in fact, that the classification sections have proven to be time consuming and valueless. In practice the statutes have often been interpreted by the courts as effectively giving them a discretion as to how all the property owned by the spouses should be distributed. The obvious solution to this state of affairs, therefore, is to introduce a discretionary regime by statute. Such a regime would not contain any complex rules regulating the classification of property as shareable or non-shareable and would leave it open to the courts to determine what property should be shared in order to ensure economic justice for all members of the family, having regard to the needs of the particular case. For added certainty it could be provided that there should be a prima facie presumption in favour of equal entitlement to assets with a discretion to vary this presumption in appropriate cases. The introduction of a discretionary regime would not necessarily reduce litigation in this area. It would, however, have the advantage of making such litigation less confusing and less subject to the vagaries of the policies of individual courts.

Footnotes to Conclusion

1. The Family Relations Act, R.S.B.C. 1979, c.121.
2. The Family Law Reform Act, R.S.O. 1980, c.152.
3. The Family Law Reform Act, S.P.E.I. 1978, c.6.
4. For example, see Bateman v Bateman, (1979), 10 R.F.L.(2d) 63 (R.S.B.C.); St.Germain v St. Germain, (1980), 14 R.F.L.(2d) 186 (Ont. C.A.).
5. Thus a future pension right was held to be a family asset in Rutherford v Rutherford, [1981] 6 W.W.R. 485 (B.C.C.A.). In Gillis v Gillis, (1980), 14 R.F.L.(2d) 137 (P.E.I.S.C.), it was held that the words "ordinarily used" did not require an "actual use" and that intended future use was sufficient to bring property within the classification of a family asset.
6. For example, contrast the decision in Jarvis v Jarvis, (1980), 14 R.F.L.(2d) 1 (B.C.S.C.), with Sheppard J.'s comments in Simpkins v Simpkins, (1981), 29 B.C.L.R. 330 (S.C.), at p.343.
7. Supra, n.2, s.3(b).
8. (1978), 2 R.F.L.(2d) 121 (Ont. U.F.C.).
9. For example, Elsom v Elsom, (1982), 35 B.C.L.R. 293 (S.C.); Wagner v Wagner, B.C.S.C., Vancouver 5036/D140202, March 16, 1982 (unreported).
10. For examples of the Ontario approach, see Leatherdale v Leatherdale, (1980), 31 O.R.(2d) 141; and Young v Young, (1981), 21 R.F.L.(2d) 388 (Ont. C.A.).
11. Supra, n.1, ss.45(3)(e), 46.
12. The Matrimonial Property Act, 1979 (Sask.), c.7-6.1.
13. The Matrimonial Property Act, S.A. 1978, c.22.
14. (1981), 27 A.R. 341 (Q.B.).
15. For example, see Bains v Bains, (1981), 17 R.F.L.(2d) 193 (Sask. Q.B.); Mazurenko v Mazurenko, (1981), 23 R.F.L.(2d) 113; Alta. L.R.(2d) 357; 30 A.R. 41 (C.A.).
16. For a contrary view to that taken in Bains, above, see Thatcher v Thatcher, (1981), 20 R.F.L.(2d) 257 (Sask. Q.B.).
17. Saskatchewan, British Columbia and Alberta, supra, at n.12, 1 and 13 respectively.
18. For example, Archibald v Archibald, (1982), 48 N.S.R.(2d) 361; 92

A.P.R. 361 (S.C.).

19. As in Hierlihy v Hierlihy, (1982), 88 Nfld.R. & P.E.I.R. 1; 91 A.P.R.1 (T.D.).
20. The Marital Property Act, c.M-1.1 of 1980 (N.B.).
21. Supra, n.17, s.21.
22. For example, see Williams v Williams, (1982), 26 R.F.L.(2d) 325 (B.C.C.A.).
23. For example, Re Young v Young, (1981), 32 O.R.(2d) 19 (C.A.).
24. This was the approach suggested in Stewart v Stewart, (1982), 37 A.R. 57 (C.A.).
25. Supra, n.3, s.62.
26. Bregman v Bregman, (1978), 21 O.R.(2d) 722 (H.C.).
27. See the chapter on Alberta, infra, under the heading "Onus of proof".
28. For example, contrast Simpkins v Simpkins, supra, n.6, which appears to place the burden of proof on the owner spouse in s.46 cases, with Johnson v Johnson, (1982), 24 R.F.L.(2d) 70 (B.C.S.C.), where a contrary position was taken.
29. R.S.C. 1970, c.V-4.
30. (1974), 4 O.R.(2d) 393 (C.A.).
31. So held in Hallett v Hallett, Man. Q.B., January 15, 1982, Dewar C.J.Q.B. (unreported); Bateman v Bateman, supra, n.4; and Harper v Harper, B.C.C.A., November 15, 1977 (unreported).
32. [1979] 5 W.W.R. 289 (S.C.C.).
33. For example, Arnason v Arnason, (1982), 32 B.C.L.R. 292 (B.C.S.C.); Christensen v Christensen, (1981), 19 R.F.L.(2d) 240 (B.C.S.C.).
34. See Bregman v Bregman, supra, n.26.
35. As in Dixon v Dixon, (1982), 25 R.F.L.(2d) 266 (Man. Co. Ct.).
36. R.S.M. 1978, c.M45, s.10.
37. (1981), 20 R.F.L.(2d) 12 (Man. Q.B.).

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